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Chapter 8

JUDICIAL DIVERSITY

Catherine Albertyn

In 1962 Nelson Mandela famously applied for the recusal of the magistrate presiding over his trial on charges of incitement to strike and leaving South Africa without a passport.[1] He challenged the possibility of a 'fair and proper trial' in political cases where 'whites are interested parties':

> A judiciary controlled entirely by whites and enforcing laws enacted by a white parliament in which Africans have no representation—laws which in most cases are passed in the face of unanimous opposition from Africans— . . . cannot be regarded as an impartial tribunal in a political trial where an African stands as an accused.[2]

The explicit connection made here between race and justice under apartheid is layered in meaning. Although Mandela doubts the possibility of justice from a white magistrate, it is in the context of a political and legal system constructed on the basis of racial dominance, rather than individual racism. Racial power plays out in the legal system, and means that 'a white judicial officer . . . , however high his esteem, and however strong his sense of fairness and justice', is inevitably a 'judge . . . in [his or her] . . . own case'.[3] This is so in perception, if not in substance, as Mandela also recognises that 'a commitment to . . . genuine democratic values among some of the . . . whites in the judiciary' has meant that courts have

> upheld the right of the African people to work for democratic changes [and] [s]ome . . . judicial officers have even openly criticised the policy which refuses to acknowledge that all men are born free and equal, and fearlessly condemned the denial of opportunities to our people.[4]

In the end, however, these few judges were unable to hold back the tide of white supremacy.

'Judicial diversity' was not a familiar concept in the 1960s, yet Mandela's statement captures important elements of contemporary debates on diversity, and the contested nature of the links between race, gender, legitimacy and justice in the judiciary. Mandela's words assume a link between racial diversity and justice, but do not reduce it to a simple equation between skin colour and outcomes. He is

[1] This application, described as an act of political theatre, is compellingly described in Anthony Sampson's *Mandela: The Authorised Biography* (1999) ch 13.
[2] Nelson R Mandela 'Black man in a white court: Mandela's first court statement' 28 October 1962, last accessed from *www.anc.org.za* on 18 August 2012.
[3] Ibid.
[4] Ibid.

aware that power, perception, context, experience and values create a more complex relationship between race and justice.

It is no surprise that at the end of apartheid, the South African judiciary remained almost exclusively white and male, appointed from the ranks of senior advocates through a process in which the Minister of Justice played a decisive part.[5] Out of 166 judges in 1994 there were only three black men and two white women.[6] Although there were a number of black magistrates, these were mainly located in racially segregated townships and in the 'homelands'[7] (as were two of the black judges). With notable exceptions, the judiciary was characterised as executive-minded with a strong tradition of legal formalism and deference to a supreme legislature.[8] In the early 1990s the political agreement to retain all judges appointed under apartheid, and at the same time to give the judiciary extensive powers to enforce the new Constitution and Bill of Rights, meant that the transformation of the judiciary became an important objective in the democratic era. The centrality of judicial diversity or representivity to this project was confirmed by s 174(2) of the 1996 Constitution, which required the appointment of judicial officers to be guided by the 'need for the judiciary to reflect broadly the racial and gender composition of South Africa'.

More than fifteen years later, the effects of this provision are substantial. Of the 240 judges in office at the time of writing, 151 (63 per cent) were black and 89 (37 per cent) were white; 72 (30 per cent) were female and 168 (70 per cent) male.[9] Black men held most judicial leadership positions (those of Chief Justice, Deputy Chief Justice and about twelve heads of court). The President of the Competition Appeal Court was white and male, while only the Judge President of the North West High Court was a (black) woman.[10] Women lagged significantly behind men as judges and judicial leaders.

The profile of the magistracy has changed similarly. Of 1 711 magistrates in November 2013, 1 021 or 59.6 per cent were black (African, Indian and coloured) and 673 or 39.3 per cent were female. Women fared better as regards leadership, too, with four out of nine Regional Court Presidents and nine out of 18 Chief Magistrates being women.[11]

Although South Africa can be seen as a positive example of constitutionally mandated judicial diversity, there is no clear consensus on the actual meaning and role of diversity, its relationship to the idea of representivity, and their place and

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[5] François du Bois 'Judicial selection in post-apartheid South Africa' in Kate Malleson & Peter H Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) 280 at 283.

[6] Ibid 287.

[7] On the Bantustan or 'homeland' policy, see Chapter 1 at 9.

[8] Most famously captured by John Dugard in his inaugural lecture, 'The judicial process, positivism and civil liberty' (1971) 88 *SALJ* 181.

[9] Statistics as at 31 July 2013 (supplied by the Judicial Service Commission). Justice Mbuyiseli (Russell) Madlanga, who took up his position as a judge of the Constitutional Court on 1 August 2013, is included in these statistics.

[10] In addition, the Deputy Judge President of the Western Cape High Court was a woman.

[11] Statistics as at 4 November 2013 (supplied by Mr Danie Schoeman, secretary of the Magistrates' Commission). For 2012 statistics, see Department of Justice and Constitutional Development *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* (February 2012) para 4.3.2.3.

effects in transforming the judiciary. Thus the precise meaning of s 174(2), and whether and how it advances a thick notion of diversity or a thinner idea of representivity, is uncertain and contested. On one hand, s 174(2) could be read to require a more demographically representative and thus legitimate judiciary through the appointment of more black and female judges. On the other, it could be an insistence on something deeper: a judiciary that is more sensitive to multiple differences, that delivers a better and different quality of justice, that promotes the values of the Constitution and helps create a more caring and egalitarian democracy. The former supports a thin idea of representivity as a matter of mere numbers. The latter can speak to multiple intersectional differences of race, gender, culture and sexual orientation, to diverse judicial attitudes and values, and to the effects these might have on the very nature of the institution and its norms, values and modes of adjudication. Between these two meanings are likely to be different manifestations of representivity and diversity in particular settings.

In exploring 'judicial diversity' in South Africa, this chapter thus distinguishes between representivity, diversity and representation.[12] Representivity generally refers to the demographic requirement that the judiciary should be made up of members of different social groups. Diversity is used to express a more complex idea of multiple judicial differences that go beyond facial, group-based difference to differences in norms, values, judicial attitudes and philosophies. Representation signifies the idea that members of different groups represent, in some way, the interests of their constituency. As will be argued here, it is diversity rather than representivity or representation that ultimately enables a deeper transformation of the judiciary.

This chapter considers diversity and representivity—and judicial transformation—in the historical, legal and political context of South Africa. It starts with history, considering in part 8.1 how our understanding of race and judging under apartheid gave rise to different understandings of race and the judiciary, how these influenced the manner in which diversity or representivity was written into the Constitution, and the manner in which different ideas of diversity and representivity have been justified, contested and implemented in post-apartheid South Africa. Part 8.2 looks at contemporary South African debates on diversity and representivity. It points to the primacy given to the rationales of legitimacy and improved deliberation, and interrogates the connections between diversity or representivity and judicial decision-making. This section also considers whether diversity and representivity can be justified as a form of equality under our Constitution, and discusses the contested role of affirmative action in achieving judicial representivity and diversity. Part 8.3 turns to s 174(2) of the Constitution to consider its interpretation and role in judicial selection. Part 8.4 briefly discusses progress in achieving a judiciary that is representative of women, while the concluding section poses questions about the different roles of representivity and diversity in the transformation of the judiciary.

[12] This kind of distinction is also suggested by Du Bois (note 5 above) 282 and Morné Olivier 'A perspective on gender transformation of the South African judiciary' (2013) 130 *SALJ* 448 at 450ff.

8.1 JUDICIAL DIVERSITY AND REPRESENTIVITY IN SOUTH AFRICA—DEBATES UNDER APARTHEID AND DURING THE TRANSITION TO DEMOCRACY

From the late 1960s, a small body of liberal and critical scholarship began to interrogate the role of the South African judiciary in supporting and failing to challenge an increasingly racialised and authoritarian apartheid order. This body of work provides an important context to the characterisation of the judiciary during the political transition in the 1990s, and the manner in which issues of representivity and, to a lesser extent, diversity were justified and addressed in the interim and 1996 Constitutions. Particularly relevant to subsequent understandings of judicial representivity and diversity under democracy were the overlapping, but separate, historical debates on (a) race and judicial decision-making, and (b) race and public perceptions of the (il)legitimacy of the judiciary. These are discussed below, followed by an analysis of how different political and legal understandings of the judiciary under apartheid and in a future democratic South Africa shaped the constitutional text.

(a) Race and the apartheid judiciary

For more than a century the South African judiciary enjoyed a strong international reputation for its independence and for the quality of its judgments. The Appellate Division's celebrated defence of the coloured vote in the Cape in the first two *Harris* cases,[13] and its attempts in the 1940s and 1950s to protect formal equality before the law and individual liberties, added credence to the independent and liberal characterisation of the judiciary.[14] However, as racial segregation deepened into apartheid and the state responded to its extra-parliamentary opposition with growing repression, the failure of the judiciary to defend civil liberties elicited criticism (then unfamiliar) for its 'executive-mindedness' and its failure to protect black South Africans from the excesses of apartheid.[15]

(i) Judges, judicial decision-making and race

The pioneering work of Mathews[16] and Dugard[17] on judicial decision-making under apartheid decried the failure of judges to exercise legal imagination and pay greater attention to liberal ideas of individual freedom and civil liberties in the

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[13] *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

[14] See eg Albie Sachs *Justice in South Africa* (1973) 244–50. However, Corder's work suggests that this reputation was overly generous. Although the courts did protect the rights of some facing racial discrimination, in general judges supported racial segregation. Indeed, 'implicit race prejudice and several legal principles adopted by the judges established a framework and atmosphere that did little to mollify the effect of apartheid legislation after 1948': see Hugh Corder 'The record of the judiciary' in Hugh Corder (ed) *Democracy and the Judiciary* (1989) 46 at 49.

[15] See further Chapter 2 of this work.

[16] A S Mathews & R C Albino 'The permanence of the temporary—An examination of the 90- and 180-day detention laws' (1966) 83 *SALJ* 16; A S Mathews 'A bridle for the unruly horse' (1964) 81 *SALJ* 312.

[17] Dugard (note 8 above); John Dugard *Human Rights and the South African Legal Order* (1978).

face of unjust laws. Dugard's work on the growth of executive-minded decisions in the apartheid judiciary was particularly influential. Drawing on American legal realism, Dugard argued that the influence of legal positivism (manifest in the idea of law as the command of the sovereign and the distinction between law and morality) obfuscated the reality of individual judicial choice and the possibility of alternative outcomes. Dugard concluded that the racial and class character of the judiciary, combined with a tendency towards 'mechanical, positivistic methods of statutory interpretation', shaped its 'loyalty to the status quo'.[18] He called for an acknowledgment of judicial choice in adjudication, and of the role played by values and the judge's moral and political philosophy.[19] Dugard's work was followed by comprehensive studies by Corder,[20] Forsyth[21] and Dyzenhaus,[22] each of which considered the various influences of personal background, legal philosophy, judicial ideology and political and social norms on judicial decision-making.[23]

For the purposes of this chapter, the importance of this work lies in the fact that it never draws a simple equation between a white judiciary and injustice. Instead, it suggests that race-based decisions, and the judiciary's role in supporting a racial status quo, emanated from a complex reality. Read across the work, judicial decisions are affected by at least four interrelated factors. The first is the prevailing legal philosophy and ideology of legal formalism and restraint, as well as the objective legal tools available to judges, including the extent to which the legal system permits them to evaluate state action against substantive values. Second, there is the individual race and class (if not gender) background of the judge, and the unarticulated ideas and experiences that this brings to the task of decision-making. Third, prevailing societal norms and ideologies, including those of race and gender, unconsciously shape race- or gender-based decisions. Fourth, general political conditions shape the relative power or vulnerability of the judiciary as a state institution and a judge's ability to make decisions that oppose prevailing norms and policies.

The latter point is sometimes under-emphasised in this body of work. However, the changing socio-political context was fundamental to understanding the shift

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[18] Dugard (note 8 above) 190–1.

[19] Ibid. This article generated extensive academic debate. See eg Christopher Forsyth & Johan Schiller 'The judicial process, positivism and civil liberty II' (1981) 98 *SALJ* 218; John Dugard 'Some realism about the judicial process and positivism—A reply' (1981) 98 *SALJ* 372; David Dyzenhaus 'Positivism and validity' (1983) 100 *SALJ* 454; Dennis M Davis 'Positivism and the judicial function' (1985) 102 *SALJ* 103; David Dyzenhaus 'Judges, equity and justice' (1985) 102 *SALJ* 295.

[20] Hugh Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910–50* (1984).

[21] Christopher Forsyth *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa, 1950–80* (1985).

[22] David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991). A second edition of this work appeared in 2010.

[23] See also Donald Nicolson 'Ideology and the South African judicial process: Lessons from the past' (1992) 8 *SAJHR* 50 at 64–5, where it was argued that 'disappointing record of the South African judges' was best explained by the dominance of illiberal societal ideologies (and the weakness of liberal societal ideologies) combined with a judicial ideology of restraint.

from the liberal judgments of the early 1950s[24] to the executive-minded decisions of the 1960s, and the re-emergence of some liberal decisions in the late 1970s and 1980s. Haynie's study of the Appellate Division between 1950 and 1990 emphasises the importance of socio-political context, concluding, for example, that the weakening of the apartheid regime in late 1970s and 1980s, together with a growing recognition of its 'moral and logistical' futility, provided more judicial space to oppose the state in criminal cases.[25] Thus the weakness or strength of the state, coupled with a judicial concern to preserve institutional legitimacy, shaped the willingness of judges to make decisions opposing the state and the racial order.[26]

In the end, for liberal critics, the judiciary's failure was that it supported and reinforced the oppressive use of state power and a racialised status quo. In one way or another, this work envisaged the possibility of fair decisions that rejected race-based violations of human rights and civil liberties through the deployment of more liberal values present within the common law, and more powerfully through a Bill of Rights.[27] The problem was not so much white judges as executive-minded judges, often appointed to the bench and positions of judicial leadership for political reasons. Liberal and left criticism of these political appointments escalated in the late 1970s and early 1980s, and although intermittent calls were made for the appointment of black judges and magistrates,[28] more emphasis was placed on judicial independence and an appointment process that could not be tainted by executive choices.[29] Only an independent judiciary could hold the state to account on the basis of human rights and liberal values that protected individuals against the abuse of power.

