

# The rule of law versus *decisionism* in the South African constitutional discourse

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## OPSOMMING

### Die heerskappy van die reg teenoor *desisionisme* in die Suid-Afrikaanse grondwetlike diskoers

Die heerskappy van die reg (rule of law) is een van die grondliggende waardes van die Suid-Afrikaanse grondwetlike orde. Saam met 'n aantal ander waardes wat in artikel 1 van die Grondwet van die Republiek van Suid-Afrika van 1996 vervat is, omskryf dit die eenstemmige waardekompleks waarop die huidige grondwetlike orde berus. Hierdie bydrae ontleed onlangse gebeure in die Suid-Afrikaanse grondwetlike diskoers, meer bepaald: (1) die omstredenheid rondom die Regterlike Dienskommissie se hantering van die klagtes van die regters van die Konstitusionele Hof teen regterpresident John Hlophe en (2) die president se verlenging van die ampstermyn van die vorige hoofregter kragtens 'n ongrondwetlike wetsbepaling. Daar word geargumenteer dat die omstredenheid te wyte is aan twee onversoenbare denkbeelde oor die heerskappy van die reg. Die een is die klassieke konsep van oppergesag van die reg, wat op die beginsel van legaliteit gegrond is, en die ander, hier *desisioinisme* genoem, is gegrond op 'n "norm" van die "beste" besluit in die omstandighede. Hierdie diepliggende verskil spruit voort uit twee uiteenlopende (regs)kulture. Die een het 'n skriftuurlike grondslag en is geanker in 'n soewereine *corpus* van reg teenoor die ander een wat mondeling en teenswoordig-gesentreerd is en wat nie met die idee van 'n soewereine *corpus* van reg soos dit eeue lank in veral die Westerse regskultuur bestaan, bekend is nie.

## 1 Introduction

The South African state is based on the foundational values, set out in section 1 of the Constitution of the Republic of South Africa of 1996. One of these values encapsulated in section 1(c) is the rule of law.

During the constitutional negotiations that led to the adoption of the Constitution in 1996 the rule of law was never an issue: It was generally agreed that it had to be one of the foundational constitutional values. There was also no trace of disagreement on what it signified. Or at least, that was the perception. In this way the rule of law provided one of the cornerstones of the new constitutional order and of a common South African nationhood built on the Constitution, more specifically built on the foundational values of the Constitution.<sup>1</sup>

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<sup>1</sup> This consensus was also reflected in a number of *dicta* of the Constitutional Court. Many of these may be referred to. Compare for example *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*

However, the South African legal discourse has lately been marked by controversies surrounding the meaning and implications of the rule of law and of the emergence of an arguably aberrant notion of the rule of law in South Africa that are now casting doubt on whether there is in fact consensus on this.

First, there is the controversy around two decisions of (the majority) of the Judicial Service Commission (JSC) regarding complaints against the Judge President of the Western Cape, Judge John Hlophe. The first decision related to the complaint against JP Hlophe in the *Oasis* matter (discussed in 4). The second decision was on the dispute between JP Hlophe and the justices of the Constitutional Court (the *CC/Hlophe* matter), discussed in 3, sparked the most controversy, causing a bitter public row that divided not only the country's lawyers but the public in general. The majority decision of the JSC in *CC/Hlophe* was eventually set aside by the Supreme Court of Appeal (SCA) in *Freedom Under Law v Acting Chairperson of the Judicial Service Commission*.<sup>2</sup> The most important interventions within this controversy are:

- (a) the reasoning in the majority decision of the JSC and of those who support the majority decision;
- (b) the judgment of the SCA in *Freedom Under Law* mentioned above on the *CC/Hlophe* matter;
- (c) aspects of the argumentation in the heads of arguments submitted to the JSC on behalf of the Advocates for Transformation (AFT);<sup>3</sup>
- (d) aspects of the arguments advanced in the heads of argument on behalf of the sixteenth respondent (JP Hlophe) in the mentioned judgment of the SCA.<sup>4</sup>

The second controversy revolved around the re-appointment of the former Chief Justice of South Africa, Mr Justice Sandile Ngcobo, by the President in accordance with an unconstitutional statute. This decision to re-appoint the former Chief Justice was set aside by the Constitutional Court in *Justice Alliance of SA v President of the RSA*.<sup>5</sup> The arguments by the second *amicus curiae* in this matter, the Black Lawyers Association (BLA),<sup>6</sup> are particularly pertinent for the present discussion.

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2 1998 (12) BCLR 1458 (CC) par 56-59; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) par 48- 49, 108, 109.

2 2011 3 SA 549 (SCA).

3 These heads of argument were signed by Advv Semenya SC, Madima, Pillay and Maenetje dated 2008-08-29. The heads have been obtained from the JSC and is on file with the author.

4 The heads of argument were obtained from the Registrar of the Supreme Court of Appeal and are on file with the author.

5 2011 10 BCLR 1077 (CC).

6 The heads of argument were obtained from the Registrar of Supreme Court of Appeal and are on file with the author. There were also other decisions that caused considerable public outrage namely that by the National Director of Public Prosecutions not to institute a prosecution against the President of the ruling African National Congress (ANC) and now president

This discussion will now proceed first with a discussion of the rule of law in section 2 below. In doing so, the relevant aspects of the jurisprudence of the Constitutional Court on the rule of law will be referred to. This is followed by my own concise exposition of the content and consequences of the rule of law which is informed by the historical and philosophical tradition of the notion of the rule of law as it has emerged particularly in the Western legal tradition. This exposition of the rule of law serves as the normative framework and yardstick for judging the interventions made in the course of the two mentioned controversies. The majority decision of the JSC in the *CC/Hlophe* matter is discussed in section 3 and the JSC decision in the *Oasis* matter in section 4. In section 5 below the controversy surrounding the renewal of the term of office of the Chief Justice is dealt with. The discussion of these controversies reveals the existence of an aberrant view on the rule of law which is not reconcilable with the rule of law described as *decisionism* discussed in section 6. In 7 decisionism is critiqued and in section 8 it is argued in conclusion that these two approaches to the rule of law reveal the existence of two conflicting (legal) cultures that had been concealed by the common hegemonic Western legal terminology of the Constitution which, in the period after the constitutional transition in 1994, created the deceptive impression of constitutional consensus.

