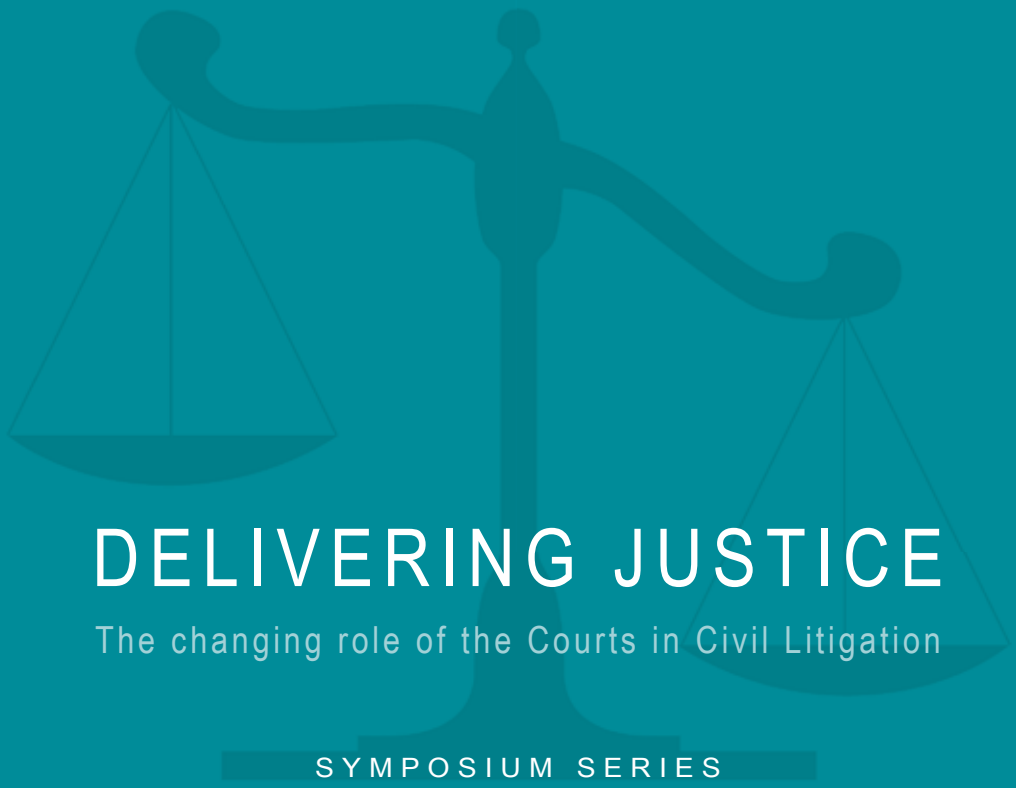
helen.suzman.foundation
promoting liberal constitutional democracy



DELIVERING JUSTICE

The changing role of the Courts in Civil Litigation

SYMPOSIUM SERIES
PART ONE

helen.suzman.foundation

promoting liberal constitutional democracy

Vision

Promoting liberal constitutional democracy in South Africa.

Mission

To create a platform for public debate and dialogue – through publications, roundtable discussions, conferences, and by developing a research profile through an internship programme – with the aim of enhancing public service delivery in all its constituent parts. The work of the Helen Suzman Foundation will be driven by the principles that informed Helen Suzman's public life.

These principles are:

- reasoned discourse;
- fairness and equity;
- the protection of human rights.

The Foundation is not aligned to any political party and will actively work with a range of people and organisations to have a constructive influence on the country's emerging democracy.

Hosted in association with our partner
The Open Society Foundation for South Africa

Contact Details

Tel +27 11 646 0150 **Fax** +27 11 646 0160 **Email** info@hsf.org.za Website www.hsf.org.za

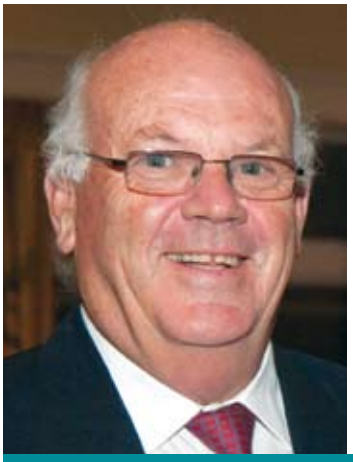
Postal address Postnet Suite 130, Private Bag X2600, Houghton, 2041, South Africa

Physical address Block A, Anerley Office Park, 7 Anerley Road, Parktown, 2193, Johannesburg

Contents

Director: Francis Antonie **Board of Trustees:** Hylton Appelbaum, Wendy Appelbaum, Doug Band, Colin Eglin, Nicole Jaff, Patricia de Lille, Temba Nolutshungu, Sipho Seepe, Mary Slack, Richard Steyn, David Unterhalter, Gary Ralfe, Jane Evans and Modise Phekonyane
Design & Layout: Alison Parkinson **Media Photography:** Caroline Suzman **Printers:** Colorpress (Pty) Ltd
Funders: The Helen Suzman Foundation is grateful to the Open Society Foundation for South Africa for their support.
This *Symposium* monograph is published by The Helen Suzman Foundation.

Profiles



Judge Murray Kellam

Judge Murray Kellam was a partner in a Melbourne law firm before joining the bar and taking silk, and spent many years on the Victoria County Court, the Supreme Court and the Court of Appeal of Australia. He served as First President at the Victoria Civil and Administrative Appeals Tribunal; he's the Chair of the Australia Institute of Judicial Administration and the Chair of the National Council, which advises the Australian government on dispute resolution.

Judge Kellam has for many years been at the cutting edge of dispute resolution policy and practice in Australia. He has worked extensively in these areas in Papua New Guinea, Bangladesh, Fiji, New Zealand and Samoa.

Prof Laurence Boulle

Laurence Boulle has degrees in Arts and Law. He completed his PhD in 1982, is an advocate of the High Court of South Africa and is an accredited mediator in Australia.

He has practiced law, been a law teacher for many years, and has worked as a mediator since 1990. He chaired the advisory council to the Australian government on dispute resolution policy and practice. He was awarded the Order of Australia in 2008.

Laurence has published extensively in several areas, including constitutional law, mediation and dispute resolution. Laurence has worked as an academic at several Universities. He is currently Director of the Mandela Institute and Issy Wolfson Professor of Law at the University of the Witwatersrand, Johannesburg.

Adv Nazeer Cassim

Nazeer Cassim practices as an advocate at the Johannesburg Bar. Prior to his admission to the Bar in 1986, he practiced as an attorney. He was appointed as Senior Counsel in 1999. He has presided on a number of occasions since 1997 as Acting Judge in the High Court and Labour Court of South Africa. He was Chairman of the Society of Advocates, Johannesburg in 2000.

He has also lectured in the Faculties of Law, University of Natal, Durban and at University of Witwatersrand. He has been published widely.

He was awarded the Hilgard Muller Prize for best final year student - LLB (Unisa), Fullbright Scholar in 1997-1998 - LLM at the Southern Methodist University, Dallas, USA and British Council Scholar in 1984 - LLM at the University of London (LSE).

Prof Cathi Albertyn

Cathi Albertyn is Professor of Law at the University of the Witwatersrand, where she teaches Public Law and Human Rights. She is also a part-time commissioner at the South African Law Reform Commission.

Judge Dennis Davis

Judge Dennis Davis is a Judge of the High Court, Judge President of the Competition Appeal Court, and Hon Prof. of Law at UCT where he teaches Constitutional Law, Tax and Competition Law. He has recently had his latest book (co-authored with Michelle Le Roux) *Precedent and Possibility: The Use and Abuse of Law in South Africa*, published.

Francis Antonie

Francis Antonie is the Director of the Helen Suzman Foundation. He is a graduate of Wits, Leicester and Exeter Universities. He was awarded the Helen Suzman Chevenning Fellowship by the UK Foreign Office in 1994. From 1996 to 2006 he was Senior Economist at Standard Bank; thereafter he was director of the Graduate School of Public and Development Management at Wits University. He was the founding Managing Director of Strauss & Co.

Executive Summary

JUDGE KELLAM presented a paper on civil court reform measures implemented in the Australian justice system and highlighted their positive impact on the delivery of justice in the Australian justice system. The general nature of some of these reforms, he felt, could provide precedence in a number of other jurisdictions around the world.

Judge Kellam said that the rule of law requires fair and just resolution of disputes through a fair but swift process (involving court and case management) at a reasonable expense. Delay and excessive expense negated the value of an otherwise just resolution, and systemic delay and expense rendered the system inaccessible. Public confidence in legal outcomes as well as legal processes is of utmost importance and it was for this reason he said that litigation processes must be reviewed continuously, and refined as necessary

Judge Kellam did acknowledge that in certain instances, court management added to the cost of litigation, but argued that for case management reform to be effective, there had to be a change in the culture of all parties involved - legal practitioners and the judiciary.

Other civil justice reforms in Australia related to the reduction of excessive reading of documentation in the discovery process and expert evidence (to counter misuse of expert witnesses). These reforms he said were a means of changing the very process of litigation in order to better deliver just outcomes to the parties involved in dispute.

He concluded with Australia's alternative dispute resolution or ADR that has become a statutory means for courts to resolve matters. Australian courts are able to order the mediation of a matter without the consent of the parties.

PROF. LAURENCE BOULLE described the 'meta-principle' for judicial reform to be keeping the 'patient (Justice) alive and well'. To achieve this, litigation needs to be modified and transformed through comprehensive management that involves parties and the legal profession. Much of the legitimising theory for the transformation of justice, Boulle asserted, had emerged through the alternative dispute movement. Key aspects for deep transformation would include a drive for more efficiency of performance throughout the system; a constitutional right to justice; the 'delegalisation' of disputes and introducing a sense of self-determination.

The demand side of the transformation process, Boulle said, tends to be much weaker than the supply side with professionals being reluctant to buy into the process and accepting non-legal solutions to disputes. The important focal point therefore is to be able to change attitudes and cultures and facilitate an evolution into new ways of thinking.

JUDGE DENNIS DAVIS was outright in his view that after 16 years of constitutional democracy, the legal culture in South Africa had remained unchanged. Taken as a given that changes to the legal culture were imperative to accommodate the country's diverse population in the 21st century, what these changes would be, remained to be understood, he said. He questioned whether the London Bar, the British Courts and Australian precedent should act as a barometer for standards in South Africa, the demands in South Africa being different.

Legal strategy adopted in litigation, he said, is counterproductive - the 'Stalingrad process' of litigation. Here he said the key motivator was to keep going as long as possible no matter what the cost, so cases would not be resolved. He cited competition law as a typical example of this, as well as the non-intervention of judges in case management at pre-trial. The paucity of discussion in this area, he said, was problematic for if as a country we aspired to be global players, gathering expertise in the courts around intellectual property and copyright law (as opposed to in Chambers), was crucial.