A handful of critical scholars saw the problem within law itself. For example, Suttner emphasised the ideological role of the judiciary in reproducing and legitimating the capitalist, apartheid state and a racial social order.[30] His work focused on the way in which law and legal process masked racial difference and inequality. Here, law was too bound up with social and economic power to be a vehicle of significant change. But for most critical and (post-) marxist scholars, E P Thompson's evocative conclusion that the 'rule of law [wa]s a cultural achievement of universal significance'[31] resulted in a general consensus on the

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[24] See eg the changing socio-political context of the coloured vote cases discussed in Dennis Davis & Michelle le Roux *Precedent and Possibility: The (Ab)use of Law in South Africa* (2009) ch 2.

[25] Stacia L Haynie *Judging in Black and White: Decision-making in the South African Appellate Division, 1950–1990* (2003) at 103.

[26] Ibid 101–3.

[27] Dugard (note 8 above); Dugard (note 17 above) 47–9, 402; Christopher Forsyth 'Interpreting a Bill of Rights: The future task of a reformed judiciary?' (1991) 7 *SAJHR* 1.

[28] See eg the criticism by Barend van Niekerk of the academic and public silence concerning the absence of black judges in *The Star* 8 May 1978; David Unterhalter 'The Hoexter Commission and the independence of the judiciary' (July 1984) 16 *Reality* 3 at 5 (calling for the appointment of black and female judges), last accessed from *www.disa.ukzn.ac.za* on 12 February 2013.

[29] See eg the public criticism by Sydney Kentridge SC and academics Anthony Mathews and John Dugard reported in South African Institute of Race Relations *Survey of Race Relations in South Africa 1982* at 210.

[30] Raymond Suttner 'The ideological role of the judiciary' (1984) 13 *Philosophical Papers* 28 (also published in John Hund (ed) *Law and Justice in South Africa* (1988)).

[31] E P Thompson *Whigs and Hunters* (1975) 260.

need for an independent judiciary, justiciable human rights and a role for law in pursuing justice.[32]

(ii) The judiciary, non-racialism and legitimacy

A second and related body of work interrogates the links between the racial composition of the judiciary and public perceptions of the institution under apartheid, and lays the basis for the strong legitimacy rationale for a more racially representative judiciary under democracy. The connection of whiteness with injustice and illegitimacy in Mandela's 1962 statement[33] was a compelling example of the idea that justice cannot be seen to be done if the judiciary consists of members of one dominant racial group. However, if the connection between a white judiciary and state illegitimacy was recognised politically for decades, it emerged in academic work and official texts only in the late 1970s and 1980s.

Race and illegitimacy were recurrent themes in trials of the extra-parliamentary black opposition to apartheid. Central to the 1952 Defiance Campaign of the Congress Alliance was a challenge to the legitimacy of unjust laws enforced by white courts:

> We, the accused, members of the African community, refuse to plead to the charge laid against us because we are under no obligation to obey a law which has been imposed on the African people without their consent. We deny this court the right to sit in judgment of this case because it is constituted by members of the South African white community who have arrogated to themselves the exclusive right, which we dispute, of deciding for or against us in this country.[34]

As discussed above, Mandela's 1962 application for recusal of a white magistrate raised a similar point, as did the defence in other political trials related to the suppression of political resistance in the 1960s.[35] However, after the African National Congress went into exile, political claims about the illegitimacy of the judiciary as part of a white state reappeared only in trials connected to the resurgence of armed conflict in the country in the 1980s. This is best illustrated by the 1989 treason trial of the Delmas Four, in which the accused condemned the illegitimacy of the apartheid state, refused to participate in their trial and asked to be treated as prisoners of war.[36]

Outside the courtroom, the illegitimacy of the (white) state, including the judiciary, motivated the political call for a representative or 'non-racial' and independent judiciary in a future democratic South Africa. While still in exile in 1989, but anticipating political change, the African National Congress (ANC)

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[32] See Corder (note 14 above); Dennis Davis 'Legality and struggle. Towards a non-instrumentalist view of law' in Hund (note 30 above) 103.
[33] Note 2 above.
[34] From a report in *The Times* 6 April 1960 as cited by M A Millner in 'Apartheid and the South African courts' (1961) 14 *Current Legal Problems* 280 at 304.
[35] Catherine Albertyn *A Critical Analysis of Political Trials in South Africa, 1948 to 1988* (unpublished PhD thesis, University of Cambridge, 1993).
[36] Their story is evocatively captured in Peter Harris *In a Different Time: The Inside Story of the Delmas Four* (2008). The case is reported as *S v Masina* 1990 (4) SA 709 (A) (judgment on appeal only).

published its Constitutional Guidelines which stated that '[a]ll organs of government including justice, . . . shall be representative of the people as a whole, democratic in their structure and functioning, and dedicated to defending the principles of the constitution'.[37] In the same year, the Harare Declaration (setting out the ANC's proposals for a political settlement and negotiations in South Africa) endorsed an 'independent and non-racial judiciary' in a democratic South Africa.[38]

In apartheid South Africa it took courage for legal academics to speak openly about the relationship between race and perceptions of an illegitimate legal system. Indeed, when a legal academic, Van Niekerk, criticised the nexus between sentencing, race and judicial personality in 1969, he was charged with contempt of court.[39] Dugard later took up the cudgels,[40] and as apartheid was increasingly challenged and a series of legal and constitutional reforms sought to shore up the white state in the 1980s, more research and writing emerged on race and perceptions of justice. Increasingly, this began to document the difficulties of securing justice in a deeply divided society in which bias often resulted from the fact that white judicial officers knew little of the lives of the black accused in their courtrooms.

In 1983 the *Fifth and Final Report* of the (Hoexter) Commission of Inquiry into the Structure and Functioning of the Courts[41] called for the appointment of black magistrates. Prior to 1977 there were no black magistrates in South Africa, and by 1982, only two out of 754 district and regional magistrates were not white but Indian. Africans were expected to train and practise in the 'self-governing' and 'independent' homelands.[42] The Hoexter Commission recommended that magistrates be made independent of the public service and that 'active steps be taken to recruit judicial officers from all racial groups in the private sector'.[43] Although the justifications for this are muted, the report clearly recognises the problems of legitimacy created by a system in which the majority of the people appearing in the lower courts were black. There is no call for the appointment of black judges, but the report recognises the political nature of some judicial appointments and recommends a more independent appointment process.[44]

A 1985 study by the Human Sciences Research Council on inter-group relations provided some empirical evidence of the fact that racial groups differed in their perception of justice meted out by white judges and magistrates, and recom-

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[37] African National Congress *Constitutional Guidelines for a Democratic South Africa* (1989), last accessed from *www.anc.org.za* on 22 August 2012.

[38] African National Congress *Harare Declaration* (1989) paras 16.6 and 16.7. The Harare Declaration was supported by the Ad-Hoc Committee on Southern Africa of the Organisation of African Unity (OAU), the Non-Aligned Movement (NAM), the Frontline States and (with some amendment) the General Assembly of the United Nations.

[39] Barend van Niekerk ' . . . Hanged by the neck until you are dead' (1969) 86 *SALJ* 457 and (1970) 87 *SALJ* 60; Barend van Niekerk 'Mentioning the unmentionable: Race as a factor in sentencing' (1979) 3 *SACC* 151. The charge is reported in *S v Van Niekerk* 1970 (3) SA 655 (T).

[40] In *Human Rights and the South African Legal Order* (note 17 above) at 401–2.

[41] RP 78/1983 (hereafter Hoexter *Final Report*).

[42] See eg Minister of Justice 'Justice Vote' in Hansard *Debates of the House of Assembly* 6 June 1977 col 9363.

[43] Hoexter *Final Report* vol II part IV ch 6 para 6.14.

[44] Hoexter *Final Report* vol I part II ch 1 para 1.3.2–7.

mended the appointment of more black magistrates and judges.[45] At the same time, the newly formed *South African Journal on Human Rights (SAJHR)* began to document examples of racial bias in sentencing.[46] Dugard reiterated the problem of racial bias and argued that it created perceptions of injustice that undermined public confidence and led to the 'diminution of the judiciary's standing in black community'.[47] He called for judicial seminars that would allow white judges to interact with black community leaders so that they might better understand the perceptions of the black community.[48] In Parliament in the same year a Progressive Federal Party MP, Dave Dalling, noted the lack of public confidence in the legal system as a result, inter alia, of perceptions of racial unfairness in sentencing, and called for the need to develop a non-racial bench: 'In this way a start can be made to bring justice closer to the people and to create a climate in which the people identify more closely with the system of justice in our country'.[49] In 1987 Mokgatle addressed the failure to appoint black judges and argued that the ideal of non-racialism required the appointment of black judges.[50]

In general, the liberal critique of an all-white bench that emerged in the 1980s had two strands. First, it characterised the problem as one of politics rather than merely race. Secondly, it highlighted the problem of illegitimacy caused by an all-white bench that was insensitive to the needs of the black community. Thus liberals tended to call for an independent bench (by eschewing political appointments) rather than a non-racial bench,[51] but recognised the need for the bench to become more representative as suitable candidates became available. Judicial education that enhanced judges' understanding of South Africa's diverse community was also identified as important. Thus by the mid-1980s there was some support within the legal community for the appointment of black magistrates and judges 'on merit',[52] although progress was minimal. By 1987, there were only six Indian and 14 coloured magistrates in South Africa (serving in courts based in coloured and Indian areas), with more African appointments in the homelands,[53] in line with the notion that, in South Africa's racially stratified society, black magistrates could not preside over cases concerning white people. The Minister of Justice appointed the first acting black judge in Natal in 1987, Mr Hassan Mall.[54]

Overall, by 1990, a number of divergent ideas on race and the judiciary had begun to coalesce around support for an independent and non-racial post-apartheid judiciary. For the national liberation movement, the call for a non-racial

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[45] Human Sciences Research Council *Report of the Work Committee Investigation into Intergroup Relations: Politieke Samewerking binne 'n Fundamentele Regsorde* (1985).
[46] Fiona McCleod & Felicity Kaganas 'Statement on sentencing' (1985) 1 *SAJHR* 106.
[47] John Dugard 'Training needs in sentencing in South Africa' (1985) 1 *SAJHR* 93.
[48] Ibid 100–2.
[49] Hansard *Debates of the House of Assembly* 4 June 1985 col 6746.
[50] D D Mokgatle 'The exclusion of blacks from the South African judicial system' (1987) 3 *SAJHR* 44.
[51] See Hoexter *Final Report* (note 41 above) vol I part II ch 1 para 1.3.2–7; Edwin Cameron, Harold Rudolph & Dirk van Zyl Smit 'Judicial appointments: Public confidence and the court structure: Proposals for a new approach' September 1980 *De Rebus* 430.
[52] Mokgatle (note 50 above) 46.
[53] Ibid.
[54] Ibid.

judiciary was embedded in the overall transformation of an illegitimate, authoritarian white state into a democratic and inclusive state, whose institutions should reflect the black majority in the country. Importantly, it was the illegitimacy of the apartheid state and the manner in which the (white) judiciary reproduced and reinforced this state and a racialised society that drove this call for judicial transformation and the need for the institution to reflect the demography of South Africa.

The idea of a non-racial judiciary was shared by many liberal and left-thinking or critical scholars and lawyers who recognised the importance of a diverse or representative judiciary, even if they also acknowledged the complexity of the relationship between race and justice.[55] However, liberals would be divided over how this could be achieved. For some, the concepts of institutional independence and individual merit were paramount, an idea that expressed itself later as the need for merit to 'trump' representivity in drafting and interpreting the relevant constitutional provisions. For more 'egalitarian' liberals and left-thinking scholars, the relationship between race and merit was more value-based and contested, requiring a redefinition of merit and the meaning of race in judicial appointments. While the legitimacy value of a non-racial bench was clearly acknowledged by all, there would emerge different understandings of the relationship between independence, merit and representivity in judicial selection. Uncontroversial, however, was the need for a post-apartheid judiciary to be legitimate and to hold the state accountable to human rights and democratic principles, and thus to play a role in overcoming the racial injustices of the past.

(b) Gender and the judiciary before 1990

The deep consciousness of the influence of race and racial bias amongst liberal and radical critics of the apartheid judiciary was not replicated in the issue of gender. In his work on South African legal culture between 1902 and 1936, Chanock writes that:

> It is significant that there are no women's voices in any of the sites in which law was talked about: no women lawyers, no women politicians, no women 'experts'. An alliance of patriarchies relegated African women to the bottom of the social structure, and simultaneously elevated and demeaned white women. They became not invisible, but inaudible, to state, polity and law.[56]

Only Corder's work on the Appellate Division before 1950 addressed cases dealing with women, and then only in the context of race relations. Corder records the conservative nature of judicial attitudes towards women, based on traditional and fixed gender roles, which relegated women to the private sphere.[57]

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[55] See Anton Lubowski 'Democracy and the judiciary' in Corder (note 14 above) 13 (calling for methods of selection that ensured a diversification of the judiciary).

[56] Martin Chanock *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (2001) 26.

[57] Corder (note 20 above) 235–7. See eg *Incorporated Law Society v Wookey* 1912 AD 623; Melius de Villiers 'Women and the legal profession' (1918) 35 *SALJ* 289.

Feminist critiques of the law appeared in South Africa from the 1970s, especially in relation to family law[58] and sexual violence.[59] These sought, inter alia, to expose the patriarchal views about women and marriage expressed in the law and by judges. This gathered momentum in the 1980s and especially the 1990s, when women began to organise politically for inclusion in the new constitution. In the national liberation struggle gender was subsumed by race until the late 1980s,[60] when statements about women's rights began to appear in ANC policy documents.[61] As discussed below, the eventual inclusion of the notion of gender representivity within the judiciary followed a completely different trajectory to that of race, arising from the particular conditions of women's struggles around the new constitution in the early 1990s.