## 2 The Rule of Law

### 2 1 Introduction

The Constitutional Court has on numerous occasions dealt with various aspects of the rule of law, indicating that the rule of law requires rational decision-making,<sup>7</sup> that *stare decisis* is an incidence of the rule of

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of the country, Jacob Zuma, on various corruption-related charges. The prosecution took great pains to collect evidence and to prepare for the trial. There was a *prima facie* case against Zuma. Shabir Shaik, Zuma's financial advisor, was convicted on counts that share a similar factual basis as the case against Zuma. However, while the prosecution prepared for the trial against Zuma – and notwithstanding the impending prosecution Zuma gathered increasing support from within the ANC and was eventually elected president of the organisation in December 2007. Zuma's rise in the ANC was accompanied by a tremendous pressure from within the ANC for prosecution to be dropped. This was precisely what the National Prosecuting Authority eventually did when it announced its decision on particularly flimsy grounds. This cleared the way for Zuma to become president of the Republic of South Africa. The legal soundness of the decision was doubted and the official opposition, the Democratic Alliance considered legal action to challenge the decision.

7 *Poverty Alleviation Network v President of the RSA* 2010 6 BCLR 520 (CC) par 65-66; *Affordable Medicines Trust v Minister of Health of RSA* 2005 6 BCLR 529 (CC) par 74-79; *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA* 2000 3 BCLR 241 (CC) par 85, 90; *Bel Porto School Governing Body v Premier of the Province, Western Cape* 20029 BCLR 891 (CC) par 45; *United Democratic Movement v President of the RSA* 1 2000 11 BCLR 1179 (CC) par 55-76 (more in

law,<sup>8</sup> that the rule of law prohibits arbitrary decision-making and vague legislative provisions, et cetera. Possibly the most important aspect of the rule of law consistently highlighted by the Constitutional Court and very pertinent for the present discussion, is that the doctrine of legality lies at the very heart of the rule of law. In terms of this principle all spheres of governmental power are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law; Public power can therefore only be validly exercised if it is clearly sourced in law.<sup>9</sup> Hence, public governance must be conducted on a consistent basis in terms of predetermined, properly promulgated general legal rules (and principles). Arbitrary, unpredictable public conduct is the arch-enemy of the rule of law. It is against this public threat that the rule of law seeks to guard. The rule of law acknowledges the need for discretionary decision-making, yet strictly within the framework of clearly defined legal rules and principles. In terms of the rule of law the boundaries for conduct, more in particular the conduct of organs of the state are defined, thus ensuring certainty and affording the citizenry guaranteed legal protection without the fear of unpredictable, arbitrary decision-making beyond the bounds of predetermined law.

The rule of law is bolstered by general principles of the legal tradition alongside specific legal rules. These general principles assume particular relevance in situations that were not foreseen and therefore not accounted for by specific rules. These general principles co-assure conduct and decision-making on account of the law and in doing so reinforce the legally-based outcome of decisions where the rules are falling short. In so doing they strengthen the rule of law and guard against arbitrary decision-making and absolutism.<sup>10</sup>

Adding on to the above, I now proceed with an outline of what I would submit to be the core content of the (classical) rule of law as it has developed mainly in the Western legal tradition. Having done that, the contrasting content, implicitly held by the majority of the Judicial Service Commission and the more expressly argued by the BLA and the AFT and others (as discussed in 6 infra) will be clearer and more pronounced.

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particular parr 55, 68 & 70); *New National Party of South Africa v Government of the RSA* 1999 5 BCLR 489 (CC) parr 19, 24.

- 8 See the recent judgment of the Constitutional Court in *Gcaba v Minister of Safety and Security* 2010 1 BCLR 35 (CC) parr 59-62 and the case law cited there.
- 9 See for example *Fedsure Life assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) parr 56-58; *Pharmaceutical Manufacturers Association Of SA: In re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) par 17; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) parr 49-50; *Minister of Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC) par 27.
- 10 The legal tradition abounds with general legal principles such as the principles of natural justice, which are an integral part of the legal order. One need not be a supporter of Dworkin to realise how important legal principles are. For Dworkin's discussion on principles see Dworkin *Taking Rights Seriously* (1977) more in particular chapters 4 and 7.

## 2 2 The Quintessential Characteristics of the Rule of Law

The rule of law has the following quintessential features that logically imply and mutually strengthen each other. It is marked by sovereign corpus of law; it has a literary, ie scriptural foundation; it is impersonal and abstract; it is characterised by and functions on account of the authority of the past and has forward-looking perspective at the same time; it is marked by the temporal distance between the legal norm and the (legal) decision.

Law is constituted by and legal decision-making is premised on a corpus of law. This corpus of law consists of legal rules, principles and precedents – the sources of the law – clearly distinguishable from and independent of non-law. The corpus has its own sovereign existence and grows independently in terms of its own rules. It is clearly distinguished from other considerations such as morality, religion, habitual behaviour, public policy, feasibility, et cetera. These other considerations might be very important. For legal decision-making they are irrelevant, however. Legal decision-making is determined independently by the corpus of law<sup>11</sup> on the basis of deductive reasoning applied to the facts of the subject-matter that calls for a decision. Other considerations have no part to play there. For such non-legal considerations to play any part in legal decision-making they must first be converted into law – legal rules. Such conversion takes place in terms of existing legal rules that set out the manner in which such conversion has to take place, whereafter they would form part of the corpus of law.<sup>12</sup> Only then, can such rules, now forming part of the corpus be taken into account in legal decision-making.