ADVOCATE NAZEER CASSIM was adamant that the Justice System and the civil process in particular had failed South Africa and there was no longer respect for law and order anymore in the country.

Cassim cautioned against comparing the South African system of justice to other countries because the bulk of the South African population does not have the same access to education as in other societies. Although the Woolf Report in the United Kingdom might have effected immense improvement, in South Africa the realities of South Africa are such that the majority of the population cannot afford the exorbitant legal fees to access the justice system.

He spoke critically of big business and how it uses the courts strategically, according to their own agendas. Such is the power of this sector, Cassim said, that the judges are fearful of tackling cases and being criticised by the Supreme Court of Appeal.

Infrastructure problems; human resource problems (6000 advocates serving 40 million people); exorbitant fees (a senior advocate will charge about R35,000 a day) were key ingredients for the failure of the system.

The future for justice, he said, would be to move away from the current system that is rooted in the past and find other methods and interventionist approaches. In sum this would mean changing the mindset of the entire body of players (judges, administrators, advocates, attorneys, citizens) involved in the process.

PROF. CATHI ALBERTYN questioned whether courts are the ideal place to resolve all disputes. The appropriate place to resolve disputes would need to consider physical location, geography, cost effectiveness and accessibility to the people. She also questioned whether South Africans are receiving just outcomes from the courts and what other jurisdictions could do to make justice quicker and fairer.

Supporting Cassim, Albertyn said that the majority of poor people (who have little ability to access courts) are more often than not unable to challenge unfair administrative procedures that impact so negatively on their lives. Having institutions in place equipped to deal with unrepresented parties (such as the CCMA), she asserted, is critical to meet the rights of all citizens. The incapacity of institutions in South Africa, she said, meant that this right is far from being realised. With legal aid board resources scarce and dispensing disproportionate amounts of resources to the criminal process, further undermines access. The pro bono system put in place provides a small light in the darkness, setting aside a number of hours per week for law firms to provide their services. At present however, these services were only 'skimming the surface' of real need in society.

Opening & Welcome

Mr Francis Antonie

On behalf of the Helen Suzman Foundation and our partner, the Open Society Foundation for South Africa, I'd like to welcome you to this symposium on Delivering Justice.

Helen Suzman was passionate about public service. And the guiding principle that informed Helen's life, an unwavering commitment to and respect for human rights, underpins the work of the Foundation. Its research focuses principally on state institutions and delivery, and on the relations between state and civil society. Justice is one of these research areas.

This is the first in a series of three symposia on practical aspects of the justice system in South Africa. The seminars pick up on some of the themes elaborated on in a recent issue of Focus, the Foundation's journal. That edition explores images of justice. Tonight we focus on the delivery of justice in the civil litigation system.

This is a somewhat technical topic but with immense practical significance. The second seminar will examine the criminal justice system in South Africa and the third will focus on the composition of the courts and the accountability of judges.

There are many challenges facing the South African justice system. Key among these are the prohibitive costs associated with accessing the legal system, the perceived remoteness of the justice system, and issues relating to conjoint evidence. The courts also face competing pressures: to uphold the rule of law, to afford individual litigants procedural fairness, and demands from governments and communities for quicker, cheaper and more effective justice delivery.

Balancing the competing imperatives requires choices by legislatures, by courts and by individual judges, since not all can be accommodated at the same time. In some jurisdictions this has led to extensive institutional changes, particularly where courts have taken control of managing the litigation process.

This evening's symposium will consider three broad areas. Firstly, what is the traditional role of the courts and judges in civil cases, what pressures are emerging to change that role, and what specific structural and procedural changes in civil litigation have taken place around the globe?

The second area explores the meta-themes relating to institutional changes, with particular reference to shifts from adversarial litigation to managerial judicial roles: the partial – if I may call it this – privatisation of justice services, what this means? – and consumer demands for responsiveness, efficiency and effectiveness.

The third area which I hope we will cover tonight considers the extent to which South African courts have adopted or could adopt some of the reforms to civil litigation. Here the role of judges in other jurisdictions is important. How would these changes accommodate constitutional imperatives in this country and deal with demands for access, efficiency and effectiveness in our civil courts?

We also need to factor in the social context

in which judging takes place. Here issues of customary law, gender and poverty are important. What may be necessary, I suspect, is a cultural change to litigation. Institutional procedural changes are of limited impact without these cultural changes. And the response of the legal profession has been critical in the success or failure of reforms in other jurisdictions.

These balances and tensions will be referred to by the principal speaker tonight, who has survived the rigours of litigation reform elsewhere. Judge Murray Kellam was a partner in a Melbourne law firm before joining the bar and taking silk, and spent many years on the Victoria County Court, the Supreme Court and the Court of Appeal of Australia. He served as First President at the Victoria Civil and Administrative Appeals Tribunal; he is the Chair of the Australia Institute of Judicial Administration and the Chair of the National Council, which advises the Australian government on dispute resolution.

Judge Kellam has for many years been at the cutting edge of dispute resolution policy and practice in Australia. He has worked extensively in these areas in Papua New Guinea, Bangladesh, Fiji, New Zealand and Samoa.

Our first panellist will be Professor Laurence Boulle, the new Director of the Mandela Institute, who will relate the institutional changes referred to by Judge Kellam to some global themes in modern litigation and dispute resolution. Clearly developments in civil litigation in Hong Kong, Canada, New Zealand, Papua New Guinea and elsewhere

are relevant to South Africa only in so far as they are compatible with local constitutional imperatives, legal traditions and social culture.

These perspectives will be given respectively by the bar, the legal academy and the bench. And it is my pleasure to introduce Advocate Nazeer Cassim, Senior Counsel from the Johannesburg Bar, Professor Cathi Albertyn from the Wits Law School and Judge Dennis Davis of the Cape High Court.

These presentations will be followed by questions and I welcome participation from the audience. And while you are welcome to raise questions on any of the issues relating to tonight's themes, questions requesting free legal advice will be ruled out of order.

Judge Kellam, thank you.

Judge Murray Kellam AO

Delivering Justice – International Trends in Civil Justice

The Rule of Law requires fair and just resolution of disputes.[1] However it also requires that the process, particularly in relation to civil disputes be cost effective. The primary goal of a civil justice system is the just resolution of disputes through a fair, but timely, process at a reasonable expense. Delay and excessive expense will negate the value of an otherwise just resolution. Systemic delay and expense will render the system inaccessible. The public must have confidence in not only the outcomes but the processes of that litigation. Whilst the principles of the rule of law are immutable, the methods by which the rule of law may be enhanced must be reviewed continuously and refined as necessary.

When I commenced practice nearly 40 years ago, civil justice operated much as it had for the better part of nearly a century before that time. Writs were issued, defences were filed, requests for further and better particulars of pleadings were exchanged, interrogatories were delivered, general discovery took place, and in due course the matter would be listed for trial. At trial one would hear what the opposing witnesses would say for the first time. There was no requirement for the parties to exchange anything other than pleadings, and in some circumstances affidavits in support of certain claims. There was no exchange of witness statements and in particular expert witness statements. In many ways trial was by 'ambush'. Although the timetable of pleading was dictated by the court rules, in reality the legal profession controlled the process of the litigation. More often than not the case settled at the court door. However if the matter did go to trial, counsel would be required to commence the case with the assumption that the trial judge had done no preparation and had little if any knowledge of the nature of the proceeding. I can well recall standing and reading the pleadings to the trial judge at the commencement of a trial. The tradition in Australia, as in the UK was an "oral" one and very little documentation, apart from the pleadings, and perhaps affidavits in support, was provided to the judge.

Not surprisingly this process created substantial delay for the parties, as well as incurring great cost for the litigants and also for the public purse. Calls by the courts to appoint more judges in the face of increasing backlogs met with more and more resistance from the executive and from governments. Concerns expressed about the cost of civil justice to litigants, government and the community became strident. Delay and cost were perceived to be barriers to access to the courts. There were calls for the courts to become more efficient and responsive to community needs.

The days when the courts were seen as passive tools controlled wholly by the litigants are days that are past.

It was in this context that the first major change took place. That change, which can be summarized as being 'case management' took the general conduct of proceedings away from the profession. The judges took control of the management of the timetable, and much of the process of litigation.

The first "managed lists" tended to be in limited areas or in 'boutique' areas of law such as building and construction or certain types of commercial proceedings. Although initially perceived as an unacceptable intrusion into the adversarial system, judicial case management of proceedings is now universally adopted in the superior and intermediate courts in Australia and New

Zealand. The days when the courts were seen as passive tools controlled wholly by the litigants are days that are past. As early as 1992 Gleeson CJ said in State Pollution Control Commission v Australian Iron & Steel Pty Ltd[2]:

> *"The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase of the resources made available to them. The inevitable consequence has been delay. This, in turn, has brought an increasing responsibility on the part of judges to have regard, in controlling their lists and cases that come before them, to the interests of the community, and of litigants in cases awaiting hearing, and not merely to the concerns of the parties in the instant case. The days have gone when courts will automatically grant an adjournment of a case simply because both parties consent to that course, or when a decision to grant or refuse an adjournment sought by one party is made solely by reference to the question whether the other party can adequately be compensated in costs. There are a number of Practice Notes issued in relation to the business of the Supreme Court making that perfectly clear. The flow of cases through the courts of this State is now managed by the judiciary, and not left to be determined by the parties and their lawyers."*

Judicial Case Management

The management of the interlocutory stage of litigation by judges was well established in some courts in Australia by the late 1980s and use of the technique was accelerated during the early 1990s. It is fair to say that such Australian schemes were derived largely from similar processes which had been adopted in US Federal Courts over the preceding decade.[3] A variety of case management schemes existed in the various Australian jurisdictions by the time Lord Woolf visited Australia in 1994 in the course of the preparation of his report.[4] No doubt many of you are familiar with the Woolf Report which resulted in extensive reform of the English civil justice process.

The objectives of case management include early resolution of disputes, reduction of trial time, more effective use of judicial resources, the establishment of trial standards, the

monitoring of case loads and the development of information technology support. Other objectives include increasing accessibility to the courts, facilitating planning for the future, enhanced public accountability and the reduction of criticism of the justice system by reason of perceived inefficiency.

There are different models of judicial case management in Australia, but the Federal Court of Australia has led the way and it is useful to consider the manner in which it manages litigation before it.