(c) Negotiating the constitutional texts: How ideas of judicial diversity and representivity were written into the interim and 1996 Constitutions

After 1990 the liberal critique of the judiciary, encapsulated in the work of Dugard and others, became the 'official version' of the apartheid judiciary. Presented to the Truth and Reconciliation Commission by the leadership of the newly formed Constitutional Court and the Supreme Court of Appeal,[62] amongst others, this critique was captured in the Commission's 1998 report which concluded that the judiciary, together with the magistracy and organised legal profession, had 'collaborated, largely by omission, silence and inaction, in the legislative and executive pursuit of injustice'.[63]

Despite this record of apparent judicial compliance, the negotiations for the interim Constitution in the early 1990s achieved agreement on the retention of the apartheid judiciary.[64] This judiciary was to be given extensive powers of judicial review in the newly crafted democracy, based on democratic values, human rights and the rule of law. Anxieties about the character of the apartheid judiciary and its capacity for protecting and enforcing fundamental rights in a constitutional democracy were partly deflected by the creation of a new Constitutional Court,

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[58] June Sinclair 'The financial consequences of divorce in South Africa: Judicial determinations or private ordering' (1983) 32 *International and Comparative Law Quarterly* 785.
[59] See Felicity Kaganas & Christina Murray 'Rape in marriage—Conjugal right or criminal wrong' 1983 *Acta Juridica* 125; and see generally Felicity Kaganas & Christina Murray 'Law and women's rights in South Africa: An overview' 1994 *Acta Juridica* 1.
[60] Jo Beall, Shireen Hassim & Alison Todes ' ''A bit on the side'': Gender struggles in the politics of transformation in South Africa' (1989) 33 *Feminist Review* 30.
[61] Catherine Albertyn 'Women and the transition to democracy in South Africa' 1994 *Acta Juridica* 39.
[62] See A Chaskalson (President of the Constitutional Court), I Mohamed (Chief Justice), P Langa (Deputy President of the Constitutional Court), H J O van Heerden (Deputy Chief Justice) & M M Corbett (Former Chief Justice) 'The legal system in South Africa 1960–1994: Representations to the Truth and Reconciliation Commission' (1998) 115 *SALJ* 21; and cf David Dyzenhaus *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998).
[63] Truth and Reconciliation Commission of South Africa *Report* (1998) vol 5 ch 6 para 158.
[64] Section 241 of the interim Constitution provided that all judges would remain in office.

entrusted with the certification of the final Constitution,[65] and identified as the apex court in all constitutional matters.[66] In addition, the ANC acknowledged that a stable transition required continuity in the legal system, and saw 'transformation' as a longer-term objective. The achievement, over time, of greater racial and gender representivity, if not diversity, would be central to this transformation.[67] During the transition, however, the crucial role of the Constitutional Court in the new democracy brought significant pressure to bear on the appointment procedures for its judges, resulting in a representivity requirement for this court, albeit a limited one. In the 1996 Constitution, the idea of representivity was extended to the judiciary as a whole. In both instances the relevant provisions were capable of interpretations that limited their meaning to demographic representivity or extended it to a wider idea of diversity. This section explores the debates and issues surrounding the actual writing of the constitutional texts. Their interpretation and application is discussed later, in part 8.3.

(i) The interim Constitution

In 1991 the Convention for a Democratic South Africa (CODESA) released a Declaration of Intent, the first formal agreement by the parties negotiating political change in South Africa. It recorded the understanding 'that the Constitution would be the supreme law . . . guarded over by an independent, non-racial and impartial judiciary'.[68] The following year, in a major policy statement, *Ready to Govern*, the ANC called for judges of the envisaged Constitutional Court to be drawn from all sections of the community on the basis of their integrity, skills, life experience and wisdom'.[69] In the same document the ANC spoke of the transformation of the judiciary as a whole:

> The bench will be transformed in such a way as to consist of men and women drawn from all sections of South African society. This will be done without interfering with its independence and with a view to ensuring that justice is manifestly seen to be done in a non-racial and non-sexist way and that the wisdom, experience and competent judicial skills of all South Africans are represented.[70]

By 1992 the ANC had expressed a clear commitment to a racially and gender-diverse judiciary to which female and black judges would bring different experiences and competencies, thus enhancing its legitimacy through public confidence and more inclusive decision-making. There seemed to be some support

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[65] In terms of s 71 of the interim Constitution the Constitutional Court was to certify that the Constitution to be drafted by the Constitutional Assembly was in line with the agreed constitutional principles.

[66] Section 99(2) of the interim Constitution: 'The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution.'

[67] See African National Congress *Peace and Stability: Policy Document* (March 2012) para 1, last accessed from *www.anc.org. za* on 24 April 2013.

[68] CODESA Declaration of Intent 21 December 1991 para 5.b.

[69] African National Congress *Ready to Govern: ANC Policy Guidelines for a Democratic South Africa* (1992), 'A Bill of Rights', last accessed from *www.anc.org.za* on 24 April 2013.

[70] Ibid, 'The Rule of Law'.

for diversity (rather than mere representivity) in the idea that the post-apartheid judiciary would be characterised by a diversity of skills, experiences and values. The ANC had also suggested that eligibility for the Constitutional Court, if not the judiciary as a whole, should go beyond the usual requirement of experience at the bar. Particularly important was the inclusion of gender as a criterion of representivity, a reflection of the political struggles being waged by the women's movement for inclusion in the new constitution.[71]

In the Multi-Party Negotiating Process (MPNP) of 1993 the realpolitik of negotiation and compromise, and the agreement to retain the apartheid judiciary in office, meant that the interim Constitution was to reflect a rather muted constitutional text both in relation to the character of the judiciary and the appointment of judges.

The character of the democratic judiciary was established in s 96(2) and in Constitutional Principle VII, which set the parameters for the text of the 1996 Constitution. Both described the judiciary as 'independent and impartial' but made no reference to 'non-racial' or 'legitimate', words previously used in policy documents to signify representivity, if not diversity, in the judiciary.[72] Although the word 'impartial' clearly envisaged a judiciary free of sectional race, class or gender interests, the text omitted to make a positive statement on the need for a representative or diverse judiciary as an *institution*—a compromise that reflected the agreement to retain the existing white judiciary. The text was also silent on representivity in judicial selection, except in respect of Constitutional Court judges. Here the links between representivity, legitimacy and public confidence in the institution were explicitly acknowledged in the MPNP. For example, the Technical Committee on Constitutional Issues advised the Negotiating Council that Constitutional Court judges must 'be perceived to have the legitimacy . . . [to] promote public confidence in their decisions' and thus enable the court to carry out its important constitutional role.[73] Central to this legitimacy and public confidence was the idea that the judges should be representative of all sections of the population and should not be 'dominated by any party, person or profession'.[74] Thus racial and gender representivity and political independence, and some diversity in respect of values, were noted as crucial to legitimacy.

The manner of achieving such a representative or diverse and independent Constitutional Court was strongly contested in the MPNP. The major points of contention concerned the power to select and appoint judges (speaking to independence and diversity in politics or values), and the weight to be given to the criterion of 'representivity' in the selection process, the latter being part of a wider debate on the place of affirmative action in a future South Africa. On one side, the Democratic Alliance wanted judicial selection to be largely in the hands of the

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[71] Albertyn (note 61 above).

[72] See changes in the wording of the constitutional principles in the *Third Report to the Negotiating Council by the Technical Committee on Constitutional Matters* (27 May 1993) para 2.4 and the *First Supplementary Report on Constitutional Principles by the Technical Committee on Constitutional Issues to the Negotiating Council* (15 June 1993) para 2.4.

[73] *Twelfth Report of the Technical Committee on Constitutional Issues to the Negotiating Council* (2 September 1993) paras 2.3(c) and 7.6.

[74] Ibid.

judiciary and legal profession (to ensure political independence), and representivity to be limited by requirements of competence or merit. On the other, the ANC wished to ensure that Constitutional Court judges could be selected from a pool that went beyond sitting judges and senior counsel, given their overwhelmingly white and male character. A greater racial and gender representivity was deemed essential to provide the moral authority and legitimacy the court needed to carry out its constitutional mandates.[75]

An early deal between the ANC and the government placed the power to appoint almost exclusively in the hands of the executive. This generated strong opposition from the Democratic Alliance, fervent proponents of judicial independence, who worried about 'the most important court ever created in South Africa being politicised, centralised and hand-picked by a new government'.[76] Agreement was reached on the appointment and composition of this court in the final stages of the constitutional negotiations.[77] Of the 11 judges, the President of the court would be appointed by the President of the country in consultation with the Cabinet and after consultation with the Chief Justice,[78] and four judges would be appointed in similar fashion from the ranks of sitting Supreme Court judges.[79] To achieve greater race and gender representivity, a further six judges would be appointed by the President from a list of ten nominees provided by the Judicial Service Commission (JSC).[80] Section 99(5)*(d)* of the interim Constitution—the first constitutional statement of judicial representivity, if not diversity—required the JSC, when submitting these recommendations to the President, to 'have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender'. The first court consisted of five white men, four black men and two women (one white and one black).

This generous interpretation of s 99(5)*(d)* to include both representivity and some notion of diversity in values is discussed below in part 8.3. Although limited to the selection of six judges of the Constitutional Court, the provision set an important precedent for the final constitutional text.

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[75] Hassen Ebrahim *The Soul of a Nation: Constitution-Making in South Africa* (1998) 169–70; Richard Spitz with Matthew Chaskalson *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2000) 191–5.

[76] Democratic Alliance press release cited in Spitz with Chaskalson (note 75 above) 205, and see generally at 199–209.

[77] This was one of several highly contested issues in respect of which agreement was reached at the last minute. Ebrahim refers to this as the 'six-pack' agreement that enabled the finalisation of the interim Constitution, its enactment by Parliament and the first democratic elections of April 1994: see Ebrahim (note 75 above) 169–70. See also Heinz Klug *Constituting Democracy: Law, Globalisation and South Africa's Political Reconstruction* (2000) 140–2.

[78] Section 97(2)*(a)* of the interim Constitution. The meaning of 'in' and 'after' consultation was defined in s 233(3) and (4), and is discussed more fully in Chapter 5 at 121.

[79] Section 99(3).

[80] Section 99(4) provides that 'six judges of the Constitutional Court shall be appointed by the President in consultation with the Cabinet and after consultation with the President of the Constitutional Court', while s 99(5) provides for these judges to be appointed from the recommendations of the JSC.

(ii) The 1996 Constitution

Section 174(2) of the 1996 Constitution extended the above representivity requirement to the judiciary as a whole, stating that '[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'.[81] Interestingly, neither the Constitutional Assembly's Technical Committee on the Judiciary and Legal Systems nor its Constitutional Committee (responsible for preparing and submitting drafts to the Constitutional Assembly) had included a provision on representivity in their reports or draft texts. Although a provision similar to s 99(5)*(d)* was included initially,[82] it seemed to have been lost in subsequent drafts.[83] In the end one of the Constitutional Assembly's constitutional experts, Professor Christina Murray, noticed its absence and drafted the section. She found little opposition to its inclusion and suggests that because the principle of representivity had been partly won in the interim Constitution, its place in the 1996 Constitution—even in an expanded form—was not overly contentious.[84]

Section 174(2) (discussed in more detail in part 8.3 below) addresses both the character of the judiciary and the manner of selecting judges. It endorses and lends constitutional authority to the goal of a representative, and even diverse, judiciary expressed by the ANC in 1992, and it establishes race and gender as criteria to be taken into account in the appointment of all judges. It is noteworthy that the provision is phrased in an aspirational manner, envisaging the kind of ongoing change that was anticipated in ANC policy documents on transformation of the judiciary. In addition, representivity or diversity is textually separated from ideas of independence and competence despite opposition to this from the Democratic Alliance, which was concerned to limit the ambit of permissible judicial affirmative action and to ensure the centrality of merit.[85] Overall, the explicit inclusion of race and gender representivity or diversity as a constitutional requirement in the selection and appointment of judges acknowledges some idea of representivity or diversity as a central feature of a democratic judiciary, and establishes it as a key marker of transformation. Whether s 174(2) actually connotes a narrow idea of representivity or a more substantial idea of diversity is discussed in more detail below.

8.2 UNDERSTANDING DIVERSITY AND REPRESENTIVITY IN THE DEMOCRATIC JUDICIARY

Judicial representivity, if not diversity, is constitutionally mandated, its inclusion driven by the universal recognition that an all-white, all-male judiciary would be

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[81] Section 174(2).
[82] See clause 17(d) of the *Report of the Technical Committee* of 2 May 1995.
[83] It is absent in the Technical Committee's 'Summary of Decisions: Chapter 6, Courts and the Administration of Justice', undated but reflecting decisions of 9–10 November 1995.
[84] E-mail communication with Christina Murray, constitutional expert at the Constitutional Assembly, 19 August 2012.
[85] See the submission by the Democratic Party to the Constitutional Assembly entitled 'Democratic Party amendments: Constitution Bill' 24 April 1996, last accessed from *www.constitutionnet.org* on 10 October 2013.

both illegitimate and absurd in a democratic South Africa. The need for legitimacy—driven by a history of racial exclusion—was the dominant justification for a more representative judiciary in the years leading up to democracy, and remains central today. However, it is only one of several interrelated and overlapping explanations advanced in the academic literature on judicial diversity and representivity. These explanations suggest that both of these can be justified by (a) greater institutional legitimacy, public confidence and accountability; and/or (b) equality; and/or (c) a better quality of deliberation and judicial process; and/or (d) improved legal outcomes.

While the first justification links diversity to the credibility and legitimacy of the judiciary, the second emphasises that, as a matter of fairness and justice, the inclusion of different groups in the judiciary is the 'right thing to do'. The third and fourth address the manner in which diversity might enhance the quality of decision-making, either in process or outcomes, and justify diversity or representivity on this basis. Although some understanding of outcomes is implicated in (a) and (b), justifications (c) and (d) pay particular attention to whether and how diversity or representivity results in positive judicial processes and legal outcomes. It is thus useful to discuss process and outcomes separately from legitimacy and fairness or equality.

This section considers the role of these justifications in contemporary South Africa, starting with the legitimacy rationale, then moving to the relationship between diversity or representivity and judicial process and outcomes (a 'better justice'), and finally dealing with the significance of equality justifications. These arguments apply in different ways to representivity, as the requirement that the judiciary be demographically representative, and to diversity, the idea that the judiciary ought to comprise people who are different in multiple intersecting ways. They also suggest that the relationship between diversity and representivity is one of continuity rather than opposition. At one end is the thinnest conception of mere representivity, at the other a complex diversity. Between the two are varying ideas of the nature of difference and its relationship to judging and justice.