The corpus of law is recorded in the distinct sources of law (legislation, codes, case law, et cetera). Legal decision-makers must always go back to these sources that serve as the sole authoritative and decisive basis for legal decision-making. They must always remind themselves of the past – of the corpus of law that has already been in existence for a long time. Hence, memory of the law is the basis of the rule of law. They must consult the literature in which the law has been recorded over the ages and deductively apply it to the facts of a matter.<sup>13</sup> To arrive at a decision on a present issue the past is always the decisive factor. This perspective on the past is a salient feature of the rule of law. (This aspect of the rule

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11 The emergence of an independent corpus of law as the basis of Western legal culture is explained very instructively by Berman *Law and Revolution: The Formation of the Western Legal Tradition* ((1983). For the truism that law is clearly distinguished and exists distinct from equity, expediency, morality, religion, custom, etc in Western (legal) culture see also Deutsch “On nationalism, world regions and the nature of the West” in *Mobilization, Center- Periphery Structures and Nation-building* (ed Torsvik)(1981) 74.

12 This argumentation is in line with Hart’s exposition of the rules of recognition in widely read *Concept of Law*.

13 Through the art of *artificial reason* of the law as Edward Coke once reminded King James I. Quoted by Sabine *A History of Political Theory* (1971) 452 from *Coke’s Reports* Pt XII 65.

of law is closely linked to its accompanying forward-looking characteristic explained below.)

In consequence there is, and there must necessarily be a temporal distance between the legal norm and the legal decision. In order to arrive at a decision the norm must necessarily precede the decision. They cannot be collapsed into one moment – ie the decision taken and the norm proclaimed simultaneously. If that was not so, the norm would not *predetermine* the decision simply because it did not predate it. The obvious manifestation of (and test for) temporal distance is the existence of legal precepts contained in the corpus of law, which obviously predate the decision and is for that reason capable of determining it.

Temporal distance is not only an essential feature and prerequisite of the rule of law. It is, also, a logical and principled prerequisite for separation of powers and on that score of constitutionalism and the armour against absolutism. This is so because temporal distance assures that the adoption of general legal norms executing decisions in terms of the norms and adjudication of disputes on the basis of the norms, are authored by different people and institutions, thus securing separation of powers, without which the very idea of constitutionalism is inconceivable. Conversely, if temporal distance between norm-making, execution and adjudication was removed and all these powers were collapsed into one (authored by the same person or body), the crucial difference between legislative, executive and judicial functions would be done away with, thus sacrificing the foundation of constitutionalism.

The rule of law is premised on the reliable recording of the corpus of law. Even though customary law, which is distinguished from custom (which does not qualify as legal rules) has in the pre- and early-modern era of the Western legal tradition occupied a prominent place as a legal source, comprehensive codes with roots in Roman law, have since an early stage played an important part in this tradition. In recent centuries the corpus of law originated and has been existing either in authoritative continental (Western European) legal codifications or in recorded (English) case law. These two bodies of law are important for distinguishing between the European civil-law tradition and the English common-law tradition.<sup>14</sup> However, the two traditions are more similar than dissimilar in that both are rooted in the notion of an independent corpus of law: The one on the codes and the other on the cases. On that score they are equally dependent on a literary culture: the corpus of law must be recoded in written form. Without that (the corpus of) law cannot be distinguished from non-law, more in particular from mores and precepts of morality and religion, from custom and from considerations of policy, feasibility and the like. Written recording further ensures preservation of the corpus of law for posterity. Hence it is clear that the

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14 See for example the discussion by David & Brierley *Major Legal Systems in the World Today* (1985) on the Romano-Germanic and the common law legal traditions.

rule of law is based on a literary culture. In this respect the Western legal tradition is not exceptional as there are distinctive similarities between the Western (Christian) legal tradition and that of the Muslim world, which as Fukuyama points out in his captivating discussion of the rule of law, share the salient feature that both are, as he aptly pointed out *deeply scriptural*.<sup>15</sup> Although, as indicated above the rule of law presupposes a clear distinction between the legal corpus in contrast to religion (the religious canon) among other things, Western (Christian) and Muslim notions of the rule of law are in their origins both anchored in a similar scriptural religious tradition. Christianity, Islam (and Judaism), Fukuyama states, from a very early point on were based on authoritative Scriptures.<sup>16</sup> The Western tradition, however, went one step further, by systemising law at a very early stage in a single authoritative legal canon, distinct from non-law and distinct from legal discourse that did not qualify as authoritative and which therefore did not merit incorporation in the legal canon. As Fukuyama states:

But only in Western Europe was the confusing welter of written texts, decrees, interpretations, and commentaries systemised with a view toward making them logically consistent. There was no equivalent for the Justinian Code or Gratian's *Decretals* in the Muslim, Hindu or Eastern Orthodox traditions.<sup>17</sup>

This crucial characteristic of the rule of law – its scriptural nature as manifested in the authoritative legal corpus – therefore has ancient roots, and although it might have been most advanced in the Western legal culture, it does not stand alone as it shares the indispensable scriptural basis with other (legal) cultures, more in particular the Muslim culture.

The scriptural foundation of the rule of law embodied in the corpus of law is the prerequisite for a legal order. It is the enabling instrument for living within a legal order and, at the same time the life-long burden of everyone living in such an order, more in particular for jurists, lawyers and public office-bearers who are responsible for administering the legal order. They are invariably bound by the corpus and must always justify everything they do – their decisions, judgments, opinions, submissions, et cetera – against the yardstick of the corpus of law. To that end they bear the burden of life-long reading and grasping the legal sources and of measuring and judging conduct in terms of the corpus. Never is there any escape from that burden of consulting – of reading and acting in accordance with – the corpus. The lawyer can, must and often do engage in rhetoric as part of her/his professional work, but always within the ambit of the authoritative script – the acknowledged sources – of the corpus. The lawyer might be a sage or philosopher speaking wisdom, but if that *wisdom* falls beyond the corpus of law, it is from the rule of law perspective (ie legally speaking) of no moment.

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15 Fukuyama *The Origins of Political Order: From Prehuman Times to the French Revolution* (2011) 278. Fukuyama discusses the rule of law in part 3 of this book.

16 Fukuyama 288.

17 *Idem*.