The Federal Court of Australia Docket System

When an initiating document is filed, matters are given a return date for directions before a single judge. Cases in some areas of law requiring particular expertise (including intellectual property, taxation and admiralty law) are allocated to a judge who is a member of a specialist panel. That judge has a 'docket" of cases which he or she is responsible to manage. At directions' hearings the judge gives whatever directions are necessary to assist the parties in identifying the relevant issues. The judge also makes the necessary orders for the progress of a case to trial. Such orders include those for particulars and discovery. There is no longer any entitlement to general discovery or to interrogatories. Leave is required for both. A case is adjourned to a fixed date by which parties are expected to have completed any interlocutory steps which have been ordered. The docket judge monitors compliance with directions, deals with interlocutory issues and ensures that hearing dates are maintained. Usually that judge will hear the case if it is not resolved before trial.

I shall not dwell further on case management processes as numerous examples of its manifestation can be found in Australia, New Zealand, Hong Kong, the US and the UK.[5] One example is the Victorian Supreme Court Practice note for Case Management Conferences.[6] However, the genesis of other reforms can be seen in the assumption of control of the litigation by the judiciary in the management of cases. It was this assumption of control which led judges to introduce ADR, and in particular mediation[7], as a court connected process.

In particular the 'docket system' whereby a judge has control of the proceedings from start to finish has been the subject of criticism. An empirical study of the individual docket system in the US Federal Court suggests that the system reduces delay but does not reduce costs.

There have been concerns raised by commentators about active case management by judges. In particular the 'docket system' whereby a judge has control of the proceedings from start to finish has been the subject of criticism. An empirical study of the individual docket system in the US Federal Court suggests that the system reduces delay but does not reduce costs and in fact appears to have increased the cost of litigation in that Court.[8] However, whatever concerns may have been expressed, in recent times the High Court of Australia has affirmed in strong terms the obligation of judges to control the litigation before them. In *AON Risk Services Australia Ltd v Australian National University*[9] the Court said:

> *In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.*

In my view it is likely that the power of judges to be interventionist in case management will continue to increase. Adversarial trial will become more inquisitorial. Already there has been discussion in Australia as to whether or not judges should have power to call witnesses to give evidence without the consent of the parties.[10] There have been calls for judges to have greater powers to impose limits on the conduct of pre-

trial procedures.[11] Likewise judges will be granted power to limit time taken to examine and cross-examine witnesses and make submissions. This has happened already in NSW.[12] The Final Report of the Hong Kong Chief Justice's Working Party on Civil Justice Reform endorsed clearly defined directions for the conduct of trials and the power to limit times stating:[13]

> *Knowing what periods of time have been allocated for each task, counsel would be able to plan their submissions and examination and cross-examination accordingly. This would promote fairness in the distribution of trial time between the parties.'*

I note that concerns about proportionality of costs have been expressed in South Africa. In *Brownlee v Brownlee*[14] Brassey AJ described a family law case as a 'tragedy' which 'would have been evident to anyone sitting in court throughout the days, sometimes seemingly endless, when... the evidence was presented, challenged and minutely examined in argument'.

A change in culture both on the part of parties, legal practitioners and the judiciary is needed if case management is to achieve the desired result. In particular the focus must be on identifying the issues at an early stage.

As stated above there have been concerns expressed in a variety of jurisdictions that case management techniques can add to the cost of proceedings. In particular, the 'over management' of cases is a risk. If care is not taken, the process of case management can be used to delay cases and add cost just as did the 'interlocutory warfare' which case management seeks to avoid. A change in culture both on the part of parties, legal practitioners and the judiciary is needed if case management is to achieve the desired result. In particular the focus must be on identifying the issues at an early stage. If the real issues in a case are not identified early, interlocutory steps are dictated by process rather than the ends to which they should be directed.

The individual docket approach is not appropriate for all proceedings. For example the Hong Kong Final Report on Civil Justice Reform[15] recommends that an individual docket system be used for special cases, including commercial, personal injury, construction, and constitutional and administrative. Case management must be utilized with care. No doubt many cases will be more efficiently managed by experienced litigators without the intervention of a court. However experience in Australia demonstrates that many cases benefit from the control of an experienced judge in confining cost by reducing the issues. Furthermore judicial control of a proceeding can ensure that the weaker party is protected from manipulation of the litigation process by the stronger and better resourced party.

The Australian experience is that 'pilot projects' that can be properly evaluated are satisfactory methods of effecting change in this area of civil justice reform.

Specific other Civil Justice Reforms

Discovery

In his Interim Report Lord Woolf observed that the existing discovery process was a significant barrier to access to justice in England and Wales. Some of the problems brought to Lord Woolf's attention included:

- the excessive cost of the process,
- the enormous resources required to be deployed to carry out discovery,
- the increasing tendency to record matters in writing and the greater complexity of modern business,
- the use of discovery as a weapon to pressure the other side,
- the failure to weed out documents that were not essential, and this added to costs at every stage of the proceeding,
- the slavish copying of documents instead of carrying out an inspection to isolate only relevant documents.

The central platform of Lord Woolf's discovery reforms was to limit the availability of full discovery to a small minority of cases in

which it could be shown that such discovery was justified. Lord Woolf recommended two types of discovery: 'standard' and 'extra'. Lord Woolf recommended that standard discovery should be the first step, with the extent and timing of any extra discovery to be determined by the court.

Although such a two stage approach has not been adopted generally in Australia, New Zealand, Hong Kong or Canada a similar philosophy can be seen to exist in terms of the necessity to limit the cost and abuse of 'general discovery'. Indeed, just before I left Australia to come here the newly appointed Chief Justice of the Federal Court was reported as saying "At the initial directions hearing, why don't judges make an order that before discovery, the plaintiff and defendant file the 10 documents they each consider most important to their case? I think that is a way to get the senior lawyers with the analytical abilities and responsibilities for presenting the case to take responsibility at a much earlier stage."[16]

The management of discovery has been a major issue in all Australian courts. The principal criticisms of discovery are that the objectives of the process are either not being achieved or are achieved only at great cost. The use of discovery as a tactical tool to leverage settlement or deter an opposing party is also frequently cited as a serious problem. Accordingly reforms have been instituted throughout Australia. The Federal Court has stated that generally, in order to prevent orders for discovery that require production of more documents than are necessary for the fair conduct of the case, it will limit discovery orders to those documents which are required to be disclosed.

The parameters of discovery are further narrowed in the Federal Court's Fast Track List ('rocket docket'). In this list, except where otherwise ordered, parties are required to discover only those documents on which they intend to rely and documents that have a significant probative value adverse to their case. In addition, the scope of the parties' search obligations is further narrowed to a good faith proportionate search. A party must make a 'good faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive having regard to the nature and complexity of the issues raised by the case, including the type of relief sought and the quantum of the claim'. If requested, a description of the search that has been undertaken must be provided.

Recently, expert evidence has been the subject of extensive enquiry and reports in a number of jurisdictions. These reviews have led to the introduction of a new framework for the judicial control of expert evidence in an attempt to improve the usefulness of and address the high costs of such evidence.

Expert Evidence

Recently, expert evidence has been the subject of extensive enquiry and reports in a number of jurisdictions.[17] These reviews have led to the introduction of a new framework for the judicial control of expert evidence in an attempt to improve the usefulness of and address the high costs of such evidence.

The Woolf Reforms

Lord Woolf had significant concerns about the use of expert evidence in litigation, arguing that it was susceptible to misuse. However, his interim proposals on the topic, which focused on mitigating 'the full-scale adversarial use of expert evidence", met with substantial resistance during the consultation stage. Members of the legal profession, he opined, were 'reluctant to give up their adversarial weapons'.

Nevertheless Lord Woolf believed reform was necessary if 'more focused use of expert evidence' was to be achieved, and premised his recommendations on the notion that 'the expert's function is to assist the court'. He considered that there was no uniform solution appropriate to all cases, and that the preferable approach would be a 'flexible' one built around enhanced court

control and broad management discretion. In particular, he proposed making leave of the court a condition precedent to the adducing of expert evidence, such that the court can, for example:

- prevent the use of expert evidence, in general or on particular subjects,
- limit the number of experts whose evidence the parties can adduce,
- direct the use of a single expert on a particular matter,
- require an expert's evidence to be given in writing,
- direct the parties' experts to meet and produce a joint report noting matters of agreement and divergence and
- limit the scope of expert evidence in fast-track cases (e.g. one expert per side per field of expertise, global limit of two experts per side, preference for single joint experts, no oral evidence).

In this regard Lord Woolf observed that there was significant opposition within the legal profession to the use of single experts, but he believed nevertheless that judges should consider whether it was appropriate in a particular matter. He stated that:[18]

> *A single expert is much more likely to be impartial than a party's expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up.*

The use of single joint experts in the UK following Lord Woolf's Final Report has not been without controversy. Indeed the NSW Law Reform Commission considered this to have been 'arguably the most significant and controversial recommendation' of the Report.[19] Importantly, the Woolf civil justice reforms in the UK were evaluated in two reports issued by the Department for Constitutional Affairs of the UK. The first report, entitled "Emerging Findings: An early evaluation of the Civil Justice Reforms," was issued in March 2001[20], and the second, "Further Findings: A continuing evaluation of the Civil Justice Reforms," was issued in August 2002.[21] The first UK evaluation report, "Emerging Findings," relying primarily on anecdotal evidence, suggests that most stakeholders believe that the reforms in this area have helped to promote early settlement and a less adversarial approach to litigation. The subsequent "Further Findings" report reported a high level of satisfaction with the quality of appointed experts (91%), but a majority of respondents (56%) also expressed some concerns about the use of single joint experts, with the possibility of increased costs being a frequently mentioned comment. Furthermore, the same survey indicated that while most lawyers (82%) felt single joint experts were appropriate in fast-track cases, far fewer lawyers (54%) thought they were appropriate in the more complex multi-track cases. Again, the possibility of increased costs was mentioned as a reason behind their concerns.

Expert Witness strategies in Australia

There has been a dramatic change in the reception of expert evidence by Australian courts. The first significant change was a requirement for exchange of expert witness statements well before trial. However, the later reforms have gone well beyond the mere earlier exchange of reports.

New strategies which have been introduced in Australia for controlling expert evidence include:

- limiting the number of expert witnesses to be called,
- appointing single joint experts (that is, one expert appointed jointly by the parties, sometimes referred to as the 'parties' single joint expert') or court-appointed experts,
- permitting experts to give evidence concurrently in a panel format (often referred to as 'concurrent evidence' or 'hot-tubbing'), or in a particular order
- introducing a code of conduct to be observed by experts, with the principal focus being that experts have an obligation to the court rather than to the client by whom they are retained,
- formalising processes for instructing experts and presenting experts' reports,

- requiring disclosure of fee arrangements,
- imposing sanctions on experts for misconduct and
- developing training programmes for expert witnesses.