(a) Legitimacy and public confidence

Perhaps the most widely cited argument in favour of diversity is that a diverse or representative judiciary can help to establish the credibility of the institution and increase public confidence in it. Representivity, in the form of what we might call 'mere representivity'—the mere presence of people who are different—has important symbolic value that confers legitimacy on the institution, particularly amongst previously excluded and disadvantaged groups. As suggested by Chen, a United States judge, the presence of judges from disadvantaged groups sends out 'an invaluable message of inclusion' and promotes confidence and trust in the judiciary that would be lacking if 'the communities it is supposed to protect are excluded from its ranks'.[86]

In South Africa, as elsewhere in the world, institutional legitimacy has come to depend in part upon the extent to which the judiciary is representative, if not

[86] Edward M Chen 'The judiciary, diversity, and justice for all' (2003) 91 *Cal LR* 1109 at 1117.

diverse. In a presentation to the Truth and Reconciliation Commission in 1997, the past and present judicial leadership emphasised the importance of diversity to public confidence in the judiciary, especially in its role of enforcing and protecting human rights.[87] More recently, retired Constitutional Court Judge Kate O'Regan has noted the importance of diversity. She has suggested that a judiciary that is diverse (in the sense of encompassing race and gender, as well as multiple other factors that affect a judge's beliefs and understandings of the world) will 'not be seen to be the preserve of a particular group or élite' and is more likely to win the confidence and support of society.[88] In this sense, arguments for both representivity and diversity in South Africa signify a clear response to an illegitimate past and a requirement for a more inclusive and democratic future.

Throughout the world, legitimacy arguments relate to public support for and confidence in a just and fair legal system. Legitimacy—as public confidence and support—can be measured and understood in a number of ways, but generally lies in the realm of public attitudes and perceptions. As Lord Sumption of the UK Supreme Court noted in a public lecture, '[l]egitimacy depends on collective sentiment'.[89] In South Africa public sentiment on justice is irretrievably tied to race. This was apparent under apartheid and remains the case under democracy. Anecdotal evidence of this is perhaps most apparent in public responses to perceived racial disparities in sentencing.[90] However, the links between race and perceptions of justice are evident in empirical research. For example, qualitative research by Koen and Budlender, published in 1997, found that lawyers working in the criminal justice system in Cape Town both experienced and witnessed instances of racial and gender bias in the courts.[91] Later quantitative research, published in 2005, pointed to a widespread public perception that race does matter in the adjudication of a case. Just over half (51 per cent) of two thousand respondents interviewed across seven metropolitan areas agreed that this was the

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[87] See Chaskalson et al (note 62 above) 35 (perhaps using diversity and representivity interchangeably). See also Chen (note 86 above) 1116; Geoffrey Bindman 'White male judges: The Supreme Court and judicial diversity' 6 July 2012 at 2 (arguing that diversity is especially important in relation to constitutional and apex courts dealing with human rights), last accessed from *www.opendemocracy.net* on 25 February 2013.

[88] Kate O'Regan 'A pillar of democracy: Reflections on the role and work of the Constitutional Court of South Africa' (2012) 81 *Fordham L R* 1169 at 1176. See also Susannah Cowen *Judicial Selection in South Africa* (2013); Lex Mpati 'Transformation of the judiciary: A constitutional imperative' (inaugural lecture by the President of the Supreme Court of Appeal, University of the Free State, 6 October 2004); Forsyth (note 21 above) 18; Murray Wesson & Max du Plessis 'Fifteen years on: Central issues relating to the transformation of the judiciary' (2008) 24 *SAJHR* 187 at 199; S Sandile Ngcobo 'Sustaining public confidence in the judiciary: An essential condition for realising the judicial role' (2011) 128 *SALJ* 5.

[89] Lord Sumption 'Home truths about judicial diversity' *Bar Council Law Reform Lecture* 15 November 2012 at 21, last accessed from *www.uksupremecourt.gov.uk* on 12 February 2013 .

[90] See eg note 120 below; AfriMAP and the Open Society Foundation for South Africa *South Africa: Justice Sector and the Rule of Law* (2005) 60 (finding that in some criminal cases 'white male judges and magistrates have been accused of wrongly failing to convict persons charged with inter-race crimes, or failing to impose adequate sentences').

[91] Raymond Koen & Debbie Budlender ' ''The law is fraught with racism'': Report on interview research into perceptions of bias in the criminal justice system' (1997) 7 *Stell LR* 80.

case, while only 31 per cent, or just under a third, disagreed. There were no significant racial differences in these answers.[92]

Dumisa Ntsebeza, an advocate and JSC commissioner, speaks bluntly about the connection between race, representivity and legitimacy in South Africa:

> No judicial system which is majority white is going to pretend that it can, with legitimacy, deliver justice to a majority black population. . . . We need to appoint to the Bench men and women of integrity, who will hand down judgments which will be respected by the society they serve. There will be majority black judges, black women judges, white male judges, white female judges. It is when we have that kind of judiciary that we will not have an outcry when a white judge goes into a predominantly black area, tries a white farmer accused of having killed a black farm worker by dragging him behind his bakkie, with the white judge sentencing the white farmer to a fine. When the population reacts with anger and revulsion to that scenario, as it did in Mpumalanga, we are one step from a complete lack of confidence in the judicial system. That is a slippery road to chaos and anarchy. We cannot afford that.[93]

Ntzebeza's view is that the public perceptions of individualised racism will fade as the judiciary becomes more representative and thus more respected. A representative judiciary confers legitimacy on the institution as a whole, regardless of the race of individual judges, and it does so because people believe that a more representative bench increases the capacity of judges to understand the situation of different groups in society and thus to deliver a better quality of justice. In the words of former Chief Justice Ncgobo in a 2011 speech:

> The importance of diversity to public confidence in the judiciary cannot be gainsaid. It underscores the principle that consideration of a broad range of views is the surest path to sound governance and a foundation of democracy. Diversity on the bench promotes confidence in judges in many ways. When a litigant comes before court and sees from time to time people reflective of his or her own background and experience, it engenders confidence that he or she can get a fair trial. It also promotes confidence because it facilitates the taking into account of different perspectives.[94]

Legitimacy can be achieved by 'mere representation', the mere presence of black and woman judges, or public perceptions of legitimacy might require a greater diversity in the judiciary. Whether legitimacy speaks to representivity or diversity will depend upon the nature and politics of a particular society. However, the legitimacy rationale is probably based more on perception than actual outcome. In the example given by Ntsebeza above, it does not matter whether, on the facts, the judge was correct in giving such a light sentence. What matters is that a recent exclusionary and racialised past inevitably gives rise to perceptions of injustice in these circumstances. Overcoming that racialised past requires, in the short term, a

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[92] Research Surveys 'Do South Africans trust the judiciary?' Press release (17 July 2005), cited in Geoff Budlender 'Transforming the judiciary: The politics of the judiciary in a democratic South Africa' (2005) 122 *SALJ* 715 at 717.

[93] Dumisa Buhle Ntsebeza 'South Africa: Why majority black bench is inevitable' *Sunday Times* 25 July 2004, last accessed from *www.allafrica.com* on 12 March 2013.

[94] Ngcobo (note 88 above) 13–14. Ngcobo seems to be speaking of representivity rather than diversity here. See also Budlender (note 92 above) 716.

more legitimate and—in South Africa's context—a more racially representative judiciary.

At the same time, it is important to note that a strong understanding of judicial legitimacy is probably not achieved simply by aiming for a more demographically representative judiciary. It also depends, inter alia, on how well the judiciary performs the tasks entrusted to it by the Constitution, whether the judiciary is seen to be independent and the extent to which the public accepts the moral authority of its judgments.[95] Race is important but not determinative in this regard. Thus questions of legitimacy inevitably morph into questions about outcomes and the quality of justice, and what this has to do with a more representative or diverse bench. Otherwise, one can be left with a thin understanding of legitimacy as mere representivity, and even fall into an essentialist trap that directly links certain outcomes with black or female judges. This conflation of race or gender with outcomes and the idea that black or woman judges somehow judge differently, or 'represent' the interest of their race or gender, has been squarely rejected by the courts. As Hlophe J noted in response to an application by a black defendant for the recusal of a white magistrate in *S v Collier*:

> the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or judge could ever administer justice fairly and even-handedly in a matter involving a white accused.[96]

One could argue that a more substantive notion of legitimacy requires a more complex understanding of diversity in the judiciary. Whether it does will depend largely upon politics. Indeed, South Africa's recent emergence from centuries of white rule and white judges certainly provides a receptive political context for a thin 'legitimacy as representivity' rationale. But as society progresses and differences of education, class and culture, as well as judicial philosophy and legal culture, become apparent and cut across race in the judiciary, so too might the popular understanding of legitimacy and representivity or diversity shift. For now, and as is apparent in the discussion below of s 174(2) of the Constitution, there is a more contested reality.

(b) Diversity, deliberation and the quality of justice

To what extent does a more representative or diverse judiciary affect the quality of justice? Here the nature of the relationship between race or gender and judicial process or outcomes has been the subject of much controversy and debate, ranging from a simple determinism between race or gender and outcome to a far more complex understanding of difference and modes of judicial reasoning.

In its simplest form, the claim that representivity or diversity might affect outcomes is based on the idea that women and black people bring a different set of

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[95] James L Gibson & Gregory A Caldeira 'Defenders of democracy? Legitimacy, popular acceptance and the South African Constitutional Court' (2003) 65 *Journal of Politics* 1.

[96] *S v Collier* 1995 (2) SACR 648 (C) at 650E–H, cited with approval by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 43.

values, experiences and expertise to decision-making that can lead to different outcomes. For example, feminists have argued that women can bring a 'different voice' to legal reasoning.[97] This is drawn largely from Gilligan's argument that women live in a world of 'connection and care', and thus adopt a more 'contextual and relational care-based moral reasoning' than men's more abstract and rational logic.[98] Women judges in South Africa and elsewhere have suggested that the particular experiences, perspectives and knowledge of women judges can bring different perspectives to law and legal reasoning.[99] Thus Baines argues that the first woman on the Canadian Supreme Court, Justice Wilson, introduced the use of contextual analysis into the court's constitutional jurisprudence because of her knowledge of the use of context in feminist legal method.[100] In South Africa similar arguments have been made about links between race and particular experiences of racism and apartheid. Budlender alludes to the 'connectedness' that black judges currently have with 'the life experiences and concerns of the people who constitute the majority in the country'.[101]

In many instances, claims about experiences (of being mothers, of living under conditions of racial inequality or apartheid)[102] or knowledge (of feminist thinking) that tend to be common to one group do not translate into identity determinism. Indeed, the idea that race or gender are irretrievably linked to particular ideas and attitudes, or that these translate into specific outcomes, is controversial and highly contested in comparative literature. In contemporary South Africa, academic and judicial opinion tends to eschew any direct ties between race or gender and judicial outcomes. However, it is present in political and media discourses (as discussed below). More common is a broad acknowledgement of general links that might be present between experiences, knowledge and attitudes common to a particular group (defined by race, gender or a combination of factors) and their effects on modes of deliberation or outcomes. This is discussed in the following section.

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[97] Carrie Menkel-Meadow 'Portia in a different voice: Speculations of a women's lawyering process' (1985) 1 *Berkeley Women's LJ* 39.

[98] Carole Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982) 28–31, discussed and cited in Erica Rackley 'Reassessing Portia: The iconic potential of Shakespeare's woman lawyer' (2003) 11 *Feminist Legal Studies* 25 at 29.

[99] Justice Yvonne Mokgoro 'Judicial appointments' December 2010 *Advocate* 43; Justice Sisi Khampepe's interview for the Constitutional Court as reported in Democratic Governance and Rights Unit, University of Cape Town *Summary of JSC Interviews for the Constitutional Court Vacancies: 20–22 September 2009* at 23. In respect of Canadian Supreme Court judges, see Bertha Wilson 'Will women judges really make a difference? (1990) 28 *Osgoode Hall LJ* 507 and Claire L'Heureux-Dubé 'Making a difference: The pursuit of compassionate justice' (1997) 1 *University of British Columbia LR* 31. See also Elsje Bonthuys 'The personal and the judicial: Sex, gender and impartiality' (2008) 24 *SAJHR* 239.

[100] Beverley Baines 'Contextualism, feminism, and a Canadian woman judge' (2009) 17 *Feminist Legal Studies* 27. On context and feminist legal method, see Katharine T Bartlett 'Feminist legal methods' (1999) 103 *Harvard LR* 829.

[101] Budlender (note 92 above) 716. See also Ngcobo (note 88 above).

[102] See Harry T Edwards 'Race and the judiciary' (2002) 20 *Yale Law & Policy Review* 325 at 330 on race in the United States: 'Nonetheless, ''being black'' in America connotes something. America is not a fully integrated society, either economically or spiritually, so blacks in America continue to be seen and treated differently than persons who are not black, and many blacks continue to feel differently about their place in society than do many non minorities.'

(i) Deliberation and the judicial process

The relationship between diversity (in the sense of multiple differences) and deliberation has particular resonance in South Africa given the historical criticism of judges and their failure to recognise the extent to which their personal experience and bias (including but not limited to race) might have affected adjudication under apartheid.[103] The presence of potential judicial bias was admitted in a number of judicial submissions to the Truth and Reconciliation Commission, including that of the judicial leadership,[104] but perhaps most eloquently stated by Justice Ackermann:

> Judges who believe that they are wholly free of prejudice delude themselves. It behoves us all to seek out rigorously, painful as that might be, our own particular prejudices, of whatever nature. We need to keep these constantly in mind and to endeavour actively and persistently to counteract them. Furthermore, we all need to understand the insidious influence of institutional culture and to appreciate the powerful effects of the class, social and political environment in which we live and work, and the potential that this has for making us insensitive to the context and views of others.[105]

This past speaks directly to the links between diversity, judicial process and just and impartial decisions, both in terms of collective decision-making in the higher courts as well as a single judge's ability to overcome his or her personal bias.