The law of the rule of law is inherently *impersonal*, general and abstract, ie, not personal and specific.<sup>18</sup> The impersonality, generality and abstractness of law ensure that the law is applied regardless of any person (strikingly encapsulated in the Afrikaans: *sonder aansien des persoon*). If a legal rule is applied to a defined category of persons, it is applied without exception. The specific person *vis-a-vis* the rule will be applied in a specific case, does not determine the (legal) decision, ie the specific individual is not relevant to the legal decision about to be taken; the decision is determined by the operation of the relevant legal rules themselves.

So-called hard cases may occur where dire consequences of faithful and consistent application of a legal rule in a specific case may elicit the temptation to bend the law or not to be faithful to it. If the rule itself does not allow for discretion, or if there is no legal basis, in the form of a qualifying legal rule that allows an exception to the general rule, there is no way out. It must be applied. "*Hard cases make bad law*" the saying goes. This follows logically from the rule of law itself. So, do not allow a hard case to force a legally unwarranted exception, because that is destined to haunt future decision-making and to compromise the law in question. Before long others, claiming that their cases are also hard, are going to press for similar exceptions. Referring to the exception in the previous hard case, they might well have a foot to stand on and it is going to be difficult to justify why another exception is not once again to be made. If another exception is in fact made, the rule of law is further compromised in favour of arbitrary decision-making, which is another step towards inconsistent and unpredictable lawlessness. Hence, in order to avert this state of affairs and to protect the integrity of the law, always be consistent and never surrender to a hard case.

This forward-looking element of the rule of law reveals that no legal decision is restricted to have *inter partes* implications only. It always has implication for future decision-making and therefore always tends to be precedential as it were.

The fear that hard cases may force inconsistency in legal decision-making reveals the distinctive forward-looking characteristic of the rule of law, which is closely linked to the perspective on the past. Decision-makers who act in accordance with the rule of law are always alert to avoiding exceptions to the application of a rule in a particular case that may compromise the integrity of such rule in future. In order to protect the existing pre-determined rule, decision-makers are compelled to be forward-looking at the same time. Hence, in terms of the rule of law the

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18 It may be argued that law is by definition abstract and impersonal and that the abstractness and impersonality of law distinguishes it from other forms of control of human behaviour. There is a long history, dating back to the Roman legal tradition that can be drawn upon as authority for this. See for example the references of Jolowicz *Historical Introduction to the Study of Roman Law* (1954) 25; Cicero *De Legibus* Part III 19 (English translation by Keyes (1966)); *D* 1 3 8 (translation by Watson (1985)).

future is always a factor that is prominently present in the decision in an instant case.

These then are the core features and consequences of the rule of law, without which the rule of law is hardly conceivable. If a Constitution, therefore avows the value of the rule of law in the way the South African Constitution does, these consequences are necessarily implied.

### 3 The Two Decisions of the Judicial Service Commission

#### 3 1 The Role of the Judicial Service Commission

The JSC is one of the most important bodies created by the South African Constitution and its decisions are of great importance for the preservation of the country's constitutional order. The JSC is an independent body that plays a pivotal part in the appointment and impeachment of judges. According to section 177(1)(a) of the Constitution a judge may be removed from office only if the JSC has found that he or she suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct. If the Commission has made a finding based on one of these grounds, the National Assembly<sup>19</sup> may take further action towards the removal from the bench of the judge in question.

In order to discharge its responsibilities under section 177(1)(a), the JSC has the power to pronounce on whether a judge is guilty of gross misconduct. However, there is a *lacuna* in South African law in that the JSC cannot pronounce on misconduct that fell short of gross misbehaviour.<sup>20</sup> This *casus omissus* was an important factor in the reasoning of the JSC in relation to the two decisions under discussion.

#### 3 2 The *CC/Hlophe* Matter

##### 3 2 1 Background

In the *CC/Hlophe* dispute the judges of the Constitutional Court lodged a complaint against Hlophe with the JSC.<sup>21</sup> They alleged that the Judge President in two separate conversations with Judges Jafta and Nkabinde (of the Constitutional Court) in March and April 2008, had sought

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19 S 177(1)(b) Constitution of the Republic of South Africa, 1996.

20 There have been various discussions to address this problem but no legislation has been passed to fill this lacuna.

21 The background of the matter is reflected in full in *Complaints of the Judges of the Constitutional Court against Hlophe and counter-complaint by Judge-President Hlophe against the judges of the Constitutional Court: Decisions and Reasons of the Judicial Service Commission*, dated 2009-09-29 available at Judicial Service Commission. This will further be referred to JSC majority decision 2009.

improperly to persuade them to decide the *Zuma/Thint* case in a manner favourable to the president of the ruling African National Congress (ANC) (and now the president of the Republic), who was a party in that case. The case was on appeal before the Constitutional Court after the Supreme Court of Appeal had decided against Thint and Zuma.<sup>22</sup> When the judges of the Constitutional Court lodged their complaint, they also released a media statement in which their complaint against Hlophe was made public. The media release was the subject matter of a counter-complaint by Hlophe who alleged that the Constitutional Court judges had in doing so violated a number of his constitutional rights. Hlophe also instituted litigation against the judges of the Constitutional Court in the High Court. The majority judgment in the High Court was in his favour<sup>23</sup> but was later overturned by the Supreme Court of Appeal.<sup>24</sup>

It was common cause that Hlophe on his own initiative did have conversations with Constitutional Court Judges Nkabinde and Jafta. (Jafta was a former junior colleague of Hlophe at the University of the Transkei.) Hlophe visited the two judges in their offices at the Constitutional Court where the impugned conversations took place. It was also common cause that Hlophe raised the *Zuma/Thint* matter with the two judges. Judgment in the case was at that stage pending and the judges were preparing the judgment.

The judges of the Constitutional Court lodged a collective complaint against Hlophe since they regarded his actions an attempt to compromise the integrity of the court in general. Hlophe denied having improperly tried to influence the outcome of the case. Both parties filed statements with the JSC on the complaint and the counter-complaint. This was followed by oral hearings on 7 and 8 April 2009. Hlophe did not attend these hearings, reportedly due to his indisposition. Six judges of the Constitutional Court, including the then Chief Justice and Deputy Chief Justice, testified at the hearings. On July 30 a three-person subcommittee of the Commission took evidence from Hlophe, the then Chief Justice, the Deputy Chief Justice and Judges Nkabinde and Jafta. None of them was cross-examined.