By way of example, and in response to concerns that expert witnesses were being misused, a number of significant changes have been made to the procedures in the Common Law Division of the Supreme Court of New South Wales. The changes include single experts appointed by agreement between the parties, the option of court-appointed experts, power of the court to control the number of experts and the manner of their giving evidence. The amended rules allow the judge to order the sequence for the giving of evidence so as to require the defendant to call lay or expert evidence in what would otherwise be the plaintiff's case.

Single Joint Expert Witnesses

The NSW Supreme Court rules provide that at any stage of the proceedings the Court may order that an expert be engaged jointly by the parties. Where such an expert has been called in relation to an issue, the rules prohibit the parties from calling further expert evidence on that issue, except with the leave of the court.

Concurrent Evidence

Perhaps the most significant change in relation to expert evidence is the use of the concurrent method of hearing the experts' evidence. How does it work? Reports are obtained in the conventional manner by the parties. Exchange of the reports takes place and as is commonplace now the experts are required to meet to discuss the reports. This may be done in person or by telephone after which the experts are required to produce a short dotpoint document which sets out the matters upon which they agree, but more importantly those on which they disagree.

Essentially concurrent evidence is a discussion chaired by the judge in which the various experts, the parties or their advocates and the judge engage in an endeavour to identify the issues and to arrive at a common resolution of them. If agreement between the experts does not result what follows is a structured discussion with the judge as the chairperson. This allows the experts to give their opinions without constraint by the advocates in a forum which enables the experts to respond directly to each other. The resolution of the litigation is enhanced if the experts can give their evidence in an atmosphere of structured and constructive discussion where their views are respected rather than in an aggressive encounter where the object is to destroy the witness.

The resolution of the litigation is enhanced if the experts can give their evidence in an atmosphere of structured and constructive discussion where their views are respected rather than in an aggressive encounter where the object is to destroy the witness.

A concurrent witness case study

McLellan J, the Chief Judge of Common Law in the Supreme Court of NSW, has been a pioneer in the use of concurrent evidence. In *Halverson v Dobler,*[22] a case where a young man had had a cardiac arrest and sustained devastating and permanent brain damage. He sued his general practitioner. The issues required evidence from other general practitioners about the duty of a general practitioner when faced with the plaintiff's circumstances. There was also a major cardiological issue. Five general practitioners gave evidence concurrently. They sat at the bar table and over a period of one and a half days discussed in a structured and cooperative manner the issues which fell within their expertise. McLellan J estimated their evidence would have taken at least 5 days if taken in a conventional manner. In addition four cardiologists – one by video link from the US- also gave evidence concurrently. Their evidence took one day. They were able to distill the cardiac issue to one question. Although they had different views on that question, their respective positions were stated clearly. McLellan J said "I have been a lawyer for in excess of

35 years. That day in court was the most significant I have experienced. It was a privilege to be present and chair the discussion between four doctors - all with the highest level of expertise, discussing the issues in an endeavour to assist me to resolve the ultimate question."[23]

Court Connected ADR

Mediation

Of all the reforms that have taken place in civil justice, court connected ADR processes are the most significant. Of these, mediation is used most often, but other processes such as early neutral evaluation are being used increasingly. Most Australian courts have long had power (with the consent of the parties) to refer all or part of a proceeding out to an independent arbitrator, and power to refer a particular issue arising in a proceeding for determination by a 'special referee'. However, it is only in relatively recent times that courts have had statutory power to order the mediation of a proceeding without the consent of the parties.

The methods by which such mediations take place vary according to the jurisdiction but it is now true to say that it is only in exceptional circumstances that a proceeding in a superior or intermediate court is not the subject of an order for mediation.

Indeed in May of 1999 the Chief Justices of Australian and New Zealand superior courts published a declaration on Court Annexed Mediation which included the following:

- Mediation is an integral part of the Court's adjudicative processes and the "shadow of the court" promotes resolution.
- Mediation enables the parties to discuss their differences in a co-operative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from that process as soon as possible.
- Consensual mediation is highly desirable but, in appropriate cases, parties can be referred where they do not consent, at the discretion of the Court.
- The parties should be free to choose, and should pay their own mediator, provided that when an order is sought for such mediation the mediator is approved by the Court.
- Mediation ought to be available at any time in the litigation process but no referral should be made before litigation commences.
- In each case referral to mediation should depend on the nature of the case and be at the discretion of the Court.
- Mediators provided by the Court must be suitably qualified and experienced. They should possess a high level of skill which is regularly assessed and updated.
- Mediators must have appropriate statutory protection and immunity from prosecution.
- Appropriate legislative measures should be taken to protect the confidentiality of mediations. Every obligation of confidentiality should extend to mediators themselves.
- Mediators should normally be court officers, such as Registrars or Counsellors rather than Judges, but there may be some circumstances where it is appropriate for a Judge to mediate.
- The success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation.

The adoption of these principles by the Chief Justices of the Australian courts provided significant impetus and imprimatur to the use of mediation by the courts.

It should be noted that in Australia the legal profession was involved in the commencement of court annexed mediation processes from an early stage. The first court annexed mediation program in Australia commenced when members of the Victorian Bar convinced a Building List judge to refer such cases out for mediation as early as 1984. The involvement of the legal profession in mediation has grown from that time such that there are now legal practitioners whose sole practice is as a mediator. It is also notable that the early referral of cases to mediation took place in the absence of any empowering legislation or court rules.

In the Supreme Courts of Australia the overwhelming majority of court-referred mediations are conducted by outside mediators at the referral of a judge. The Supreme Court of Victoria does conduct a small number of 'in-house' mediations. In these mediations the mediator is an associate judge (formerly a 'master'). On the other hand almost all mediations ordered by Federal Court judges are conducted 'in-house' by trained court registrars.

I note that South African courts have recognised the role that mediation can play in the civil justice system and have expressed dissatisfaction with parties and their lawyers who fail to consider the benefits of ADR.[24]

Referral of proceedings by a court to mediation is a process widely accepted in the Asia Pacific region. It is a process which has been adopted in Papua New Guinea, Palau, India, Samoa, Vanuatu and Bangladesh. It is of considerable significance that the use of mediation as a method of dispute resolution bears considerable similarity to traditional and cultural methods in such countries. Indeed it is arguable that mediation is more readily accepted by the community in such cultures by reason of that similarity.

Mandatory Referral to Mediation

Most Australian jurisdictions have statutory power to refer proceedings to mediation with or without the consent of the parties. Some US jurisdictions have introduced mandatory ADR processes.[25] Mandatory mediation has been provided for by the Ontario Courts since 1999. Canadian research suggests that mandatory referral to mediation led to significant reduction in delays, costs and the settlement of a high proportion of cases early in the litigation.[26] On the other hand mandatory ADR requirements have not been adopted in the UK. The view there is that ADR should be encouraged but not compelled.[27] In particular concerns have been expressed that mandatory referral to ADR processes is constrained by human rights issues. Likewise the recent Hong Kong civil justice reforms stopped short of empowering judges to impose mandatory ADR processes on the parties.

It should be observed that no Australian court has power to require parties to submit to arbitration without consent.

The statutory power of referral to mediation without consent was bitterly opposed by some members of the legal profession when first introduced. It was argued that forcing parties to engage in mediation would erode respect for the rule of law. However, my experience (and that of other judges[28]) is that there has proved to no foundation to the concerns. Practitioners now routinely advise their clients that the judge will in all likelihood require the matter to be mediated and it is now rare for there to be any resistance to such an order.

Judicial Mediation

There has been a significant debate in Australia as to whether or not it is appropriate for judges to engage in mediation processes as mediators. Mediation by judges does take place in Europe, Canada, Papua New Guinea and the USA. Some judges in Australia have acted as mediators, but the majority view in New Zealand and Australia is that it is not appropriate for judges to act as the mediator, if the mediation is to involve the possibility of the judge meeting the parties or their lawyers in private session.

Early Neutral Evaluation (ENE)

This ADR process has only recently had formal recognition by Australian Courts. The Supreme Court of Victoria is at present engaging in a pilot program of ENE. Likewise, in the UK a recent proposal for judicial neutral evaluation is to be the subject of a pilot program in Cardiff. In his recent report Sir Rupert Jackson stated if the results of the pilot 'are favourable, then judicial neutral evaluation may pass into more general use and become an effective means of promoting early, merits-based settlements.[29]

Pre–action Protocols

A number of Australian jurisdictions require pre-action disclosure in specified areas of litigation. The *Personal Injuries Proceedings Act 2002* (Qld) provides that in Queensland the parties to a proposed personal injury action must give notification of a claim,

compulsorily provide certain documents, and engage in a compulsory conference before proceedings may be commenced. The Supreme Court of South Australia requires that in monetary claims (with some exceptions) the proposed plaintiff is required to give written notice to a proposed defendant containing details of the claim, copies of any expert reports and an offer to settle. Likewise the Family Court of Australia has extensive pre-action procedures.

Woolf Report

Pre-action protocols were introduced in England and Wales as part of the civil procedure reforms under the *Civil Procedure Rules 1999* (CPR). The intention of the protocols is to encourage the early disclosure of relevant documents and information and to enable parties to better assess the strengths and weaknesses of their cases at an early stage thus fostering early settlement. Pre-action protocols have been developed under the Practice Direction in England and Wales. Each protocol relates to a particular area of dispute, such as personal injury, defamation, professional negligence, judicial review and building and construction.[30]

The UK Practice Direction on pre-action conduct refers to the use of pre-action ADR as follows:

> *Starting proceedings should usually be a step of last resort and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require some evidence that the parties considered some from of ADR…* [31]

The UK pre-action protocols have been the subject of evaluation by the two reports referred to above. Both reports concluded that the pre-action protocols "are working well to promote settlement and a culture of openness and co-operation." The "Further Findings Report" cited a study on the effectiveness of pre-action protocols, done by the Institute of Advanced Legal Studies and the University of Westminster. The study consisted primarily of qualitative interviews with lawyers, insurers and claim managers. For personal injury cases, the study included a quantitative analysis. The study found that 85% of cases were settling without recourse to the courts and that most practitioners considered the protocols to be a success in helping "focus minds on key issues at an early stage and encourage greater openness to smooth the way to settlement." Unfortunately, however, the quantitative data for personal injury cases indicated that the overall time from instruction to settlement remained unchanged and that both injury awards and costs had risen following the introduction of the protocols.

Indeed, the UK pre-action protocol model was rejected in Hong Kong, because of the concern that they would lead to a front-end loading of costs. The Hong Kong Final Report on Civil Justice Reform[32] however, did indicate that pre-action protocols might be useful for certain specialized cases.

Costs

The reforms in both the UK and Australia have required a different view to be taken about costs other than that 'costs follow the event".