Dugard alerted us in 1971 to the problems of the inarticulate premiss that masked loyalty to the status quo, as well as the racial bias that arose in sentencing because a white, middle-class judiciary could not understand the motivations and behavour of a black accused.[106] O'Regan argues that judicial officers in post-apartheid South Africa need to make 'a self-conscious appreciation of the impact of their background on their way of thinking and a conscientious attempt at all times to be *impartial*'.[107] This process of impartial decision-making is greatly enhanced by a diverse bench:

> So requiring diversity on a collegial court enables judges to interrogate their own prejudices or blind-spots. The more alike judges are, the more likely that they will mistake prejudices for simple truths; the more different they are, the more likely that they will interrogate the correctness of their assumptions. If our backgrounds are the same, it is very comfortable and easy to reinforce the prejudices that such backgrounds foster. When we are different, prejudices masquerading as 'common sense' or 'the ways things are' are much more likely to be uncovered.[108]

These links between diversity and impartial justice were acknowledged by the Constitutional Court in its judgment on the application for the recusal of four of its

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[103] See part 8.1 above at 248.
[104] Chaskalson et al (note 62 above) 19–20.
[105] Justice L W H Ackermann 'Submission to the Truth and Reconciliation Commission re: The role of the judiciary' (1998) 115 *SALJ* 51 at 54.
[106] Dugard (note 8 above); Dugard (note 47 above). See generally part 8.1 above.
[107] O'Regan (note 88 above)1176, my emphasis.
[108] Ibid. See also *Regents of the University of California v Bakke* 438 US 265 (1978) at 312n48, quoting President William Bowen of Princeton University.

judges in the *SARFU* case.[109] The respondent had based his claim of a 'reasonable apprehension of bias' on various alleged political, professional and social connections between members of the court and the President, as well as his party, the ANC. Interrogating the meaning of bias, the court noted that '[a]bsolute neutrality on the part of a judicial officer can hardly if ever be achieved'[110] and that it is 'appropriate for judges to bring their own life experience to the adjudication process'.[111] It cited with approval the following dictum of Cory J in the Canadian Supreme Court:

> It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.[112]

At the same time, the court noted that 'the reasonable person does expect that judges achieve impartiality in their judging'.[113] The outcome must not be determined by race or gender: 'Judges must decide cases impartially and not on the basis of their identity or the identity of those who appear before them.'[114]

Diversity thus plays a valuable role in the process of judicial decision-making. It brings a variety of perspectives and experiences to the task of adjudication, and in doing so it assists individual judges to confront and overcome their particular and partial ideas and assumptions. As Chief Justice Langa noted in a public address, diversity 'improves the quality of decisions by increasing judicial debate'.[115] His words echo those of judges around the world. Diversity 'affects the direction and effectiveness of any organization by encouraging richer debate and more thoughtful reflection and discussions within the organization'.[116] Overall, the various perspectives and experiences that different judges bring to the deliberative process enhance impartiality and good justice.[117] There is, of course, an equation of representivity and diversity in some of this literature, but there is also an implicit link between the two, namely that greater representivity can lead, over time, to greater diversity, properly understood.

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[109] *President of the Republic of South Africa v SARFU* (note 96 above). The application was made by the Dr Louis Luyt, the president of SARFU (the fourth respondent on appeal).
[110] Ibid para 42.
[111] Ibid para 48.
[112] *R v S (RD)* (1997) 118 CCC (3d) 353 para 119.
[113] Ibid paras 38–9 (L'Heureux-Dubé and McLaughlin JJ).
[114] O'Regan (note 88 above).
[115] Pius Langa 'The Bram Fischer Memorial Lecture: The emperor's new clothes: Bram Fischer and the need for dissent' (2007) 23 *SAJHR* 362 at 371.
[116] Chen (note 86 above) 1109. See also Michael Kirby 'Appellate courts and dissent', a speech quoted by Langa (note 115 above) 371: '[D]iversity of judicial outlook [is] a most precious intellectual commodity'; Sydney Kentridge 'The highest court: Selecting the judges' (2003) 62 *Cambridge LJ* 55 at 61: 'Diversity illuminated our conferences when competing interests, individual and government and social, had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had.'
[117] Edwards (note 102 above) 329.

In the final analysis, these arguments in support of diversity dispel the 'myth' of impartial justice in classic liberal thought as adjudication that is divorced from values, prejudices and assumptions. Rather, adjudication is a process of making visible one's 'inarticulate premiss' and through reasoned engagement to achieve a result that has taken all aspects of a case into account, including the previously 'unknown' perspectives that may be associated with being a woman or being black, and associated differences of class, culture, politics, and so on. Significant in South African constitutional jurisprudence concerning gender, for example, is a greater acknowledgement of the private sphere.[118] The aim is not to replace one (unacknowledged) partiality with another, but to open up the process of justice to a wider range of perspectives. This approach has a particular resonance in South Africa given the nature of the criticisms of judicial decision-making under apartheid.

These arguments make particular sense when judges sit *en banc*, as with the US and Canadian Supreme Courts and the South African Constitutional Court. However, a diverse bench also benefits individual judges, whose interaction with different colleagues can develop their ability to appreciate diversity and understand that others—including those who appear before them—may hold different values, assumptions, expectations and motivations. It is also here that diversity is implicated in the qualities of a good judge. This is discussed in more detail in part 8.3 below.

(ii) Diversity, race and outcomes: From essentialism to transformation

Before 1994, academic scholarship on the judiciary refrained from drawing a simple distinction between race and outcomes while clearly acknowledging the influence of a judge's racial, class and gender position on adjudication. Today South African debates tend to emphasise process over outcomes, and impartial justice over determinism. In doing so they acknowledge some correlation between the position of one's group in society and one's experience, and thus of indirect links between race or gender (and other forms of difference), multiple perspectives and experiences, and judicial deliberations. Few claim a direct relationship between race, gender and individual outcomes, the idea that the race (or gender) of a judge determines outcomes. Such essentialist links are most likely to be found in political discourse in response to individual cases and in debates about the nature of the judicary and transformation.

In the light of our apartheid past and the perceived role of judges in upholding the racial order, it is not surprising that race is invoked in political criticism of controversial judgments, including those affecting the ongoing disputes concerning the 'on-again, off-again' corruption charges against the current President of South Africa, Jacob Zuma,[119] and trials about inter-racial

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[118] Bonthuys (note 99 above) 256–63.

[119] See eg the criticism of the conviction by Squires J of Schabir Shaik for corruption and his finding that there was a 'mutually beneficial symbiosis' between Shaik and Zuma as the racist conclusions of a white, ex-Rhodesian judge (discussed in Amy Gordon & David Bruce *Transformation and the Independence of the Judiciary in South Africa* (2007) 46–7, last accessed from *www.csvr.org.za* on 7 February 2013. Other examples of this are cited in Democratic Alliance *The DA's Judicial Review:*

killings.[120] As the Democratic Alliance noted about a variety of criticisms emanating from different sections of the ANC:

> By making such statements, office-bearers of the ANC imply that judges rule in a race-conscious way; in other words, that black judges are more likely to 'represent' black people and sympathetically hear cases involving black people than white judges.[121]

However, such criticisms also point to powerful and continuing perceptions and experiences of racism in South African society, and the manner in which our past continues to shape the way we define the present. As Ntsebeza suggests, the ability of political figures to play on public perceptions of race determinism will disappear only when there is greater public confidence in the judiciary, itself tied to greater institutional representivity and diversity (and to ongoing societal change).[122]

Concerns of race determinism similarly emerge around political criticisms of the judiciary and judges as 'untransformed'. Often cited here is the 2005 statement of the ANC national executive committee on the occasion of the ANC's 93rd anniversary:

> We face the continuing and important challenge to work for transformation of the judiciary. . . . We are also confronted by the similarly important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of the masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious negative consequences for our democratic systems as a whole.[123]

This statement elicited a variety of responses about judicial independence and the ANC's apparent desire for a compliant judiciary.[124] It also fed into a lingering concern about political statements that claimed direct links between race and the ability to effect social justice: that 'whiteness' is connected with a regressive past, and 'blackness' with a commitment to transformation. Some of this was countered by a public statement from the Chief Justice of the day, Arthur Chaskalson, in

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Threats to Judicial Independence in South Africa (2005), last accessed from *www.da.org.za* on 15 April 2013.

[120] One of many examples is the setting aside of a conviction for murder in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA), where the accused had allegedly thrown the body of a black worker into a lions' enclosure. The court found that it had not been proved beyond reasonable doubt that the deceased was still alive at the time that he was thrown to the lions. For comment on the racialised responses to this case, see Andrew Meldrum 'White farmer found guilty of throwing black worker to lions in South Africa' *The Guardian* 29 April 2005, last accessed from *www.guardian.co.uk* on 15 April 2013; Sebastien Berger 'Uproar over South Africa ''lion murder'' ruling' *The Telegraph* 1 October 2007, last accessed from *www.telegraph.co.uk* on 15 April.

[121] Democratic Alliance (note 119 above) 9.

[122] Note 93 above, and see the accompanying text.

[123] ANC 'Statement of the National Executive Committee on the occasion of the 93rd Anniversary of the ANC' 8 January 2005, last accessed from *www.anc.org.za* on 17 March 2013.

[124] See the discussion in Gordon & Bruce (note 119 above) 32.

which he rejected the idea that the statement was aimed at 'white' judges; it was aimed at the judiciary as a whole, whose task was to give effect to the rights and values of the Constitution.[125]

In this way the debate shifts away from race towards a judge's ability to defend and uphold the values and principle of the Constitution. As Budlender argued later in 2005, the judiciary must 'be committed to the new national ethos, to the social transformation which the Constitution requires and promises, and the new society which we are building'.[126] Race and gender are not absent from this, but a crucial part of transforming the judiciary. As the Department of Justice and Constitutional Development concludes in a discussion document on transformation:

> The expectation is therefore that the collective mindset of those who function within the whole justice system must be qualitatively different from what prevailed under colonialism and apartheid. A Judiciary whose composition does not broadly represent society's demographical profile in terms of race and gender would normally not be perceived to be in a position to contribute meaningfully to pushing the frontiers of change towards inclusiveness and substantive equality.[127]

However, race is not to be conflated with transformation. In the absence of a more determinist reading of this statement, we must conclude as follows: Race and gender are important because they confer legitimacy and imply a diversity of ideas, attitudes and group-based experiences that enable a better deliberative process, and thus better outcomes. Put another way, representivity can enhance diversity. Important here is the notion that the experience of oppression that some women and black judges will bring to the bench—the experience of being marginalised by apartheid and race, patriarchy and gender—helps to foster an institutional and individual understanding of diversity, inclusiveness, equality and social justice, and thus contributes to outcomes that align with the values of our Constitution. In this way diversity assists the judiciary in overcoming the race and class ideologies and conservative legal cultures of an apartheid past.

(iii) Diversity and multiple differences: New directions

A significant international body of scholarly work has argued in favour of the positive effects of race and gender representivity and diversity on decision-making.[128] Although some of this work has been criticised as 'theoretically weak,

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[125] See 'Chief Justice reaffirms judiciary's commitment to transformation' January/February 2005 *De Rebus* 13.

[126] Budlender (note 92 above) 719.

[127] *Discussion Document on the Transformation of the Judicial System* (note 11 above) para 6.2.5.

[128] See eg Rachel Davis & George Williams 'Reform of the judicial appointments process: Gender and the bench of the High Court of Australia' (2003) 27 *Melbourne University LR* 819; Regina Graycar 'The gender of judgments: Some reflections on ''bias''' (1998) 32 *University of British Columbia LR* 1; Brenda Hale 'Equality and the judiciary: Why should we want more women judges?' (2001) *Public L*aw 489; L'Heureux-Dubé (note 99 above); Errol P Mendes ' ''Promoting heterogeneity of the judicial mind'': Minority and gender representation in the Canadian judiciary' in Ontario Law Reform Commission *Appointing Judges: Philosophy, Politics and Practice* (1991) 91; Jennifer Nedelsky 'Embodied diversity and the challenges to law' (1997) 42 *McGill LJ* 91; Wilson (note 99 above); Chen (note 86 above); Edwards (note 102 above).

empirically questionable and strategically dangerous' (as it opens female and black judges to accusations of bias),[129] and unable to avoid the dangers of 'essentialism and mythical stereotype',[130] there is some consensus that black and women judges can bring 'something different' to the bench. As Rackley comments, this is something that we intuitively know to be the case.[131] It seemed to be the case under apartheid that the judges' race and class background shaped their particular loyalty to the status quo, as documented in several studies.[132] It also seems obvious in South Africa that women judges have made a difference in the gender jurisprudence of the Constitutional Court. In an analysis of these judgments, Bonthuys concludes that they were dominated by three 'feminist and feminine' judges, who were 'often (but not always) instrumental in formulating authoritative gender jurisprudence in the Constitutional Court'.[133]

The doubt cast on judicial diversity does not necessarily suggest that the claim that race and gender can make a difference to judging is incorrect. Rather it suggests that our analyses might take too much for granted about the nature of difference and of judicial decision-making.[134] For example, Rackley, writing about gender, and Moran, writing about sexual identity, have pointed to the complexity of difference and the additional effects of ethnicity, race, social class, education and political beliefs.[135] In a public lecture in 2007, then Chief Justice Langa suggested that '[j]udicial diversity implies, not that there is an appropriate racial or gender mix, but that a wide range of views and life experiences are represented'.[136] Although Langa believed that in contemporary South Africa diversity would often coincide with representivity, diversity can be a much more complex and multi-faceted idea of difference, referring to race, religion, gender, sexual orientation, class and culture and to the diversity of ideas, norms, values and experiences that any combination of these creates. Here, as Du Bois suggests, diversity separates from representivity in that the latter refers to the extent to which the judiciary is representative of 'major social divisions', such as gender and race, and the former to a more nuanced and complex idea of variety.[137] Overall, this suggests that the impact of diversity on deliberation is far more complicated than race or gender, even if our particular history has made race and gender especially influential in shaping our humanity.

In addition to the complex and intersectional nature of difference, Minow has argued compellingly for a relational (and non-hierarchical) idea of difference. In

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[129] Kate Malleson 'Justifying gender equality on the bench: Why difference won't do' (2003) 11 *Feminist Legal Studies* 1. See also Erika Rackley 'Detailing judicial difference' (2009) 17 *Feminist Legal Studies* 11 at 14–16.
[130] See Rackley (note 129 above) and the authors cited there at 15.
[131] Ibid.
[132] See Dugard (note 17 above); Corder (note 20 above); Forsyth (note 21 above); Nicolson (note 23 above).
[133] Bonthuys (note 99 above) 261. Justice Sachs is included with the two women judges, Mokgoro and O'Regan because, in Bonthuys's words, his judgments always reflect 'feminist reasoning' (at 262).
[134] Rackley (note 129 above).
[135] Ibid; Leslie J Moran 'Judicial diversity and the challenge of sexuality: Some preliminary findings' (2006) 28 *Sydney LR* 564 at 571–2.
[136] Langa (note 115 above) 371.
[137] Du Bois (note 5 above) 282 (using the term 'representativity' rather than 'representivity'). As his work focuses on judicial selection, Du Bois does not address the meaning of diversity in detail.

this context Rackley suggests that our focus should not be limited to those who are 'different', but that we should look more holistically at judicial work and decision-making in the mainstream and the 'normal'. She calls for a 'more complete understanding of the judge and adjudication', and a greater comprehension of just how 'different', if at all, woman and black judges actually might be.[138]

In South Africa our understanding of judges, race and decision-making has been significantly enhanced by research on apartheid judges. We already know that race, class and gender matter, but so do judicial ideologies, legal tools, societal norms and political conditions. Under apartheid, judges were drawn from a very small social élite. That élite has widened considerably under democracy. Future research on the impact of this diversity should locate race and gender within a much more complex mix of politics, culture, religion and differing legal philosophies that might affect outcomes.