### ***3 2 2 The Majority Finding on the Main Complaint***

The Commission was divided. As to the main complaint – the complaint of judges of the Constitutional Court against Hlophe – the majority found that Hlophe had in fact said to Nkabinde and Jafta that the *Zuma/Thint* case was very important and that it had to be decided properly. He also raised the question of privilege, which was a crucial aspect in the pending judgment. The majority found that Hlophe had used the word ‘mandate’ in his conversation with Nkabinde. Nkabinde alleged that Hlophe had intimated that he had a mandate to visit the Constitutional Court and to

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22 *Zuma v National Director of Public Prosecutions* (2008) 1 All SA 234 (SCA).

23 *Hlophe v Constitutional Court of South Africa* (2009) 2 All SA72 (W).

24 *Langa v Hlophe* 2009 8 BCLR 823 (SCA).

raise the *Zuma/Thint* matter. However, Hlophe attached an exculpatory meaning to his use of the word “mandate”. The majority also found that Hlophe had said that Zuma was persecuted (the *Zuma/Thint* case being part of the persecution) in the same way that he (Hlophe) was being persecuted. (Hlophe apparently alluded to the protracted disputes between himself and colleagues on the Cape bench and race rows with members of the Cape bar. There had *inter alia* been a public demand for his removal from ten senior counsel of the Cape bar.)<sup>25</sup> The majority accepted that Hlophe had said that there was no case against Zuma and that the last hope was now pinned on the Constitutional Court. Hlophe was also found to have said that the majority of the Supreme Court of Appeal who decided against Zuma, and whose judgement was now on appeal at the Constitutional Court, had made a mistake. He also said that the case was most probably one of the most demanding cases ever to be dealt with by the Court given its importance to the president of the ANC, Zuma, the ANC itself and the country.<sup>26</sup>

The majority attached considerable weight to the fact that the judges of the Constitutional Court never expressly said that Hlophe had asked them to decide the case in Zuma’s favour. They merely inferred from the things that Hlophe had said – as summarised in the previous paragraph – that Hlophe had tried to improperly influence the court to decide in Zuma’s favour.<sup>27</sup> It was also important to the majority that none of the judges was actually influenced as a result of what Hlophe had said.

### ***3 2 3 The Majority Finding on the Counter-complaint***

As to Hlophe’s counter-complaint the majority noted that it might be argued that it was not collegial, unwise or imprudent of the judges of the Constitutional Court to release a media statement. However, in line with the finding of the Supreme Court of Appeal the majority could not find that it was unlawful to have done so.<sup>28</sup> Consequently there was no basis for finding them guilty of gross misconduct, which would warrant their removal from the bench. As noted before, the jurisdiction of the JSC to pronounce on judicial misconduct was limited to alleged gross misconduct and did not extend to misconduct in general. For that reason the majority did not regard it necessary to pronounce on whether the release of the statement constituted an act of (general) misconduct that fell short of gross misconduct.<sup>29</sup> The counter-complaint was therefore dismissed.

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25 This was widely reported in the media, for example “Hlophe has no place on the Bench, say legal gurus” (2007-10-08) *Pretoria News*.

26 *JSC majority decision 2009* par 343.

27 *Ibid* par 337.

28 *Ibid* parr 327, 328.

29 *Ibid* par 332.

### 3 2 4 The Majority's Flouting of the (Classical) Rule of Law

#### 3 2 4 1 Unwarranted Refusal to Clarify Unresolved Factual Disputes

The majority's decision was widely criticised by legal practitioners and legal academics. Former judge of the Constitutional Court, Johan Kriegler, is most probably the majority's most vocal critic. He described the decision as irrational and unreasonable. Most important for the present discussion is that Kriegler specifically accused the Commission for having flouted the rule of law. Kriegler stated: "The decision by the JSC is the biggest threat to rule of law the country has experienced since it emerged from darkness."

He added:

The JSC was a magnificent instrument designed by the drafters of our Constitution to ensure that the judiciary was protected in its integrity and in its manifest independence. It has failed us in producing a decision that is legally indefensible and factually insupportable.<sup>30</sup>

In the following paragraphs various aspects of how the majority of the Commission flouted the rule of law will be discussed in some detail.

#### 3 2 4 2 The Counter Complaint

Hlophe alleged in support of his counter-complaint that the judges of the Constitutional Court, and specifically the Chief Justice and the Deputy Chief Justice, had ulterior motives for the complaint against him and wanted to get rid of him at all costs. He alleged that the Chief Justice and the Deputy Chief Justice had brought undue pressure to bear on Judges Nkabinde and Jafta to act contrary to their conscience in proceeding with the complaint against him. (It should be noted that the two judges at one stage stated that they did not want to file a complaint against Hlophe.) Hlophe also alleged that the Chief Justice and the Deputy Chief Justice concealed the truth surrounding the background of the complaint; that they were driven by political motives; and that they masterminded leaks to the media as part of an orchestrated campaign against him (Hlophe).<sup>31</sup> Subsequently Hlophe indicated that he was not insisting that the counter-complaint and the serious allegations that he had made be further dealt with in a formal hearing. He asked that the counter-complaint be dealt with on the basis of his initial complaint, ie the material already before the Commission.<sup>32</sup>

Hlophe's allegations against the Chief Justice and the Deputy Chief Justice were particularly serious. Had these allegations been proven true, a finding of gross misconduct on the part of the Chief Justice and the

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30 [http://www.sagoodnews.co.za/general/kriegler\\_to\\_challenge\\_jscs\\_hlophe\\_decision.html](http://www.sagoodnews.co.za/general/kriegler_to_challenge_jscs_hlophe_decision.html) (accessed 2012-11-03); See also *The Sunday Independent* at <http://www.iol.co.za/news/south-africa/kriegler-mulls-hlophe-challenge-1.457396> (accessed 2012-11-03).

31 Reflected in *JSC majority decision 2009* par 330.

32 *Ibid* par 331.