In *Newcastle City Council v Paul Wieland*[33], the New South Wales Court of Appeal considered whether the phrase "costs of the proceedings" includes the costs associated with mediation. It was held that generally the expression "costs of the proceedings" will include the costs of a court ordered mediation.

AEI Rediffusion Music Ltd v Phonographic Permance Ltd[34] is an early case on the cost provisions of the CPR. Lord Woolf MR emphasised that while the 'follow the event principle' still had a significant role, it was a starting point from which a court could readily depart, and that under the new rules courts should be more ready to make orders reflecting the outcome on different issues.

Recently the National Alternative Dispute Resolution Advisory Council (NADRAC) published a report making recommendations to the Australian Attorney General as to reforms in Federal civil justice.[35]

That report recommended that legislation be enacted to empower courts to make an adverse costs order against a party, whether or not that party was successful in the proceedings if that party did not take reasonable steps to resolve the matter before commencing proceedings.[36]

Current proposals for further reform in Australia

The NADRAC recommendations provide that the legislation governing Federal Courts and Tribunals 'require genuine steps to be taken by parties to resolve the dispute' before proceedings are commenced. The recommendations set out a number of steps that prospective applicants and respondents should be required to take in compliance with such 'genuine steps'. Those steps include early provision of relevant documents, and a requirement to consider the use of ADR processes before commencing litigation. The recommendations suggest the imposition of ethical obligations upon legal practitioners to provide information to their clients about available ADR processes, together with an estimate of the total costs of the proceeding in the event that it goes to trial.

It is highly likely that pre-action protocols will become a regular part of the Australian litigation scene at least in some particular classes of cases. The NADRAC report recommends that the Federal Court of Australia be given legislative power to make rules about steps that prospective parties must take before commencing particular kinds of proceedings, including mandatory attendance at any appropriate ADR process. I expect that it is likely that courts will be required to provide more 'in-house' ADR processes such as mediation but also such processes as ENE. The eradication of 'trial by expert' will continue and at the minimum, joint expert reports will become the norm. There will be increasing ethical obligations placed upon practitioners to provide information and advice about ADR before and after commencing proceedings. Such obligations will include the clear identification of the costs of the proceeding in the event that it goes to trial.

The changes which have occurred in the management of civil justice throughout the world over the last decade or so have been profound. Hopefully those changes will fulfill the hopes for a just, accessible and socially responsible system of dispute resolution.

---

1 The process used to achieve a resolution must not only be fair (a level playing field), it must be designed to produce a just result. Just results come in two forms—rights based and interest-based.
A rights-based just result is one that, to the greatest extent reasonably possible, upholds the legal rights and legal obligations of the parties to the dispute. It usually follows from a rights-based process, where an adjudicator duly considers the material evidence, determines the facts as accurately as possible, properly interprets the law that pertains to the case and applies the law to those facts to determine the resolution.
An interest-based just result is the resolution of a dispute that, to the greatest extent reasonably possible, meets the interests of all parties to the dispute. It usually follows from an interest-based process, where a skilled mediator or other type of facilitator elicits the interests (the goals, objectives, purposes, needs, etc.) of the parties in a way that enables the parties to agree upon a practical resolution that serves their needs.
2 (1992) 29 NSLR 487 at6 493-494
3 Davies J Managing the Work of the Courts —Paper presented to AIJA Asia-Pacific Courts Conference Sydney 22-24 August 1997 and Civil Justice Reform Act 1990 (US)
4 Lord Woolf Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (1995)
5 Federal Court, Individual Docket System - www.fedcourt.gov.au/how/ids.html
Civil Procedure Rules 1998 (UK) – Civil Justice Reform Act 1990 (US)
Civil Justice Reform 2008 (Hong Kong) – see also – www.civiljustice.gov.hk
6 www.supremecourt.vic.gov.au
7 Throughout this paper the term 'mediation. is used to describe a 'facilitative, interests-based process in which mediators foster communication and discussion of the issues with the parties, conduct private sessions with the participants and encourage them to reach an agreed conclusion.'
8 Geoffrey L Davies 'Civil Justice Reform: Why we need to Question some Basic Assumptions'(2006) Civil Justice Quarterly 32
9 (2009) HCA 27 (113)
10 Victorian Law Reform Commission Civil Justice Review Report 14 2008 p303-307
11 Sackville J Mega-litigation: Towards a New Approach Paper presented to NSW Supreme Court Conference 17-19 August 2007
12 Civil Procedure Act (NSW)2005
13 Civil Justice Reform- Final Report (2004) Hong Kong
14 South Gauteng High Court (Unreported) Brassey AJ 25 August 2009
15 http://www.civiljustice.gov.hk
16 Keane CJ – Australian Financial Review 19 February 2010
17 Victorian Law Reform Commission Civil Justice Review Report 14 2008
New South Wales Law Reform Commission Expert Witnesses Report No 109 (2005)
NSW Attorney General's Working Party on Civil Procedure, Reference on Expert Witnesses Report(2006)
18 Interim Report [13.21]
19 'Expert Witnesses' NSWLRC Report 100 at [4.16]
20 Retrieved from: http://www.dca.gov.uk/civil/emerge/emerge.htm
21 Retrieved from: http://www.dca.gov.uk/civil/reform/ffreform.htm
22 (2006) NSWSC 1307
23 McLellan CJCL Litigation-Some Contemporary Issues Paper presented to the NSW State Legal Conference 26 March 2009
24 Brownlee v Brownlee (unreported 25/8/09) and Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)
25 See for example the Alternative Dispute Resolution Act 1998
26 Haan and Baar, Evaluation of the Ontario Mandatory Mediation program (Rule 24.1): Final Report – The first 23 Months (2001)
27 Review of Civil Litigation Costs: Final Report – 14 January 2010 Sir Rupert Jackson – http://www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm
28 The Hon Justice Bergin (Supreme Court of NSW) "Mediation in Hong Kong: The Way Forward – Perspectives from Australia" – A paper presented to the Hong Kong International arbitration Centre 30 November 2007.
29 Ibid. Para 1.4
30 See UK Ministry of Justice website - www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm
31 Practice Direction (UK) Pre-action Conduct, 8. Alternative Dispute Resolution (Commenced 6 April 2009)
32 http://www.civiljustice.gov.hk
33 [2009] NSWCA 113
34 [1999] 1 WLR 1507
35 The Resolve to Resolve –Embracing ADR to Improve Justice in the Federal Jurisdiction – September 2009
36 Recommendation 2.6

Prof Laurence Boulle

Director: Mandela Institute, Wits

I am speaking to you predominantly as an academic and not as someone who has the same depth of practical experience as Judge Kellam. My own practice in the courts is part of ancient history.

For 20 years I have practised as a mediator in different contexts and some of those have been referrals by courts in a kind of outsourcing to private mediators. Others have been matters that would have gone to court, into civil litigation, had it not been for the mediation process. I have also been a member of a tribunal dealing with land claims, where its predominant function was to mediate.

I am going to deal with four points bouncing off the Judge's presentation. The first is the meta-principle, and Judge Kellam has dealt with that very well. Here, litigation has been modified and transformed through the comprehensive management by courts and individual judges of a process which was historically controlled by the parties, for which read the lawyers.

As the old joke went, under the old system, to use the medical metaphor, the operation might have been successful but the patients had already died. Under the new system, the attempt is to keep the patients alive and well. The examples given by the Judge involve a range of strategic interventions by courts in terms of directives, inquisitional enquiries and outsourcing of certain functions. A much greater emphasis is placed on party-based resolution of disputes rather than the judicial determination of them.

One of the fascinating aspects of these examples is that the actual hearing – the court hearing, the traditional hearing – has become in that process only a minor, as opposed to a dominant, part of the litigation process. In a sense, with some exaggeration, litigation has been hollowed out: while judges are more active than ever, the actual hearing process – and this is borne out by the survey studies – has become a diminishing, and some in the literature argue, a vanishing aspect of the litigation process.

… while judges are more active than ever, the actual hearing process … has become a diminishing, and some in the literature argue, a vanishing aspect of the litigation process.

The notion of litigation has therefore become a very elastic one which involves a whole range of interventions over and above the traditional function of judges. Furthermore, developing alongside these practical innovations has been an expansion of literature on these topics. New notions of responsible lawyering, client-centred lawyering, collaborative law, problem-solving courts and therapeutic jurisprudence, to name a few, have built up intellectual constructs, but all of them have a reflection in reality. Though I hasten to add that there are no courts yet that I know of which use bean bags and incense as part of their profile.

Recently, there has also been a revolution in legal education. Law students, in many of the jurisdictions to which Judge Kellam has referred, are increasingly exposed to these new concepts, on both a theoretical and skills basis. This can lead to them sometimes coming somewhat naively out of law school with very utopian visions of what legal practice might entail.

The second point deals with the legitimising theory behind these changes. The legal profession is notorious for lack of empirical and survey evidence and thus we need to resort to legitimising theory. A lot of it is founded in what Judge Kellam referred to as alternative dispute resolution, which has the acronym ADR. In the cynic's world, ADR stands for "another damn rip-off" by the profession. In the lawyer world, at some stage, ADR stood for an "alarming drop in revenue"; the perceived but unfounded fear that it would damage practitioners' budgets.

There seem to be four kinds of key legitimising factors behind this, and they are not always complementary. The first is the efficiency drive to which the Judge referred. This relates not only to those who fund litigation, or only to clients – the consumers of the litigation process – but also to judges in many jurisdictions who are now subject to the same quality performance measures as many other professionals are subject to (sadly, including academics). Efficiency has been a major imperative behind some of these measures.

Second is the "access to justice" imperative, which is a constitutional right in many countries, including South Africa. This requires some explanation because in some quarters it is seen as a denial or at least a delay of access to justice – the kind of pre-litigation factors which have to be brought into consideration or the court's strong intervention in the process. Of course justice comprises not any single model and many different notions of justice can be contemplated in terms of a constitutional right.

What is required is a set of preliminary forms of justice process that need to be gone through, such as mediation, conciliation, early neutral evaluation and other alternative procedures.

In all of these systems, ultimate access to the courts is not excluded. What is required is a set of preliminary forms of justice process that need to be gone through, such as mediation, conciliation, early neutral evaluation and other alternative procedures. Most of these processes have been found to be compatible with access to justice rights in other countries, and in many situations, are much more compatible with customary law norms.

The third legitimising theory is interest-based dispute resolution, again referred to by the Judge. All legal disputes begin their life as business, personal or relationship disputes but they become legalised as they enter into law offices and into courts. This is a key factor in the new lawyering ideology and the aforementioned processes where parties can de-legalise their disputes and return to the personal and commercial interests which are at their base.