(c) Diversity and equality

Equality is rarely used as a justification for judicial diversity or representivity in South Africa, yet it is a rich concept that speaks directly to the need for representivity and to a more complex diversity. It is not only an important justification in this regard but also enables a deeper understanding of the systemic inequalities that inevitably infuse an institution that is, or has been, dominated by one group. As a result it also provides a conceptual justification for institutional reform, including removing practices of discrimination (as well as a biased concept of merit) in the selection and appointment of judges, and instituting positive measures to overcome past discrimination and enhance judicial representivity or diversity.

(i) Equality as justification

An important justification for representivity or diversity, especially amongst feminist writers, concerns the 'rightness' of representivity or diversity as an aspect of equality and justice. Here the exclusion of major social groups, such as women and black judges (or groups defined by a more complex idea of difference) is viewed as discriminatory, unfair and unjust. These arguments do not address what women and black people will do as judges, nor whether they bring a different perspective or content to judicial decision-making, but merely make the point that ideas of justice and equality require their presence in the judiciary.[139] Thus the equality justification speaks to the importance of an inclusive judiciary and the right of all groups to participate equally in powerful institutions.

In South Africa, early criticisms of the whiteness of the judiciary were linked to ideas of formal equality. In 1962 Mandela spoke about equality as equal participation and representation of everyone in the legal system, including the judiciary:

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[138] Rackley (note 129 above) 22.

[139] Anne Phillips *Engendering Democracy* (1991) 62–3. Phillips's arguments are made with regard to the participation of women in government and Parliament.

> In its proper meaning equality before the law means the right to participate in the making of the laws by which one is governed, a constitution which guarantees democratic rights to all sections of the population, the right to approach the court for protection or relief in the case of the violation of rights guaranteed in the constitution, and the right to take part in the administration of justice as judges, magistrates, attorneys-general, law advisers and similar positions.[140]

Today the equality argument finds surprisingly little traction, partly owing to the power of the legitimacy rationale. For example, it was rarely, if ever, mentioned as a justification for the constitutional provision on representivity or diversity. In a preface written after his retirement, former Chief Justice Chaskalson appeared to dismiss equality in favour of legitimacy as the rationale for s 174(2), the constitutional requirement of race and gender representivity in the judiciary.[141] In distinguishing this provision from s 9(2), the equality provision that permits positive action to redress inequality, Chaskalson argued that the latter has the 'ultimate purpose of creating a better and more equal society' in which 'the immediate beneficiaries . . . are the individuals whose advancement is preferred towards the achievement of that end', whereas the purpose of s 174(2) is 'not to advance individuals or categories of individuals, but to establish a judiciary that will have *legitimacy* in the eyes of the general population'.[142] In s 9(2) the focus is on individuals and equality, whereas in s 174(2) it is on the institution and legitimacy. Wesson and Du Plessis make a similar distinction, noting that the rationale for s 174(2) is to 'bring greater legitimacy and a plurality of perspectives to the bench, thereby enhancing respect for the judiciary and the quality of decision-making'.[143]

These approaches perhaps fail to see that the problem with the apartheid judiciary was not only one of legitimacy and limited decision-making, but also—as Mandela notes—one of inequality. If equality connotes the ability to participate equally in exercising power and authority within a society, then institutions that exclude persons of a particular gender or race contribute to a diminution of that group's status, reinforce harmful stereotypes and exacerbate their subordination and lack of power. Judicial authority is considered to be white and male rather than black or female.[144] Institutional norms come to be modelled on the needs and interests of the dominant group, whether in terms of entry or modes of working or measurements of success. All of this flies in the face of the Constitution's core commitment to the principles of equality and freedom from discrimination.

A commitment to an equal, inclusive, non-racial and non-sexist society requires all groups to be present and participate in the judiciary, and not to be excluded from an institution that wields significant power in our society. Section 174(2)—as the constitutional mandate for diversity—fulfils this constitutional purpose by

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[140] Mandela (note 2 above).
[141] Arthur Chaskalson 'Preface' (2008) 24 *SAJHR* viii. This was a special issue on the judiciary in South Africa.
[142] Ibid xi, my emphasis.
[143] Wesson & Du Plessis (note 88 above) 199.
[144] See eg Bonthuys (note 99 above) 244–50.

requiring the judiciary to 'reflect broadly the racial and gender composition' of our society.[145]

(ii) Equality, discrimination, equal opportunities and positive measures

Throughout the world judiciaries have tended to be male, if not white, and selected from a small élite within that society. As several commentators have pointed out, this suggests systemic forms of institutional exclusion. For example, Kenny comments on the absence of women and people of 'non-Anglo-Celtic' backgrounds in the UK judiciary:

> [This lack of participation] is disturbing because it indicates that there may be a fundamental inequality of opportunity to participate in the administration of the rule of law in this country. . . . Is there, the public may well ask, some systemic bias in the legal system which limits opportunity for women and other groups and, if so, to what extent, if any, is the judiciary as a major participant in that system responsible?[146]

Whether the cause of exclusion is societal or institutional, it can be argued that there should be equal opportunities to be appointed as a judge, and that positive measures should be instituted to enhance these opportunities. These equality-based arguments can be made in a formal or substantive sense. In a formal sense it is claimed that, as there are no relevant race- or sex-based differences that affect judicial eligibility, there is no rational basis for excluding qualified women and black people from becoming judges. Thus limited measures are possible to address this, including the removal of irrational and arbitrary bias in appointment. However, merit criteria tend to remain unchanged and any racial or gender preference is strictly circumscribed by requirements of competence. This more formal, liberal concern with judicial affirmative action was reflected in disputes over the selection of Constitutional Court judges in 1994 and the place of race and gender representivity in the 1996 Constitution. In both instances, there was a concern that representivity be textually qualified by the requirement of competence (and thus merit). As discussed above, this was the case in the interim but not the final Constitution.

A more substantive approach to equality recognises the systemic nature of group-based exclusion and allows more substantial redress, justified as overcoming past disadvantage, undoing historical imbalances of race and gender and creating a more egalitarian, non-racial and non-sexist society. Here merit and judicial qualities are seen to be distorted by their race, gender and class origins and are reconsidered in light of the experience of excluded groups, as well as the actual needs and work of the institution. The realisation that judges have historically been drawn from narrow sectors of society has resulted in several jurisdictions rethinking the content and weight of the merit criterion. In the United Kingdom, for example, merit has been redefined to include 'an understanding of

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[145] Only a couple of writers acknowledge that the constitutional commitment to equality and non-discrimination justifies the purpose of s 174(2). See Dennis Davis 'Judicial appointments in South Africa' December 2010 *Advocate* 40 at 41; Cowen (note 88 above) 63–5.

[146] Susan Kenny 'Maintaining public confidence in the judiciary: A precarious equilibrium' (1999) 25 *Monash University LR* 215.

the awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs' under the overall quality of '[a]n ability to understand and deal fairly'.[147] Here empathy or the ability to appreciate diversity is a component of *individual* merit. An *institutional* commitment to diversity is limited to the need for the Judicial Appointments Commission to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'.[148] (Here diversity seems to imply a judiciary that it broadly representative of major social groups, but it is also capable of a more complex interpretation.) Selection is solely on individual merit. By contrast, the South African Constitution establishes representivity, if not diversity, as a factor to be taken account *in* the selection process, thus posing a dilemma about the relationship between merit and representivity or diversity that is discussed further in the next part of this chapter.

In conceptual terms, this dilemma can be addressed through an understanding that equality can support positive measures, and that merit is a somewhat fluid and value-laden concept that can accommodate different types of experience and evidence of judicial potential. It is this view that underpinned the ANC's commitment to affirmative action in the early 1990s as a means of ensuring that state institutions, including the judiciary, which were 'either completely white or totally white dominated' could be opened up 'by means of programmes of search, training and retraining so as to make them representative of all South Africa'.[149]

> Whatever form might emerge or whatever definition be given, . . . the essence of affirmative action . . . meant taking special measures to ensure that black people and women and other groups who had been unfairly discriminated against in the past, would have real chances in life. In particular, it signified a concerted effort to enable them to overcome the obstacles that had been put in their way, to develop their capacities to the full and receive appropriate reward for their efforts.[150]

The manner in which these measures were put in place in relation to the judiciary is bound up with the interpretation and application of s 174(2) and is discussed in the next section.

Equality justifications for judicial diversity or representivity are rare and under-valued in South Africa. Yet they offer a powerful and principled basis for non-discrimination, equal opportunities and positive measures in the judiciary, one that is not reliant on popular sentiment and public confidence (as legitimacy can be), nor on actual or purported links between diversity or representivity and judicial outcomes. In particular, equality arguments might be most effective when advocating for gender (which has less political support than race) and for a much richer diversity through the inclusion of multiple groups, whether defined by sexuality, language, religion, culture or any other ground of discrimination. Finally, equality provides a useful theoretical rationale for more practical

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[147] UK Parliament Constitution Committee Twenty-Fifth Report 'Judicial Appointments' (7 March 2012) ch 3, last accessed from *www.publications.parliament.uk* on 25 April 2013.
[148] Section 64 of the Constitutional Reform Act of 2005.
[149] Albie Sachs *Advancing Human Rights in South Africa* (1992) 34.
[150] African National Congress *Affirmative Action and the New Constitution* (1994), last accessed from *www.anc.org.za* on 20 August 2012.

mechanisms for overcoming barriers to entry and participation by means of non-discrimination, equal opportunities and affirmative action within the judiciary. The JSC is bound by our Constitution, inter alia, not to discriminate and to advance equality in the selection of judges. This is discussed further in what follows.

8.3 REPRESENTIVITY, DIVERSITY AND JUDICIAL SELECTION

A representative or diverse judiciary is constitutionally mandated as a part of the process of selecting judges. In terms of s 174(2) of the Constitution, '[t]he need for the judiciary to reflect broadly the race and gender composition of South Africa must be considered when judicial officers are appointed'.

The past two decades have seen enormous progress in diversifying the judiciary and magistracy.[151] The number of black judges increased from just under 2 per cent in 1994 (3 out of 166)[152] to 34 per cent in 2003 (73 out of 214)[153] and to 63 per cent in mid-2013 (151 out of 240).[154] The progress of women has been somewhat slower: from 1 per cent in 1994 (1 or 2 out of 166)[155] to almost 12 per cent in 2003 (25 out of 214)[156] and 30 per cent (72 out of 240) at the end of July 2013.[157] (See the section on gender and diversity below.) Magistrates fare slightly better: as stated earlier, of 1 711 magistrates in November 2013, 1 021 or 59.6 per cent were black (African, Indian and coloured) and 673 or 39.3 per cent were female.[158] Although demography is not necessarily the measure, it is nonetheless informative: black South Africans make up almost 80 per cent of the population and 63 per cent of the judiciary, while women are 52 per cent of the population and constitute 30 per cent of judges.[159]

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[151] Although the Constitution does not specifically address diversity within the lower courts, the Magistrates' Commission has relied on the principles and provisions of the Constitution, especially s 174(2), in recommending the appointment of magistrates. The commission, regulated by the Magistrates' Act 90 of 1993, oversees the appointment process of magistrates and recommends appointment to the Minister. In *Van Rooyen v The State* 2002 (5) SA 246 (CC), in which it was argued that provisions of the Act violated the principle of judicial independence, the Constitutional Court stated that the constitutional standards set for the 'higher judiciary [are] clearly relevant to the standards required for the lower judiciary' (para 61). As apparent from *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC), the commission used a points system in selecting magistrates in which race (black) and gender (female) attracted higher points. See further Chapter 10 at 330.

[152] Note 6 above. Two of these judges were in the homelands (Judge Madala in the Transkei and Judge Khumalo in Bophuthatswana) and one in Johannesburg (Judge Mahomed).

[153] Statistics of the Department of Justice cited in M T K Moerane SC 'The meaning of transformation of the judiciary in the new South African context' (2003) 120 *SALJ* 708 at 713.

[154] Note 9 above.

[155] Note 6 above. The two women were Judge Leo van den Heever in the Appellate Division (now the Supreme Court of Appeal) and Judge Jeanette Traverso in the Cape Provincial Division.

[156] Note 6 above.

[157] Note 9 above.

[158] Note 11 above.

[159] Statistics South Africa 'Mid-year population estimates' in *South African Statistics, 2011,* last accessed from *www.statssa.gov.za* on 10 October 2013.

This relatively swift progress towards a more representative judiciary has been achieved in a number of ways, including broadening the pool of judicial candidates to include the attorneys' profession and, to a lesser extent, the magistracy and academia; providing education and training for aspirant and new judges; extending acting opportunities to potential candidates; and applying s 174(2) to the selection process. Since the selection of judges is discussed generally in Chapter 5 of this work, the discussion here will be limited to the interpretation and application of s 174(2) in so far as it demonstrates the contested place and interpretation of representivity and diversity in the selection process.

(a) The interpretation and application of section 174(2)

(i) Representivity or diversity?

In meeting the constitutional directive set out in s 174(2), whether it be interpreted as one of diversity or representivity, the JSC confronts the stark legacy of apartheid and patriarchy. Not only have the benefits, opportunities, norms and qualifications for advancement in the legal system largely been the preserve of white men, but the character, outlook and culture of the apartheid judiciary was shaped by a small élite, schooled in legal formalism under a system of racialised parliamentary sovereignty. The achievement of diversity (understood as a wider aspiration than representativity) is thus bound up with at least two broad challenges. The first is to achieve a representative judiciary in the context of an 'uneven playing field' and a paucity of black and female senior counsel (the traditional route to judicial appointment), but also to aim for a diverse judiciary in which multiple intersecting differences enrich the institution, including those of class, culture, sexual orientation, religion and ethnicity. The second is to transform the composition, values, norms and culture of the judiciary (and judicial decision-making) to fit the new constitutional democracy. Selecting new judges is central to meeting these challenges as it enables the JSC to grapple with the character of the post-apartheid judge and the criteria for his or her appointment and, in doing so, to influence positively the composition and character of the post-apartheid judiciary.