Deputy Chief Justice would undoubtedly have been justified. Had the said allegations found to be false and proven to have been made by Hlophe with malicious intent, it would have cast further doubt on Hlophe's suitability as a judge. Either way, these serious allegations called for scrutiny under cross-examination. The Commission's own *Rules Concerning Complaints of the Judicial Service Commission*, which regulated the procedure in the present matter provide for formal inquiries<sup>33</sup> accompanied by cross-examination. The serious factual issues that went to the bottom of the whole matter and the available procedural rules made it incumbent to order a formal inquiry. Strangely enough the majority nevertheless decided not to afford itself the opportunity to find the truth in this way. In doing so the Chief Justice and Deputy Chief Justice were also denied the opportunity to defend themselves and to challenge the allegations. Of utmost importance is the fact that the decision not to order a formal inquiry was clearly and unjustifiably in Hlophe's favour. He was spared the responsibility to account for his vilifying allegations and saved from the clear risk of embarrassment of cross-examination. Moreover, the decision against a formal hearing and accompanying cross-examination, was in accordance with Hlophe's own wish since he requested that the counter-complaint be dealt with on the basis of the material that was already before the Commission.<sup>34</sup> The bottom line is that the decision was not based on the applicable law and was therefore incongruent with the rule of law. Moreover, it was patently in Hlophe's favour.<sup>35</sup>

The obvious question is: Why did the majority make this legally unwarranted ruling?

### 3 2 4 3 The Main Complaint

Although the Commission made a number of findings, the statements and tendered evidence still left crucial factual disputes unresolved, more in particular regarding conflicting evidence of Hlophe and Nkabinde highlighted by the majority.<sup>36</sup> It is obvious that unless an *accused* (Hlophe and the judges of the Constitutional Court in the case of the present complaints) admitted all allegations against them, there would be factual disputes between them. These could be resolved in a formal inquiry, which is precisely what the *Rules Concerning Complaints of the Judicial Service Commission* referred to above, provide for. Such formal enquiry (accompanied by cross-examination) would have enabled the Commission to clarify the factual disputes and to make a comprehensive factual finding. The majority nevertheless once again refused to order a

33 Rule 5 of the Rules Concerning Complaints and Enquiries in terms of s 177(1)(a) Constitution of the Republic of South Africa, 1996.

34 *JSC majority decision 2009* par 331.

35 See Kriegler's comments on the majority's unjustifiable decision not to order a formal inquiry and cross-examination [http://www.sagoodnews.co.za/general/kriegler\\_to\\_challenge\\_jscs\\_hlophe\\_decision.html](http://www.sagoodnews.co.za/general/kriegler_to_challenge_jscs_hlophe_decision.html) (accessed 2012-11-03); See also *The Sunday Independent* at <http://www.iol.co.za/news/south-africa/kriegler-mulls-hlophe-challenge-1.457396> (accessed 2012-11-03).

36 Amongst others in *JSC majority decision 2009* par 336-337, 345.

formal enquiry.<sup>37</sup> Two reasons were advanced in support of this refusal: Firstly, it was regarded unlikely that new evidence would emerge from a formal enquiry. Cross-examination would not necessarily be material or relevant to the essential dispute, namely whether Hlophe had tried to improperly interfere with a decision of the Constitutional Court.

It is trite legal procedure that matters of this nature should be clarified in a formal hearing accompanied by cross-examination. As pointed out above, Rule 5 of the Commission's own rules provides accordingly. Had the Commission adhered to the rule of law, trite legal precepts, and its own rules, it had no choice but to order a formal hearing. The grounds on which the Commission based its decision not to do so were flimsy, to say the least, and had no basis in law. The speculation as to whether or not a formal inquiry and cross-examination would have taken the matter any further provides no legal ground for refusing an inquiry. Information which could be elicited during cross-examination is always clouded in uncertainty but that could never render the cross-examination dispensable, especially not when, as in the matter under discussion, the factual disputes clearly call for cross-examination. Once again the majority avoided the application of applicable law and denied itself the opportunity to make an informed factual finding. And once again the decision not to order a formal hearing protected Hlophe against the obvious risks that cross-examination might have entailed. Once again the question arises: Why did the Commission resort to such a legally untenable decision and why did it flout the rule of law?

### 3 2 4 4 Unwarranted Finding that Judge President Hlophe was not Guilty of Gross Misconduct

The majority's factual finding that Hlophe was not guilty of gross misconduct followed from its decision not to hold a formal hearing and was legally equally untenable. The majority's reasoning was to the effect that the Commission's jurisdiction in relation to judicial misconduct was confined to cases of gross misconduct; that the Commission could not pronounce on *ordinary* misconduct; that even if the evidence of the judges of the Constitutional Court (particularly that of Nkabinde) was fully accepted, a finding of gross misconduct on the part of Hlophe would not have been warranted; that at most a finding of *ordinary* misconduct might have been justified; but that since the Commission could not pronounce on *ordinary* misconduct, a formal hearing would not have served any purpose and was therefore not ordered.

The rule of law could once again serve as basis for the criticism against this decision. Within the framework of the rule of law there was no justification for the decision. The applicable law is perfectly clear; the evidence overwhelmingly shows that Hlophe improperly attempted to influence an impending decision of the Constitutional Court. Hlophe's conduct clearly constituted one of the gravest forms of serious

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37 *Ibid* parr 340-363.

misconduct a judge can be guilty of. What is more is that a finding of gross misconduct did not depend on clarification of the questions that were in dispute. The following facts that were common cause were sufficient to support a finding of gross misconduct: Hlophe had approached Nkabinde and Jafta on his own initiative; Hlophe suggested to them that the Supreme Court of Appeal had erred in its judgment in the *Zuma/Thint* case which was at that stage pending before the Constitutional Court; Hlophe said that there was no case against Zuma in the *Zuma/Thint* case; Hlophe raised the question of privilege, which was a crucial aspect in the pending judgment; and Hlophe said that Zuma was persecuted in the same way that he (Hlophe) was being persecuted. All these facts which were accepted by the Commission were strangely enough still not enough to convince the majority of a *prima facie* case of gross misconduct.