Fourth is the principle of self-determination. There is a paradox here in that the processes referred to involve a great deal of judicial control, as opposed to party – for which read lawyer – control. However, the ADR processes have at their heart the notion of

self-determination. This means parties who are being compelled to enter into these processes are not being required to submit to any determination other than that to which they consent.

It seems to me that those are four factors which come into play with the kind of institutional changes which have been referred to. In the process of change, ADR is no longer an alternative way of litigating; it has become an alternative within the litigation system. It is no longer an extreme limb; it is within the very bowels of the litigation process.

The third point is the players in these changes. One has to say upfront that a lot of the innovations referred to by Judge Kellam have been supply-driven and not demand-driven in many of those jurisdictions. Clearly, policy makers and legislatures have been involved as players in this area, particularly with the pre-litigation requirements outlining that before proceedings can be instituted, various steps have to be taken.

Courts, as already mentioned, are important players. The other key ingredient is the legal profession, which has been a major factor in the evolution of these processes. Understandably there has been considerable reluctance by practitioners in the early phases to accommodate some of these new measures. This partly stems from a belief that competence as a lawyer is measured only in the litigation process, or that the practice of law is best served by a very restrictive and legalistic definition of problems, or [it came about] just because it is difficult to adapt.

However, over time, legal cultures have modified, sometimes with incentives. In Slovenia, the local Bar Association decreed that there would be a 50 per cent uplift in lawyers' fees if matters were resolved through mediation. In Italy there are attractive tax advantages for clients who push their lawyers into mediation.

There have been some interesting institutional and structural changes around the legal profession, and to reclaim their appropriate role, lawyers themselves have had to go through cultural changes.

There have been some interesting institutional and structural changes around the legal profession, and to reclaim their appropriate role, lawyers themselves have had to go through cultural changes. They have had to accept and develop new skills in negotiating and problem solving. They have had to recognise the importance of clients' business and personal interests alongside their legal rights. They have had to acknowledge the value of non-legal solutions.

Finally, the fourth point is, moving forward, how can one move from vested procedures into future ones? Here, again, the Judge gave a key insight in terms of pilot projects. Clearly, resources and competence are required to move into this area. There is also the need for some process architecture, but that is the easy part; there are models that can be adapted for local use.

I would argue that the pilot programme is a relatively risk-free way of introducing these processes. A magistrate in Bellville has recently issued a practice direction to the effect that he will pull clients into his office and discuss with them the ADR processes. The Chief Justice's office is about to obtain the administration of the court system; a new judicial training institute is about to be developed. These I think are auspicious changes for these innovations. Let's do it.

Adv Nazeer Cassim

I would like to address you very briefly as a concerned South African. Where I criticise judges, it must be understood it is not intended for Judge Davis and where I criticise attorneys, it excludes Brian Patterson, who is very concerned about my financial well-being.

The proposition I put to you is that the justice system has failed us. I do not want to debate with you whether in the past it was a good system or a bad system, I simply say to you now that it has failed us. It has failed us dramatically in the criminal arena because there is daily evidence that the average South African does not respect law and order. There are no deterrents, there is no fear that if you do something wrong you are going to be caught out and have to face the consequences. However, I do not want to dwell on that. That is a topic for another day.

I would like to turn to the civil process. The adversarial system, as we have inherited it, is a failed system in this country. I do not, however, think the management process system, as proffered now in Europe and in Australia, necessarily has the solution for South Africa. I say that for the following reasons.

It is very dangerous to compare South Africa as a society to Europe, Canada or America, which our Constitutional Court does on a daily basis. This is simply because the bulk of our population has not, in the past 20 or 30 years, had the same access to education as those societies have had. This is a problem we must face and I am glad to say it is the first time I have seen this present government actually increasing the education budget by three times. Until ten years ago I could never understand how a revolutionary government could come into power and still spend more on arms and ammunition than on education.

The starting point is that we have to educate our people to enable us to match up to world standards. For example, the developments stemming from the Woolf Report in the United Kingdom have shown tremendous improvements to civil process. However, in South Africa the reality is that the majority of people do not have access to the civil courts at all, simply because of the cost factor. Big business has its own agenda; it can use the system to delay the ventilation of a dispute endlessly. Judges in this country, by and large the judges who man the puny courts, are frightened to get involved in trials, because the Supreme Court of Appeal will criticise them. We have an inherited system where the judge sits back, lets the parties do their bidding, and then gives a decision. This leaves us with judges who do not have the confidence to get involved.

As far as the profession is concerned, the attorneys' profession has become like big business. The advocates' profession is a monopoly in this country: there are 6 000 practising advocates serving a litigating public of 40 million.

Before 1994, when one referred to the public in this country, one was speaking about only 2 million people, now all 40 million count as the public. One has got to realise the enormity of this problem. When I stand in the High Court in Johannesburg and they all complain that the lifts do not work, this is because, until 1994, it was intended that those lifts would serve the interests of some 800 male white advocates. Back then nobody envisaged that in ten years' time 20 million people would want to use those very lifts in those very court rooms. So we have infrastructure problems.

Once litigation is not accessible to the average South African, the system fails. If the system fails, more and more people lose respect for the law and the structures that uphold law and order. And if that system fails, then we have got problems.

Coming back to access to justice, the recommended fee that the Bar Council prescribes for junior advocates who have just qualified (which means going to university, completing a four-year LLB, and going to the bar to do pupilage, thus becoming a fully-fledged advocate) ranges in the various bars in this country between R2 000 and R3 000 a day to conduct a trial. That is what the average South African earns in a month. As far as Senior Counsel is concerned, it ranges up to R35 000 a day.

The importance of these facts is that middle-class South Africans cannot litigate. The only methodology we know, where there is a legal conflict, is to bring it to the fore and get a referee who will provide a decision. Once litigation is not accessible to the average South African, the system fails. If the system fails, more and more people lose respect for the law and the structures that uphold law and order. And if that system fails, then we have got problems.

The first proposition I put to you is the realisation among South Africans, and particularly civil society (and those of you who sit here who have an interest in civil society), that we have got to move away from the past system. It might have been great for Grotius and Justinian's time but for the present South African time, it is not working.

Once there is a realisation that the system has failed, the system needs to be changed and other methodologies of conflict resolution need to be examined. I would propose that the starting point in South Africa is a totally different calibre of judge, somebody like Dennis Davis, who can intervene in the judicial process. We need an interventionist approach, the pursuit of the true facts, and quick application of the law.

Getting to that stage is easier said than done because it means changing the mentality of the whole judicial body of people, of the powers that already have a great respect for the system, of the profession who have a self-interest, and of those who wield economic power in this country.

I would like to conclude by simply saying there has to be a realisation, in my view, that the system is not working, and from there we need to look at alternative models.

Prof Cathi Albertyn

Wits Law School

I want to broaden the discussion around improving access through changing procedures and what access to justice entails in South Africa.

When we think about access to justice, traditionally we look at at least three things.

We look at people's capacity to access courts, and that's often seen as their "knowledge": do they know their rights to go to courts? Do people even contemplate that courts are a place where they can resolve disputes?

The majority of South Africa's citizens live outside of the formal system and go elsewhere to have a dispute resolved. They go into a customary or a family system. So really, when we're thinking about access to courts, it's not just knowledge, it's more. Are courts the appropriate place: have we set up alternative places that people can go to, to resolve a dispute?

The second thing that people look at is the institutions and the services themselves: are courts geographically and physically accessible, are they cost-effective, can people afford them, are the procedures cost-effective, are the procedures short, is justice quick or slow – does it take a very long time or not? What can we do to deal with that?

In relation to civil trials, what can other jurisdictions do in order to make justice accessible? The aims are to make it cheaper, to make it quicker, to make it fairer. By trying to do this, even though outcomes are not always assured, the fact that the intent is there is what matters. With this in mind, I am going to focus on the issue of legal representation and how that affects people. Legal representation is to some extent the supply side of justice, with "knowledge" being the demand side of justice.

The third important thing to look at is, are people getting just outcomes from courts – quality services from legal professionals and fair decisions from tribunals?

These three areas together form a very big package that needs to be looked at if we are to achieve fair justice in this country.

The first really big issue is that of legal representation. A lot of people might not ultimately want to go to court, but a lot of people do. If you are very poor (as the majority of people are in this country) being able to challenge an unfair administrative procedure at Home Affairs can mean the difference between surviving and slipping further into poverty. Being able to challenge an unfair labour practice, to access the labour courts, can make a difference to your life. Being able to engage in a civil matter requires assistance from an institution that is equipped to deal with unrepresented parties. In South Africa, the equality courts, for example, are equipped – theoretically – to deal with unrepresented parties and presiding officers are directed to try to assist them. In part of the labour process in the CCMA [Commission for Conciliation, Mediation and Arbitration], individuals can go and represent themselves. So there is some attempt within our legal system to deal with unrepresented parties.

However, more attempts are needed, particularly in civil processes. Whether at this point there are resources to achieve this, is a debatable point. The Legal Aid Board, as a case in point, is a state institution and has very few financial resources to disburse. Most of what it does is focused on the criminal process, with a minimal percentage going to civil procedures – family and labour matters.

There is in place, however, a court-based system to assist legal representation. It goes by the name of the in forma pauperis rule, which all courts have access to. Theoretically the rule enables members of the public who pass a means test either to approach the registrar or to be referred by a judge to a list of attorneys who must then take up their case. Although it is a rule that exists across the courts, it is not exploited.

What seems to be the modus operandi is that right-thinking judges, such as Judge Cathy Satchwell and Judge Dennis Davis, might see an unrepresented accused in front

of them and work very hard to try to get them representation. Judge Satchwell had a case that dealt with people who had drug-resistant TB and who wanted to challenge their detention and were not represented. She eventually issued an order against the Department of Health, ordering it to find representation for these patients that were in hospital so they could vindicate their rights in court. Justice provided cannot however be up to the goodwill of judges, there needs to be a better court-based system to enable people who come to court to get some kind of representation.

Lastly there's the voluntary pro bono system, which the attorneys will know about. Most law societies are beginning to introduce rules around the number of hours to give to voluntary service. Probono.org is a good initiative, functioning very well in Johannesburg, trying to provide people with access to justice. It is a civil society organisation that filters needy complainants to good law firms and high-quality attorneys. Probono.org should be an initiative of the state, not an initiative of civil society and donors.

This work however only skims the surface. For it to do more than that, a lot more resources need to be mobilised.

The second point to make is that the majority of the poor probably don't access the formal system or don't want to, and will often choose the customary system, which in theoretical terms is a very good system. It is supposed to be participative, based on community values, and to enable the resolution of disputes from family through community to traditional leader. It is, however, in danger of being undermined by a Bill currently making its way through parliament. The Traditional Courts Bill is recommending that the power of traditional courts be centred only on traditional leaders, taking authority away from the lower levels of dispute resolution. It is also undermining the capacity of women to participate in the dispute resolution process, and therefore, justifiably, it is being heavily criticised.