The interpretation and application of s 174 are critical to this process, as is the balance between the 'merit' criteria set out in s 174(1)—that a judge must be 'fit and proper' and 'appropriately qualified'—and the diversity or representivity provision of s 174(2). These are also politically and legally contested, resulting in quite different understandings of the constitutional provisions in question. It is useful, for the purpose of this discussion, to distinguish between three approaches: two narrow, rather formal approaches that equate (racial) representivity with (demographic) transformation, and envisage a trumping relationship between s 174(1) and (2), and a third, more substantive approach that links diversity with the deeper transformation of the judiciary suggested in the previous paragraph.

The first formal, narrow approach tends to read s 174(2) as a mandatory requirement for achieving a judiciary that is representative in demographic terms, and seems to pay less attention to the character of the judge, such as his or her commitment to constitutional values and judicial philosophy. Section 174(2) may be regarded as a screening or filtering criterion that trumps the merit of other

candidates. Transformation is a thin concept associated with racial and (to a lesser extent) gender representivity. An alternative formal approach prioritises a narrow, unchanged notion of merit over representivity (or s 174(1) over (2)), insisting that competence always limits positive action to diversify the judiciary. The third and more substantive approach views race and gender representivity as mandatory, but locates this within a wider understanding of difference, including class, background, ethnicity, culture, sexual orientation and religion. In this approach, s 174(1) and (2) are read cumulatively, with emphasis placed on redefining 'merit' and the qualities of a judge. Important here is a commitment to constitutional values, empathy and progressive judicial philosophies. Transformation is a wider concept linked to the demography of the judiciary as well as its diversity, its norms, values and modes of operation, and its capacity to advance the values of the Constitution.

The following sections discuss how the JSC has interpreted and implemented s 174, refers to some of the debates and criticisms that have arisen around this, and argues for a substantive and cumulative interpretation. First, however, the interim Constitution's representivity requirement for the first Constitutional Court is examined.

(ii) Section 99(5)(d) of the interim Constitution: Diversity in the Constitutional Court?

The constitutional directive to consider race and gender representation in the judiciary was first given substance by the JSC when interviewing candidates for the first Constitutional Court in 1994. Here the commission was required to apply the forerunner of s 174(2), s 99(5)*(d)* of the interim Constitution, which mandated the JSC when submitting its recommendations for appointment to the President to 'have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender'. Under the leadership of Chief Justice Corbett, the commission described s 99(5)*(d)* as a 'component of [institutional] competence', stating that 'the Court will not be competent to do justice unless, *as a collegial whole*, it can relate fully to the experience of those who seek its protection'.[160] By suggesting that 'diversity is a quality without which the Court is unlikely to be able to do justice to all the citizens of this country',[161] the JSC relied on the notion that diversity enhances judicial deliberation as a collective enterprise. It also opposed any idea that s 99(5)*(d)* allowed positive measures or the application of affirmative action for individual judges:

> This is not a question of affirmative action, in the sense in which that term is most commonly used. Affirmative action usually means varying the traditional criteria of qualification—the criteria which govern entrance or appointment or promotion—in order to undo the effects of the exclusionary policies of the past. . . . But the Constitution-maker is not here concerned with the interests of the individuals who, by appointment to the Court, might benefit from its instruction. Its concern is with the

[160] Judicial Service Commission 'Guidelines for questioning candidates for nomination to the Constitutional Court' (26 September 1994) in *JSC Handbook* (2010) 67 at 69 (my emphasis).
[161] Ibid.

> effectiveness of the Court as an instrument of justice. The constitutional instruction is based on the conviction that the Court must be constituted from a wide enough spectrum of South African society to be able to understand the experience of all South Africans and empathise with their needs.[162]

The JSC rejected the idea that s 99(5)*(d)* required demographic representivity, placing more emphasis on the court's ability to understand and empathise with the South African community as a whole. This suggests no necessary connection between race, gender and experience, and points to the importance of judicial character and outlook, including 'diversity, empathy and sensitivity' as criteria relevant to the selection of member of the court.[163] It speaks directly to the justifications of legitimacy and a better quality of deliberative justice,[164] and locates s 99(5)*(d)* as an overall consideration to be applied in selecting a legitimate and competent court, one that is fully qualified to adjudicate on constitutional matters that affect society as a whole.[165]

Although the text of s 99(5)*(d)* speaks of a court that is 'representative in respect of race and gender', for the first JSC this translates not into demographic race and gender representativity[166] but to a quality more akin to diversity (the word used by the commission) as a wider and more open-ended idea of difference in which background, judicial values and human rights experience, as well as race and gender, are part of the mix in selecting a legitimate and 'representative' court. In this respect it is interesting to note that the commission's list of ten candidates included only two women (one black and one white) and eight men (four white and four black), of whom the President appointed both of the women and four of the men (one black and three white). Overall, the court comprised nine men (six white and three black) and two women. It was nearly two-thirds (63 per cent) white and more that 80 per cent male.[167]

(iii) Section 174: Diversity or representivity in the judiciary as a whole

Although s 99(5)*(d)* of the interim Constitution was differently (and more narrowly) worded, and the selection criteria in the 1994 guidelines applied only to the first Constitutional Court, they provide a useful backdrop to the interpretation and application of s 174 to the judiciary as a whole. Here, the task was not to select 11 judges from a combined pool of liberally-minded sitting judges, public-interest lawyers and academics, but to diversify a bench of more than two hundred judges.

The JSC was initially praised for its progress in doing so, as it made a series of appointments by expanding the pool to the attorneys' profession and academia.[168] However, it soon confronted a legacy of apartheid in the small number of black

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[162] Ibid.
[163] Ibid: see para 8.
[164] Ibid paras 5–7 at 68–9.
[165] Ibid para 9 at 69–70.
[166] Ibid paras 5–8 at 68–9, and especially para 8.
[167] See *www.constitutionalcourt.org.za/site/thecourt/history.htm*, last accessed on 25 April 2013.
[168] See eg Kate Malleson 'Assessing the performance of the Judicial Service Commission' (1999) 116 *SALJ* 36 at 46–8; Mokgoro (note 99 above) 46.

practitioners who had the experience, skills and qualifications of white male candidates. Similarly, gendered barriers limited the number of women candidates. The JSC met this head-on in 1998 when, under the leadership of Chief Justice Mahomed, it identified substantive criteria and guidelines for appointment.[169] Evidence of this discussion suggests that under the merit component, s 174(1), it identified the need for integrity, energy and motivation along with competence and experience, both in technical legal expertise and in an ability to give content to the values of the Constitution, as well as knowledge of the needs of the community. Merit was thus broadly defined to identify judges who might cast aside the shackles of legal formalism, be sensitive to diversity and the broader community, and advance the values of the Constitution. Significantly, the JSC accepted the idea that 'potential' should be considered in the overall assessment of candidates, that it 'should not be afraid to take a chance with a less experienced but talented black lawyer'.[170] In addition, there was a concern with symbolism (the legitimacy aspect of diversity).

Although potential, symbolism and knowledge of the community are clear proxies for race and gender, they speak both to merit in s 174(1) and 'representivity' in s 174(2). Race and gender are not envisaged as screening or trumping criteria, but are relevant to a wider set of judicial qualities. There is no simple equation between a judge's race or gender and his or her ability to adjudicate fairly, with due regard to the Constitution and to the social reality of the community. The JSC nevertheless allows itself space to advance a black or female candidate over a more qualified white or male candidate should the former lack experience but display competence and ability in relation to the criteria under s 174(1).

This aligns with a broader substantive interpretation of s 174 and the understanding that, with appropriate support though mentoring and continuing judicial education, less (or differently) experienced black and women candidates may be appointed to the bench in terms of a cumulative reading of s 174. As noted above, this reading redefines merit to include an appreciation of South Africa's different communities and an understanding of the values of the Constitution, while s 174(2) enables a flexible approach to appointing black and women judges when presented with promising candidates. In this context, a transformed judiciary is a representative one, but it can also be a diverse one as multiple differences—including differences in values and judicial philosophy—can be taken into account. There is also an expectation that candidates should demonstrate a commitment to, and understanding of, the Constitution and thus be able to infuse their judgments with its values.

The JSC seems to have been unable to sustain this more substantive and transparent approach to selection. As the initial pool of judicial candidates shrank, and as significant political pressure continued to be placed on the JSC to appoint black, if not women, judges,[171] the JSC and the judiciary began to look to wider

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[169] Although not publicly available, these are discussed by Cowen (note 88 above) 10n2 and Davis (note 145 above) 42n11.

[170] Davis (note 145 above) 41.

[171] Carmel Rickard 'The South African Judicial Service Commission' University of Cambridge *Document No 879* (2003).

mechanisms for increasing the judicial pool. These included mentoring programmes in particular courts and special training programmes to fast-track women judges. However, the diversification of the bench was bound to be a difficult process under conditions in which white men enjoyed a substantial historical advantage in terms of training, access and opportunities. The delicate balancing act between experience and potential, and between different understandings of merit and representivity or diversity, was always going to be difficult to establish and maintain.

Soon allegations began to emerge that the JSC unduly prioritised race over other criteria, especially when it declined to appoint highly qualified white male candidates with significant constitutional experience, in favour of 'less qualified' black candidates[172] or at all.[173] In addition, concerns were expressed about the effects of the appointment of 'under-qualified' judges on judicial independence and access to justice.[174] It was suggested that some members of the JSC were using race to secure a more compliant judiciary, either because black judges were believed to be more deferent to government policies or because such judges would be beholden to those who appointed them.[175] The overall concern was that s 174(2) was being illegitimately elevated above the merit requirements expressed in s 174(1) that judges be 'appropriately qualified' and 'fit and proper'.

In 2012 the JSC began to face a different kind of public criticism over its failure to advance gender representation in the judiciary,[176] and in the same year the President attracted particular censure when he overlooked an opportunity to appoint a woman to the Constitutional Court and thus increase the percentage of women on that court to 27 per cent.[177] The debate has become more complex in recent months and it has been alleged that the JSC, under the influence of a stronger political mandate, has tended not only to elevate race over other concerns, including gender, but also to appoint judges (both black and white) who are less likely to be independent-minded and hold the government to account.[178] The ongoing contestation over the place of race and gender in judicial selection became particularly apparent in April 2013 when one of the commissioners

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[172] See eg Carmel Rickard 'South Africa: The bench is closed to pale males, struggle credentials or not' *Sunday Times* 18 July 2004; Davis (note 145 above) 42 (the failure to appoint distinguished lawyers, committed to values of Constitution, has 'diminished the credibility of the appointment process'); Carien du Plessis 'White men can't judge' *City Press* 7 April 2013.

[173] The failure of the JSC to appoint two highly qualified senior counsel and instead leave judicial posts vacant in the Cape High Court led to a legal challenge by the Cape Bar Council: *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA).

[174] See Gordon & Bruce (note 119 above) 48.

[175] Ibid 47–8.

[176] This led to a complaint to the South African Commission for Gender Equality on 12 October 2012 regarding the lack of gender transformation in the judiciary. See Democratic Governance and Rights Unit 'Time to break the judiciary's glass ceiling', last accessed from *www.dgru.uct.ac.za* on 1 May 2013.

[177] Glynnis Underhill 'Judiciary: Appointment queried on gender grounds' *Mail and Guardian* 17 August 2012, last accessed from *www.mg.co.za* on 15 February 2013.

[178] See eg 'Which white judges?' *City Press* 21 May 2013, last accessed from *www.lrc.org.za* on 2 May 2013.

resigned in protest over the JSC's apparent elevation of transformation, as a proxy for race and gender representivity, over merit.[179]

During this period the public understanding of how appointments are made—already fraught with the problems of discussing race in a post-apartheid society—has been made even more difficult by the JSC's failure to make explicit its understanding of s 174(1) and (2) and the relationship between them. In April 2009, in reply to a question from the Democratic Governance and Rights Unit based at the University of Cape Town, the JSC made the following comments about its selection process:

> There are a wide variety of factors that are taken into account by the Screening Committee before deciding to include or exclude a particular nominee. These include but are not limited to the recommendation of the Judge President, the support of the candidate's professional body, the need to fulfill the constitutional mandate of the Judicial Service Commission (JSC) so as to ensure transformation of the Bench to reflect the ethnic and gender composition of the population, the particular judicial needs of the division concerned, the candidate's age and range of expertise, including whether he or a she has served as an acting judge in the division or at all, and the relative strength and merits of the various candidates in relation to one another.[180]

This response pays surprisingly little attention to judicial character and the content of 'merit': it focuses on external factors and seems to elevate these above the actual abilities of a judge. It seems to suggest that the JSC uses s 174(2) as a screening criterion, deciding whether race or gender is a necessary requirement in a particular position or division before making a selection. This tends to reduce s 174(2) to a requirement of 'mere representivity', where race becomes the key determinant for appointment and trumps the other considerations suggested by s 174(1). The purpose of s 174 is reduced to a thin legitimacy rationale, perhaps satisfying public confidence in the short term but reducing it over time if the judiciary is unable to meet standards of competence and substantive transformation. Moreover, by reducing diversity to race and gender representivity, in a country whose rich social, cultural and religious diversity creates a more complex mix of humanity, the JSC fails to make visible the manner in which difference is found in class, education, political values, moral outlook, religion, culture, sexual orientation and so forth, and how these might give rise to different judicial philosophies, a diversity of views about the constitutional project and different ways of judging.

In 2010 the JSC issued a list of more substantive criteria derived from s 174(1) and (2) and similar to those developed in 1998.[181] They included integrity, energy and motivation, competence (technical competence and an understanding of the values of the Constitution), experience (both technical and with regard to values and needs of the community), appropriate potential and symbolism. However, no

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[179] Franny Rabkin 'Smuts resigns from JSC in wake of furore over document' *Business Day Live* 12 April 2103, last accessed from *www.bdlive.co.za* on 20 April 2013.

[180] Cited in Cowen (note 88 above) 9–10.