In order to evade a finding of gross misconduct the Commission set a much higher threshold for a finding of improper influence, and thus for gross misconduct, than that which would ordinarily be required. The well-based inference of *attempted* influence drawn from the undisputed evidence of Judge Nkabinde was insufficient to convince the majority that Hlophe was guilty of gross misconduct. Apparently the majority required actual improper influence for a finding of gross misconduct; Hlophe's clear attempt to exert improper influence was not sufficient. The Commission's improper leniency in favour of Hlophe flew in the face of the applicable legal principles and the rule of law. Again the question arises: Why did the majority flout the rule of law?

This decision attracted sharp public criticism from law academics, lawyers and the media. However, it was not to the displeasure of everyone. On the contrary, there were many senior lawyers, including the chairman of the Justice and Constitutional Development Portfolio Committee of the National Assembly, Advocate Ngoako Ramathlodi, who hailed the decision as correct and he strongly dismissed the criticism against the majority.<sup>38</sup>

### 3 2 4 5 The Minority Ruling in the *CC/Hlophe* Matter<sup>39</sup>

The ruling of the minority, on the other hand, was strictly based on the clear legal rules applicable to the situation and was therefore true to the rule of law. The minority held that an attempt to improperly influence a

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38 "Rule of Law deployed as a sword to decapitate the JSC" (2009-09-13) Sunday Times. See also Ngidi "It's time crusading Kriegerler hung up his boots" (2009-09-20) Sunday Independent. The Black Lawyers Association (BLA) was also strongly supportive of the majority decision.

39 The minority decision of the JSC in the *CC/Hlophe* matter is recorded in *Complaints of the Judges of the Constitutional Court against Judge President Hlophe and counter-complaint by Judge President Hlophe against the judges of the Constitutional Court: Decisions and Reasons of the Judicial Service Commission, dated 2009-08-29 available at Judicial Service Commission, here referred to as JSC minority decision 2009. The decision was summarised in a press release of the same date by the JSC.*

judgment in the manner that Hlophe tried to do amounted to gross misconduct that would warrant a formal hearing with a view to Hlophe's removal from the bench. They also held that the disputes of fact could only be resolved in a formal hearing. In this regard the minority specifically pointed out that the circumstantial evidence in this matter and the contexts in which the conversations had taken place could only be properly dealt with in a formal hearing where cross-examination was allowed. The minority also found the counter-complaint so closely linked to the main complaint that it also had to be dealt with in a formal inquiry.

3 2 4 6 The SCA Judgment in *Freedom Under Law v Acting  
Chairperson of the Judicial Service Commission*

The decision of the majority of the JSC was unsuccessfully challenged in the High Court. On appeal, however, the SCA made short shrift with the majority finding of the JSC. It held that the finding of the JSC that the contradictions in the evidence of Nkabinde and Hlophe was not material to the issue, not bearing on the central question namely whether Hlophe had attempted to improperly influence Nkabinde was irrational.<sup>40</sup>

Hlophe contradicted almost everything that Nkabinde said. It follows that the JSC considered virtually everything that Nkabinde said, ie virtually everything on the strength of which she drew the inference that Hlophe tried to influence her, to be immaterial in respect of the question whether he tried to influence her. It cannot conceivably, rationally be considered to be immaterial to the question whether Hlophe tried to influence Nkabinde, that Hlophe said, when making an appointment to see her, that he had a mandate, that, when he visited her, he said that the reason why he was there was that a concern had been raised that people in the Constitutional Court did not understand our history, that he said, when asked who those people were, that 'he has connection with some ministers', that he said that the question of privilege should be decided properly because the prosecution's case rested on it, that Nkabinde reprimanded him for speaking about a case he was not involved in, that he said that there was no case against Zuma and that Zuma was being persecuted, that he said that some of the people implicated in the arms deal whose names appeared on a list he had obtained from National Intelligence were going to lose their jobs when Zuma became President. These were the facts which the JSC had to consider together with Jafta's evidence, to determine whether Hlophe attempted to influence them. Once it had been determined that he did attempt to influence them, the JSC had to decide whether his attempt to do so constituted gross misconduct of such a nature that it may justify his removal from office.

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40 *Freedom Under Law v Acting Chairperson of the Judicial Service Commission* 2011 3 SA 549 (SCA) parr 41-42.

The SCA also found the refusal of the JSC, in the face of a contradictions between the versions of Hlophe and Nkabinde, to order a formal hearing (including cross-examination) “surprising”.<sup>41</sup>

Courts frequently have to decide where the truth lies between two conflicting versions. They often do so where there is only the word of one witness against another and neither of the witnesses concedes the version of the other. Civil cases are decided on a balance of probabilities but where there is a dispute of fact it is rarely possible to do so without subjecting the parties to cross-examination and without allowing them to test what are alleged to be probabilities in the other parties’ favour. A court may of course after cross-examination still be unable to decide where the truth lies. That possibility does not entitle a court to decide the matter without allowing cross-examination and it does not entitle the JSC to do so.<sup>42</sup>

The SCA noted that the JSC had already, when it decided to conduct the interviews with the judges, decided that if Hlophe had indeed attempted to do so he would have made himself guilty of gross misconduct which, prima facie, may justify his removal from office and that this decision dismissing the complaint on an acceptance that Hlophe probably said what he is alleged to have said:

In these circumstances the decision by the JSC to dismiss the complaint on the basis of a procedure inappropriate for the final determination of the complaint and on the basis that cross-examination would not take the matter any further constituted an abdication of its constitutional duty to investigate the complaint properly. The dismissal of the complaint was therefore unlawful.<sup>43</sup>

The SCA therefore concluded that the JSC flouted the rule of law. Against this backdrop the SCA among other things set aside the decision of the JSC that the evidence in respect of the complaint and counter-complaint against Hlophe and the judges of the Constitutional Court respectively are guilty of gross misconduct and that the matter be treated as finalised and ordered the JSC to hold a formal enquiry into the complaints in terms of rule 5 of its Rules Governing Complaints and Enquiries in terms of section 177(1)(a) of the Constitution.<sup>44</sup>

## **4 Judge President Hlophe and Oasis (The *Oasis* Matter)**

In the midst of the clash between the judges of the Constitutional Court and Hlophe, the earlier complaint two years earlier against Hlophe in relation to the Oasis company was largely forgotten. However, it is

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41 *Ibid* par 48.