Customary law is a very important part of dispute resolution and means of access to justice. It's a meaningful alternative in many ways for the majority of South Africans. The proposed bill threatens to turn this form of justice into a quaint alternative for people

who live in rural areas.

When talking about people who are vulnerable and marginalised (whether it's by socio-economic status, gender, class or ethnicity) one wonders whether just outcomes are the norm. Research, for example, has been done on the kind of justice that women get out of the formal system, generally through lower courts, trying to obtain maintenance for their children or domestic violence interdicts against abusive partners. The research suggests that the kind of justice that is being delivered leaves a lot to be desired.

So when looking at just outcomes and access to justice for women, the focus must be on magistrate courts and on how these courts are delivering justice, and one must resist the temptation of focusing on the more interesting high courts of the land.

Finally, with respect to research that's been done on Constitutional Court jurisprudence and research that has been done on people who kill their abusive partners, the suggestion is that "good wives" or "good mothers" – those who fit the stereotype of good wives and mothers – are more likely to secure justice from the court, whether it's a civil or criminal process, than those women who are bad mothers or bad wives, or sex workers or cohabitants, and who don't fit the stereotype.

Why is this and where does it come from? The collective profile of the bench – who we have as judges, the kind of training that is offered to judges and who is presiding over which part of South African society, a society that continues to be deeply biased in nature – offers some answers to this.

Judge Dennis Davis

Judge of the High Court

Two observations and five remarks

The first preliminary observation concerns the question of legal culture, made by Nazeer. It seems to be quite astonishing that 16 years into a constitutional democracy, the legal culture of South African society is almost as it was 16 or 20 years ago. Courts run in almost exactly the same way. The whole process is really almost identical to what it has always been.

What is surprising is that so much has been said about transformation, but there has never really been an interrogation of what a changing legal culture for a society of 45 million diverse people would be. Right from the top, from the Constitutional Court down, it's not good enough to simply change the robes. More has to be done, starting with thinking through what a legal culture for South Africa in the 21st century really means. I often think that to a large degree too many of us still think that our barometer for standards are both the London Bar, and the British courts.

The legal profession has therefore to think very seriously how we go about the business of addressing some of these difficulties.

The second observation concerns the legal strategies being adopted in litigation or what has now become known in the South African legal lexicon as the 'Stalingrad process' of litigation, which means if you've got money, you keep going for as long as possible, taking every single technical point that is imaginable so that cases never get resolved. The area of competition law is an example of where cartel cases cannot get decided. Because, with the deep pockets in South Africa, judges are simply unable to have the cases brought to fruition, and that is a serious difficulty.

Judges in case management. South African law has a rule called Rule 37, which covers pre-trial conferences. But judges have very little role in Rule 37 conferences. The commentary to Rule 37 in Erasmus, which is the leading textbook that comments on these rules, says:

> The sub-rule goes further than the previous rule. It gives the court an involvement in the pre-trial stage of the proceedings and authorises a judge to give directions which might promote the effective conclusion of the matter. The power of the judge to call mero motu, on his own, for a pre-trial conference to be held or to be continued would probably be rarely exercised, if for no other reason than in most cases a judge would not know whether or not intervention is called for.

Erasmus is correct. In the 12 years on the bench, there has never been a situation where a judge is brought into the process at an early stage. There was in the Cape a case management mechanism called the Rule 37a Conference, a fancy scheme that had been developed, and which in theory was a good idea. The idea was to try to bring the judge forcibly into the process. Judges would go into the courtroom sans robes to monitor the process of how the litigation was proceeding. Possibly because it became too complicated, it was dropped. What has replaced it is exactly as Erasmus says, almost nothing. And that's a real problem, particularly in a society like ours.

Secondly in Judge Kellam's paper, he wrote the following:

> Cases in some areas of law requiring particular expertise rights, including intellectual property, taxation, admiralty law are allocated to a judge who is a member of a specialist panel

In the areas of intellectual property, taxation and admiralty law we would have a very small panel in South Africa. This is because we have not had a serious conversation

either about how judges are appointed or the level of expertise which is required. Naturally, there are demographic considerations in South Africa because of the perversion of apartheid, where black practitioners were denied access to this kind of work, resulting in a skewed skill bias.

But nonetheless, for a society that on one level wishes to aspire to be a global player, we have to start thinking about courts which are able to deal with these sophisticated sets of questions and what expertise there is at hand. From experience, when writing judgments which have to deal with a wide range of matters such as accounting or commercial matters, one wonders, if it goes on appeal, where the level of expertise will be found to carry the matter forward. It is a problem and it has to be dealt with. It is for this reason that the Australian experience is not workable for South Africa, because there are distinct differences in demands.

Thirdly: experts. What South Africa has is a disease where the expert is an advocate for the side in question and one finds oneself listening for days on end to five different experts, all of whom are subjected to cross examination. It is such a waste of time. We have to think creatively as to how we deal with the particular problem of 'experts' in litigation. Judge Kellam provides some rich ideas.

Fourthly: the question of ADR. One of the strange things about South Africa is that there is a vibrant ADR sector in some areas. In labour law, it has been very successful for a long time. ADR is an important area of law and it needs to be utilised to build and deepen the delivery of justice.

The tragedy about ADR in South Africa today, however, is that to a large degree, it is being used for purposes which reflect the profession's lack of confidence in the judiciary. Cases that are taken through arbitration should often rather be heard by courts. As a result precedent is not created and the law does not develop.

The previous point notwithstanding, ADR has a big role to play in the mediation process and is an important complement to the judicial process.

Finally: all of the topics touched on are ones which would affect litigators in complex commercial matters or matters with lots of money or complicated technical issues. For the vast majority of South Africans, those are not the cases which concern them day to day. The legal sector has to put its mind to the question of regenerating vernacular law, sometimes called customary law, so that in fact it becomes a lived system rather than just a tool of populist politics.

A lead could be taken from a judgment of the present Chief Justice, Judge Sandile Ngcobo, who wrote a minority judgment in a case called Beare, dealing with primogeniture and customary law, in which the suggestion was that the way actually to deal with these issues, whereby customary law had to be developed, was to throw the case back, with guidance, to the rural courts, so that, in fact, a process of dialogue could take place between the generation of the constitutional principles and the customary positions. The legal sector has to think through how to achieve that in the rural communities in South Africa and in the poorer areas of society, where there's an enormous amount both of ADR-type principle on the one hand, and a range of possibilities for regenerating this kind of law into the constitutional moment, because this is where the vast majority of South Africans actually face the justice system.

Discussion

ANONYMOUS: *I'd like to direct my question to Judge Kellam. You mentioned concurrent evidence and also ADR used in court litigation. What is the status of those modes of condensing the evidence and trying to get the parties to settle? Are they off record? Are there issues if the parties go to ADR? Is the process that happened in ADR something that the presiding officer would know, or is it without prejudice?*

MURRAY KELLAM: In the case of the concurrent evidence, I believe a record is kept because it is not necessarily an open court, but it is an open procedure. The judge manages the process by asking questions, and thus those questions, and the manner in which the judge behaves, ought to be transparent and subject to appeal.

However, in the case of ADR process, we are talking about referral out to mediation. These cases are not the subject of record, they are confidential. Most of the rules in Australia provide that the judge is never to know the outcome – the only report to be made in most of the courts and rules of Australia is that the mediator may report whether the matter has been resolved or not.

The plan is that it will be confidential. And frankly that is one of the great benefits that I perceive of mediation, because as many of us involved in litigation know, what is set out in the pleadings is not really what this is about. It might be about past bad relationships, it might be about a variety of things, and mediation allows those issues to be aired in a confidential way. Australia has statutory protection of mediations, where anything that is said in mediation cannot be used in later court proceedings except with the consent of the parties. If an admission is made by a party or they have said something unwise and the matter does not resolve, what is said in the mediation cannot be the subject of the litigation later.

ISHMAEL MKHABELA: *I would like to raise a question about trust in the institutions which are linked to justice. I think, as Nazeer said, that it is not only the courts which have failed the majority of people. The people also feel failed by the police, politicians and businesses. Therefore, I think the question about trusting the courts, trusting the lawyer, trusting the judge, is such a fundamental issue.*

Related to this point is the issue of education. One finds that lawyers are generally trained through universities, but is that really the only practical way in which people can be exposed to the merits and demerits of the institutions which we are using to access justice?

Finally, I love the law and many activists love the law. I have been an activist, I am still one, but the problem is that when we look at where we are, the so-called implementation of justice is still entrenching historical imbalances and historical injustices.

DENNIS DAVIS: I will deal briefly with the first question relating to trust. We have a very serious problem in South Africa today with regard to trust in institutions, period. I understand that the most comprehensive study on South African political institutions was done by James L Gibson in about 2001. If you looked at that study you would probably find that the Constitutional Court, after seven years, is actually doing even more poorly than Parliament. Its legitimacy factor was quite minimal when you took the country as a whole. Parliament was not doing very much better.

I am not sure what the result would be if you replicated the Gibson study today, but I have little doubt that the kind of difficulties that we have encountered in every single public institution, whether it be Parliament or the judiciary or, alternatively, the problems in accessing justice, or the level of corruption in South African society, play havoc with any possible legitimacy.




It was always going to be difficult for our justice system to lift itself into a real legitimacy, given where it has come from. I don't think it has done a bad job, but a lot still has to be done.

In relation to your question on the perpetuation of injustice, you are correct, and that is part of the issue that underpins distributional questions underlying the rule of law, contract law and property law. What I have been shocked about in South African society is the absence of any serious critical jurisprudence to interrogate those rules properly. Oddly enough, an American realist school of jurisprudence spoke very powerfully about how you do this.

Somehow this has not been done in South Africa, and I find it interesting. At a recent conference a very well-known critical legal studies scholar, Professor Karl Klare, wrote a paper which was one of the seminal peak texts in South Africa on transformative constitutionalism. In it, he spoke about the extraordinary innate conservatism in South African legal culture. I think the paper has had a profound effect. Therefore the answer to your question is that there is still a lot to be done, in educating both our students and our judges, practitioners and legal communities.

One has to balance that against the fact that the South African political settlement was a compromise. It was not a victory for one side or the other, and there were always going to be compromises. However that does not mean that we should not be addressing both the legitimacy question and the distributional questions going forward.

MURRAY KELLAM: I don't want to enter into all of the areas that you raised but I would like to raise the issue of training. It is only in the last 15 years or so that Canada, New Zealand, Australia and the United Kingdom have set up judicial training institutes. I know when we were involved in Australia as recently as the 1990s, there was a fair bit of scepticism from the judiciary. In fact one person said to me in the mid-1990s that we don't need a college for judges, we have got one. You do 16 years at the Victorian Bar and you graduate and there you are, you are trained.