[181] Judicial Service Commission 'Summary of criteria used by the Judicial Service Commission when considering candidates for judicial appointment' in *JSC Commissioners' Handbook* (2010) 73.

content was given to the criteria and no indication given as to the JSC's weighting and application of s 174 as a whole.

The heart of the problem seems to be the JSC's failure to sustain a conceptually clear and open understanding of transformation, representivity or diversity, merit and the role of the democratic judiciary. This, together with the absence of detailed criteria and guidelines for selection, and reasons for its decisions, means that the JSC's already difficult task of balancing and justifying sometimes competing demands in the process of judicial selection is made even more controversial and opaque. As a constitutional body the JSC is expected to act constitutionally, and in an open and accountable manner. It is also, 'as a matter of general principle, . . . obliged to give reasons for its decision[s]'.[182] The effective execution of this constitutional mandate requires conceptual clarity: What is meant by transformation, representivity and diversity? It demands substantive interpretation: How is s 174 understood within this context? And it calls for procedural certainty: How is s 174 applied in the process of selection?

In this regard, I would argue that the broad and substantive approach set out above is most faithful to the Constitution, and best able to address the institutional problems inherited from the past and to contribute to the development of a judiciary that protects and enforces the Constitution. Thus, transformation should not be understood merely in terms of representivity, but rather in terms of the judiciary's ability to throw off the shackles of the 'inarticulate premises' and legal formalism that characterised it under apartheid. This requires judges—regardless of race and gender—to be aware of personal biases, to understand the social reality of others and to engage with the core values of the Constitution in the adjudication process. Transformation requires a representative *and* diverse institution, whose appearance and whose norms, values and modes of adjudication are qualitatively different from the past.

Flowing from this, the interpretation of s 174 should promote both representivity and a thick meaning of diversity to advance legitimacy, ensure better deliberation and contribute to more just constitutional outcomes. A judiciary that is representative of race and gender is a necessary, but not sufficient, aspiration for substantive transformation. It should also be diverse in its make-up and its values, approaches and philosophies.

A thin notion of representivity as transformation means that s 174(2) will tend to trump s 174(1). The JSC should revert to what seemed to be its initial, more substantive and cumulative reading of s 174. Here the ideas of representivity and diversity inform the qualities necessary in an individual judge, thus the institutional aspiration expressed in s 174(2) influences the meaning of s 174(1). As a result, the content of 'appropriately qualified' and 'fit and proper' (or merit) includes qualities such as empathy, an awareness of diversity and social context and a deep sense of constitutional values, including 'a . . . commitment to transform South African society, . . . which affirms and promotes substantive equality and the values of dignity, freedom and equality'.[183] Diversity also implies

[182] *Judicial Service Commission v Cape Bar Council* (note 173 above) para 51 (Brand JA).
[183] Davis (note 145 above) 42.

differences in judicial approach and philosophy, which encourage debate and deliberation amongst judges and may inspire well-reasoned, value-based judgments.

A cumulative reading of s 174 also enables an understanding of how to evaluate potential as part of the criterion of merit. It enables attention to racial, gendered and other barriers to advancement, and an assessment of how much they matter. For example, gendered or racialised gaps in legal experience (such as women being more likely to practise family law rather than commercial law) are unimportant if the candidate demonstrates a clear ability to overcome them.[184] Making this visible and getting it right is critical to effective appointments.

Finally, the JSC needs clear guidelines on how to make choices between candidates who are qualified in different ways. The diversity or representivity needs of a particular court (or of the judiciary as a whole) are important here, but so too is the ability to balance different types of experience and different attributes. The JSC is bound not to discriminate under s 9(3) of the Constitution, and it is required to advance previously disadvantaged groups under s 9(2). In this context the development of such guidelines is a prerequisite for achieving a fair and justified balance in the selection of candidates.

8.4 GENDER AND DIVERSITY

Until the 1990s, academic critique of the judiciary and political calls for a more representative and legitimate judiciary were almost exclusively concerned with race. It was only in the particular conditions of the constitutional negotiations and through extensive political activity and mobilisation that women were able to secure gender equality as a core principle of the new democracy.[185] As I have argued elsewhere, this meant that gender equality became a 'moral touchstone' of the new democracy[186] and women were able to rely on this to secure important political and legal gains after 1994.

One of the spin-offs of this was the constitutional requirement that the judiciary 'reflect broadly the racial and gender composition' of South Africa. Yet progress here has been slow and must be understood differently to race, which has dominated debates on diversity and, consequently, much of this chapter. This section briefly highlights some key issues in relation to gender and the judiciary in South Africa.[187]

In his retirement speech at the end of May 2005, Chief Justice Arthur Chaskalson reflected on the successes of diversity and transformation:

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[184] For an excellent discussion of this, see Cowen (note 88 above) generally and at 41–2.
[185] Albertyn (note 61 above).
[186] Catherine Albertyn 'Towards substantive representation: Women and politics in South Africa' in Alexandra Dobrowolsky & Vivien Hart *Women Making Constitutions: New Politics and Comparative Perspectives* (2003) 99.
[187] There is a small but growing literature on gender and the judiciary in South Africa. See Ruth B Cowan 'Women's representation on the courts in the Republic of South Africa' (2006) 6 *University of Maryland LJ of Race, Religion, Gender and Class* 291; Bonthuys (note 99 above); Susannah Cowen 'Breaking through glass ceilings' December 2005 *Advocate* 47; Olivier (note 12 above).

> Close to 50 per cent of the judiciary are now black, but only about 15 per cent are women. Looking back over 10/11 years there have been material changes, but we still have a long way to go to free the potential of black and women aspirant judges and to achieve the transformation that the Constitution demands. Transformation must remain high on the agenda.[188]

The figures speak for themselves: Women judges were only about 12 per cent of the judiciary in 2004,[189] increasing to 22 per cent in 2009[190] and 30 per cent by 2012.[191] Broken down by court, the July 2013 percentage translates into 62 women out of 204 High Court judges (just over 30 per cent); eight women out of 25 Supreme Court of Appeal judges (32 per cent); and two out of 11 Constitutional Court judges (18 per cent).[192] Only two women are in positions of leadership: one Judge President and one Deputy Judge President. The racial breakdown of women judges in 2013 reveals that 31 out of 72 women judges (just over 43 per cent) are African (almost 13 per cent of all judges); eight out of 72 women judges (11 per cent) are coloured (just over 3 per cent of all judges); 11 out of 72 women judges (15 per cent) are Indian (just under 5 per cent of all judges); and 22 out of 72 (just under 31 per cent) are white (9 per cent of all judges).[193] Of all women in South Africa, Africans make up 79.5 per cent, coloureds 9 per cent, Indians and Asians 2.5 per cent and whites 9 per cent.[194] On a slightly more positive note, the magistracy demonstrates more progress with 673 women out of 1 711 magistrates (39.3 per cent). Importantly, four of the nine Regional Court Presidents are women.[195]

The reasons for these figures are complex and systemic. They relate broadly to entrenched socio-economic inequalities tied to women's reproductive roles and the public/private divide, and the deeply gendered opportunities and burdens, assumptions and stereotypes that flow from this. It is useful to highlight just three overlapping issues that speak directly to women's lack of opportunities in the judiciary: inequalities within the professions that limit access to judicial office, attitudes and institutional barriers, and an absence of political and institutional will.

First, women experience significant barriers within the legal profession which place them in more junior positions and thus limit the number of senior women attorneys and advocates who might be eligible for office. These barriers range from a failure to account for the parenting role of women to sexist and stereotypical norms, assumptions and behaviour that limit women's access to particular areas of legal work, social networks, positions of leadership and

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[188] Arthur Chaskalson *Farewell Speech* (2 June 2005), last accessed from *www.constitutionalcourt.org.za* on 12 March 2013.
[189] That is, 25 out of 214. These figures were provided by the Minister of Justice and Constitutional Development, Brigitte Mabandla, in the Budget Speech in the National Assembly on 22 June 2004, and are cited in Democratic Alliance (note 119 above) 6.
[190] See Mokgoro (note 99 above) 46 and n 32.
[191] Note 11 above.
[192] Ibid.
[193] Ibid.
[194] *South African Statistics, 2011* (note 159 above).
[195] Note 11 above.

authority, and opportunities.[196] Addressing these inequalities requires a positive and programmatic response. Women will not automatically 'trickle up' unless there is a concerted attempt to recognise their parenting role, address attitudes and culture, unpack and adapt gendered norms that measure progress and success, and actively mentor promising young women, especially young black women.[197]

Secondly, these gendered attitudes and stereotypes extend to the JSC and the judiciary. The JSC has in the past shown itself to be insensitive to gender in some interviews with female candidates,[198] and still fails to demonstrate any real understanding of the barriers faced by women. The judiciary itself is often said to be a difficult and even hostile environment for women, who are rendered invisible by an overwhelmingly 'male' culture.[199] As a result women may be reluctant to put themselves forward for appointment.

Thirdly, in stark contrast to race, there has been a clear absence of political will to appoint women judges. This is evident in recent appointments to the Constitutional Court,[200] and perhaps also in the fact that only 9 per cent of acting appointments in 2010–2012 were women in a context where an acting position has become an almost essential qualification for appointment.[201] This underlines the importance of politics in judicial change in South Africa. The establishment of gender as a 'moral touchstone' in the new democracy has not been able to sustain itself—a fact that is apparent in a range of areas. It will take considerable political activity to put women back on the agenda, and in the judiciary.[202] Indeed, the need for and success of such political advocacy might be reflected in the JSC's recent recommendation of seven women judges for appointment to various divisions of the High Court and its encouragement to the legal profession to nominate more women for appointment.[203] This followed sustained advocacy by non-governmental organisations, and increased the number of women judges from 72 to 79: a change of almost 10 per cent.

Overall, the achievement of gender diversity is a far more intractable problem than race in South Africa, and requires ongoing and concerted positive action. Because gender raises questions about the public/private divide, it could also be a potential driver for a far more complex diversification and transformation of the judiciary than we might have experienced so far. Properly formulated, gendered change challenges accepted norms and assumptions in a profound way, asking questions about the nature of institutions, accepted gender roles, our understand-

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[196] See eg Cowen (note 187 above).
[197] Ibid.
[198] See eg Carmel Rickard 'Judging women harshly' *Sunday Times* 23 October 2005; Carmel Rickard 'Time to shape the space for women judges!' *Legalbrief Today* 11 September 2007, last accessed from *www.legalbrief.co.za* on 2 May 2013; and see further Chapter 6 at 180.
[199] Carmel Rickard 'Women judges tell of struggles for acceptance' *Sunday Times* 10 April 2005; Cowan (note 187 above); Olivier (note 12 above).
[200] See Underhill (note 177 above).
[201] Democratic Governance and Rights Unit (note 176 above).
[202] See Cowan (note 187 above) 19.
[203] South African Press Association '7 women on recommended judges list' *News24* 17 October 2013, last accessed from *www.news24.com* on 14 November 2013; Tabeth Masengu 'More women on bench sign of progress' *The Sunday Independent* 20 October 2013, last accessed from *www.iol.co.za* on 14 November 2013.

ing of authority and accepted norms of neutrality, impartiality, and so on.[204] It thus opens the way for a more nuanced understanding of representivity, diversity and transformation.

8.5 CONCLUDING REMARKS: REPRESENTIVITY, DIVERSITY AND TRANSFORMATION

This chapter started with Mandela's 1962 statement, which suggested the complexity of the relationship between race and justice. Twenty years into democracy, and with considerable experience and progress in transforming the South African judiciary into one that is broadly reflective of the race and gender composition of South Africa, that complexity remains, especially as regards the meaning and objectives of interpreting and implementing the constitutional mandate of diversity or representivity and transformation.

There is no question that representivity, the need for the judiciary to reflect major social groups, is a worthy goal. But, as suggested above, it is perhaps a necessary but not a sufficient condition for transformation. Indeed, there are few who would argue, in the end, that transformation of the judiciary is merely a numbers game. As then Minister of Justice, Dullah Omar, said at the legal hearing of the Truth and Reconciliation Commission:

> [T]ransformation does not only mean bringing black faces into our institutions, and bringing women into our institutions. Our structures have to be representative but, what is the kind of culture which must pervade in those institutions? What attitudinal change do we need to bring about so as to ensure that there is respect for human rights and that we build a democratic culture in our country and a democratic culture in our institutions? Many of our institutions still reflect the authoritarianism of the old order.[205]

This suggests a deeper meaning to transformation, one that speaks to institutional and cultural change. However, the limited progress in respect of gender and the ongoing debates around representivity and diversity, the place of race and gender in judicial appointments and the necessary qualities of a judge, suggest that South Africa is still grappling with the relationship between representivity, diversity and deep-rooted institutional change.

In general, the JSC has targeted representivity over diversity. At best, we have pursued a liberal, reformist model of judicial change that tends to identify the problems of under-representation and exclusion in terms of the major social and economic inequalities that have excluded groups in the past. Justice and legitimacy require individuals from these previously excluded groups be given an opportunity to participate through fair selection procedures and development opportunities where necessary. In the context of judicial selection, representivity is a legitimate aspirational goal. It is achieved by focusing on equal opportunities, on training and special measures to increase the pool of aspirant judges and

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[204] See eg Bonthuys (note 99 above).

[205] Truth and Reconciliation Commission *Transcript of Day One of the Legal Hearing* (27 October 1997), last accessed from *www.justice.gov.za* on 10 October 2013.

'fast-track' members of excluded groups. However, while this approach tends to broaden the scope of participation and representation, it can also leave the institution relatively unchanged.

A more transformative model acknowledges the importance of representivity, but understands that diversity is also important, not only in taking more differences into account but also in comprehending that these differences can influence the institution itself deeply. Having a larger number of black and women judges does not necessarily change the institution, although it will have an effect over time. However, a judiciary that is also diverse in culture, religion, politics and ethnicity, one that brings different understandings of constitutional values and judicial philosophies to the bench, will have a greater impact on structural and systemic inequalities within the institution, its modes of legal reasoning and decision-making, its legal culture and the way in which judges do their work in a constitutional setting.

Of course, these two approaches can be complementary rather than mutually exclusive. An equitable representation of excluded groups is part of a broader project of more fundamental institutional change. But greater attention to difference and diversity also enhances that institutional change, especially if it is combined with a careful consideration of a judge's judicial philosophy and his or her approach to the core commitments of the Constitution.