That has changed dramatically in the past 15 years. The importance of training is now accepted by the leadership of these courts, and I presume it is becoming more accepted in South Africa as I know you have a college being established here. Training has now been established as part of the judicial function. When we refer to training, we are not just talking about learning about the Evidence Act or the Commercial Arbitration Act. The training in Australia, New Zealand and Canada is in contextual matters. Its syllabus includes gender, race, and how to use interpreters. It deals with the sort of society issues that judges come into contact with in their daily lives.

In recent years, our judiciary has changed quite a lot in other ways too, however not to the extent of what I have been told here in South Africa. In Australia, affirmative action in terms of gender has meant that many younger women, without the years of experience that old troglodytes like I had when I was appointed, are being appointed. People are being appointed in their

late 30s, early 40s, whereas I was the youngest person in the Supreme Court of Victoria at age 52. Clearly that has been a huge change, and training is very relevant to that. Another change is that the Senior Bar is not coming to the superior courts the way they did.

NAZEER CASSIM: With regard to the courts, I find the first era of the Constitutional Court very disappointing. For example, there was a case where an accused had an alibi in Cape Town. He was accused of murdering his wife. The question that eventually came to the Constitutional Court was to what extent his explanation, insofar as the alibi is concerned, was admissible as evidence against him. Five different judgments came from the Constitutional Court.

We can do a lot of comparison with the Americans and the Canadians, but at the end of the day policemen and magistrates have got to interpret judgments. It is not a Constitutional Court that gives recognition to the diverse cultures and education levels, and the problem that we have with policing. It is lack of education. It is lack of proper training and proper skills. It is not a Constitutional Court that is alive to the issues that affect the majority of the people.

If you do a comparison between the rights that the Constitutional Court is creating for people who never had opportunity previously, and the old Industrial Court, [the latter] was far more effective. In the Warren era in America, they could actually manoeuvre and manipulate the government into doing the right things.

I do not believe that an independent judiciary necessarily has to be anti-government. I believe in a developing society such as ours government needs help, and from time to time they need to be told what to do. I think the Constitutional Court has a very important role to play in bringing about a better society. In that regard, I think they have the ammunition but they have failed. What stands out in our judicial system at the moment is that those who are honest and law-abiding are not necessarily rewarded.

That, to me, is a great failure. There are too many technicalities and too many rules. Access to justice is too complicated. These issues are all within the power of the Constitutional Court to remedy, because the lower judges must take guidance from it. In many spheres of redistribution of wealth, property and land the Constitutional Court could be far more affirmative. For example, in Brown v Board of Education, 1954, the [Supreme Court of the United States] ordered the police to force schools to open.

Our Constitutional Court simply does not go far enough. In fact they are behaving as the old courts behaved, which said, "We do not want to interfere in government, that is legislative." However, their powers are in fact to keep government in check, and here they are hopelessly failing the little guy. So there is a lot of valid criticism to be addressed. It has to be addressed by recognising that those people who sit on the bench do not know it all. Civil society has to become active and has to participate in the transformation of the judiciary as in many other aspects.

MILES LADDIE: *It occurs to me that the discussion has fallen into two distinct parts: one about the civil systems of the high court, and the necessity to speed the systems up and to make it more simple, and the other the discussion about representation for everybody. As far as speeding up the court process in the high court is concerned, lawyers should not be afraid of implementation of new procedures because if litigation is made cheaper, there will be more litigation as more people will want to litigate.*

But the more important point is the question of representation for those people who want to litigate but can't afford a lawyer. I'm not sure I necessarily accept that there should be representation by lawyers for everybody, and there is perhaps some truth in the expression "kill all the lawyers". However, there is the necessity to provide for litigation at a level where people can come before a court and expect to receive justice.

In the United Kingdom we have a small claims system whereby claims of up to £5 000 are dealt with in a county court without recourse to lawyers. You can take a lawyer along if you




want, but you will be paying for it yourself, you will not get your costs from the other side if you win. If you are suing a company, the company is disadvantaged because they have to be represented by a lawyer and therefore they are going to have to pay for legal costs whether they like it or not, and therefore there is an incentive for them to at least consider negotiating a settlement.

With respect to pro bono lawyers, I think one would do better if one were to take some of the highly paid solicitors and barristers and ask them to provide pro bono services as judges for two weeks or a month at a time. This they could do in areas where representation is unavailable, or where people can come before a court and expect the judge to treat them fairly. It is not a bad principle to have only the person present who is going to listen to both sides without legal mumbo-jumbo, and reach a decision based on the facts.

ARON STANGER: *A question is directed primarily by way of a proposition to Nazeer. In South Africa we tend to confuse the question of transformation and window-dressing. I think we have a totally unreformed judiciary to a large extent because we focus too much on the issue of colour and race and gender, and too little on making the courts accessible to the other 45 million South Africans.*

This goes right through to the Constitutional Court, where essentially we have an elite within an elite that is still servicing, if not 2 million people, maybe no more than 5 or 6 million people. And I think the issue and the question really is, does transformation involve re-ordering the gender issues at the court and re-ordering the racial profile accorded? Is it making the courts more accessible for the rest of the country who have zero access, zero representation, and no access to the system?

RICHARD AITKEN: *I direct a programme that runs in the ten prisons of Zululand. A comment to Advocate Cassim and Professor Albertyn: the word "education" has been mentioned several times. My interest is in what the criminal justice system is doing to society as an educational instrument. In other words, what is the social commonwealth learning about justice and the operation of justice? What has seemed to us increasingly clear, working from the bottom upwards with hundreds and hundreds of people who have collided with the criminal justice system, is that the deep structure in their thinking about that system has become fundamentally alienatory.*

What I mean by that is that it has much more to do with the throw of the dice, the wheel of fortune, rather than the operation of principle, the operation of, in fact, a just judicial system. And one of the implications of that is people are turning in huge numbers – and it's a massive anthropological fact – to magical thinking about the operation of justice. You turn to mythopoeic resources to resolve your legal problem. You turn to magical processes, to umuthi. There are many hundreds of people heard saying, "I must send for umuthi to get me out of prison."

And that just seems to be a direct implication of the judicial system failing to teach society at large about justice as the operation of principles. I'd be very interested to hear the advocate or the professor comment on this.

NAZEER CASSIM: When it comes to appointments one cannot compromise on integrity and efficiency. To make systems work better, just as far as transformation is concerned, one just cannot compromise on those two principles.

When I speak of education, I mean that South Africa has a society that to a large extent has not had access to education. This is a very serious

problem that we face in this country as it means that very uneducated individuals collide with a sophisticated legal system.

The labour law arena, for instance, is a strong example of this: sophisticated labour legislation has been imported which is essentially meaningless in terms of understanding the dynamics of the system to the ordinary worker, and yet s/he's a beneficiary of it. And what really results is s/he starts abusing the system. The solution as a developing country is that we have got to concentrate on education, and more education, to make our society a more educated society.

CATHI ALBERTYN: We do have a small claims court in South Africa, since around the 1980s or the late 1970s, And it does operate. I suspect it plods along a bit and it might be something that needs to be re-invigorated, but it certainly offers justice. Maybe we need to look at what kind of justice it offers.

We are caught in a very interesting contradiction in South Africa with respect to the criminal justice system. On the one hand, people who go through the system often experience it negatively – long waiting periods, corrupt officials, long periods in prison, not being able to get bail, and of course a lot of so-called accused manipulating the system themselves, and knowing how to manipulate it in terms of legal representation – and it ends up being a system that does not seem to operate on any kind of principle and process. I don't know so much about people going to muti but I think people certainly then go to vigilantism. Certainly, very often communities will pull in people and mete out rough justice rather than trust in the criminal justice system. On the other hand, we have the people who don't go through the criminal justice system, thinking that criminals have too many human rights. So we have this kind of contradiction between people who experience the system and people who sit outside of it and really lambaste it for giving too many rights to criminals. And the criminals are saying well, ja, where are my rights? We absolutely haven't got that right in South Africa.

On race, gender and judges: we probably put too much emphasis on race and gender and not enough emphasis on other values. But we probably all agree that race and gender remain important, and that there are important qualitative attributes to having black people and women on the bench that go beyond skills, and that we need to put everything in the mix, that we can't just have one and not the others.

DENNIS DAVIS: Part of the problem [with the criminal justice system] we have in South Africa is that we're almost a zero-sum game. You either put people in prison or you have no other alternative. In short, a simple example: every day in the high court I do reviews of unrepresented accused who have been sentenced to a certain level of imprisonment, etc, and I have to affirm whether it's in the interests of justice. Very often there are people being sent to prison for six months for stealing three potatoes. Of course the magistrate will be queried and the magistrate says: in this area everybody's stealing potatoes, we have to do something about it. This is what happens.

The point is that South Africa has got a crazy system – we have a completely inadequate probation system and an absolutely inadequate system to deal with what might be called non-carceral alternatives to imprisonment. It is madness that in a system where we should be thinking seriously, we say "build more prisons". But for whom? For violent long-term prisoners? With pleasure. But what about all these people who are awaiting trial, people who in a sense are in prison for relatively minor offences where with some intelligence we could actually not have them in prison, and probably therefore not confirm them as criminals for the rest of their lives. It is pathetic the way in which our criminal justice system does not serve the country. When you ask, therefore, how the justice system can educate, the answer is that it could educate enormously if we put some thought into what alternatives judicial officers may well have. One hopes that the justice college that is about to be launched will in fact do something that should have been done years ago, which is to educate many, many judges and magistrates on how to sentence properly, something which is just not done.

There is an enormous challenge, but the problem at the moment is that we're faced with a situation whereby there is so little alternative that I for one am not surprised that we experience the problems that we are experiencing.

The Helen Suzman Foundation would like to thank you for your interest in the Delivering Justice symposium.

If you found the content challenging and interesting, please register as a Friend of the Foundation at www.hsf.org.za. As a Friend of the Foundation you will be kept informed of our forthcoming events, such as conferences/symposia and roundtable discussions on current research topics. We will also send you future editions of Focus if you provide us with your postal address. This registration will need to be done separately by email (kate@hsf.org.za).

To assist us in our work please consider making a suggested donation of R500 p.a to the HSF. As a registered public benefit organisation, donations are tax deductible in terms of and subject to the limitations prescribed in section 18A of the Income Tax Act.

Our bank details are:
The Helen Suzman Foundation, Nedbank, Account number: 1958 496006, Branch code: 195805

With thanks
The HSF Team

helen.suzman.foundation

promoting liberal constitutional democracy