42 *Ibid* par 48.

43 *Ibid* par 50.

44 *Ibid* par 58.

important to recall this matter as the JSC dealt with it in a way strikingly similar to the approach followed in the *CC/Hlophe* matter. In that matter the JSC was divided on lines remarkably similar to those followed in the *CC/Hlophe* matter. In that case a majority also decided against a formal inquiry while a minority regarded a formal enquiry necessary in the circumstances.<sup>45</sup>

The Oasis Asset Management Group is a company that conducted business *inter alia* in the Western Cape (the province where Hlophe is the Judge President). It emerged that Hlophe had for several years provided services to Oasis for remuneration. In total he received payments amounting to R467,500 from Oasis. While Hlophe was involved in this relationship with Oasis, the company was party to several cases in the Cape High Court. Oasis was amongst others also the plaintiff in a defamation case against Judge Desai, one of Hlophe's fellow judges on the Western Cape High Court bench. According to section 25 of the Supreme Court Act<sup>46</sup> no summons or subpoena may be issued against a judge of the High Court in any civil action except with the consent of that court. Hlophe, without disclosing his relationship with Oasis, granted permission for the institution of an action against Desai. When Hlophe's relationship with Oasis came to light a complaint against him was lodged with the JSC. Hlophe's defence was that the former minister of justice, Dullah Omar, had given him permission to do work for remuneration for Oasis. The permission was given orally and the only person that could confirm the permission, former minister Omar, had died several years before. The department of justice had no formal records of the alleged permission.

In this dispute, as in the *Hlophe/CC* one, there were matters that called for clarification under cross-examination: Could Hlophe's *ipse dixit* that he had been given permission be accepted without further ado? If so, what were the terms of that permission? Could Hlophe really have regarded such permission as legitimate seeing that it was obviously incongruent with the office of a judge, let alone that of a judge president, to be remunerated for private professional work performed alongside his public duties? Why did he not disclose his relationship with Oasis, particularly at the time when he had decided on Oasis' prospective litigation against Desai? These and other matters could only be clarified in cross-examination during a formal inquiry. This was also the argument of a minority within the JSC which they had advanced in support of the view that a formal inquiry was necessary in order to get to the bottom of the matter, thus enabling the Commission to make an informed finding.

However, the majority had another view, namely that although Hlophe's explanation was unsatisfactory, and his failure to disclose his

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45 The facts and the decisions of the JSC in the *Oasis* matter are set out in two press releases issued by the Judicial Service Commission on 4 and 18 October 2007 respectively, available at the Constitutional Court in Johannesburg.

46 59 of 1959.

relationship with Oasis was inappropriate, no formal inquiry should be instituted. Instead, the Chief Justice, the President of the Supreme Court of Appeal and the Judge President of Gauteng (all members of the JSC) were delegated to meet with Hlophe and to convey to him the JSC's concerns about his conduct and its expectations regarding his future conduct.

As in the *CC/Hlophe* case a minority of the Commission, in strict adherence to the applicable law, and therefore also to the rule of law, was convinced that the evidence constituted a *prima facie* case of gross misconduct that warranted a formal inquiry. It is submitted that it undoubtedly constitutes impeachable gross misconduct if a judge receives remuneration for outside work and then gives permission to his remunerator to sue a fellow judge. This is certainly not the kind of conduct that should be swept under the carpet or be settled gently in a private discussion. It is a matter to be dealt with in the open, at a formal hearing and in accordance with the applicable law. Moreover, in this case, as in the *CC/Hlophe* matter, the only person who could cast light on the circumstances in which payments had been made to him; the alleged ministerial consent to do private work had been granted to him; and on the circumstances surrounding his permitting Oasis to sue Judge Desai while keeping his relationship with Oasis secret, was Hlophe himself. Cross-examination of Hlophe was obviously the only way in which this information could be obtained and a formal, public hearing for this purpose was therefore essential. However, the majority decided against bringing the matter into the open and in doing so denied itself the opportunity to get clarity on the relevant facts. And, very important, it also avoided the risk of any embarrassment to Hlophe. The question may once again be asked: Why did the Commission act in disregard of the rule of law?

## **5 Renewal of the Term of Office of the Chief Justice and the Judgment of *Justice Alliance of South Africa v President of the RSA***

Following the positive response of the Chief Justice to a written request of the President to serve in that capacity for another five years, the President on 3 June 2011 effected the extension of the term of office of the Chief Justice and communicated his decision to the JSC and to leaders of the political parties represented in the National Assembly before announcing the decision in an address to Parliament.

The constitutional provision pertinent to the present issue is section 176(1) which provides:

Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

It is clear from this provision that the term of office of the Chief Justice could only be renewed if an Act of Parliament so provides. The only legislative provision dealing with the question of the renewal of the term of office of Judges of the Constitutional Court (including the Chief Justice) is section 8(a) of the Judges' Remuneration and Conditions of Employment Act.<sup>47</sup> This provision, however, does not provide for the renewal of the office of these judges but purports to confer a discretionary executive power upon the President to prolong the term of office of the Chief Justice.

Section 8(a) reads:

A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.

When the renewal of the term of office of the Chief Justice by the President, acting on the basis of section 8(a) was challenged in the Constitutional Court, the Court stated that the determination of the case turning on the interpretation of section 176(1) of the Constitution and section 8(a) of the Act, involve crucial constitutional imperatives including the rule of law.<sup>48</sup> The court held that the provision as well as the act of the President, renewing the term of office of the Chief Justice, in terms of this provision, was incompatible with section 176(1) of the Constitution and for that reason invalid. It stated:

In all the circumstances, we conclude that the Constitution determines that a Constitutional Court judge holds office for a non-renewable term, "except where an Act of Parliament extends the term of office of a Constitutional Court judge." It is only by an Act of Parliament that an extension may occur. The provisions of section 8(a) amount to an impermissible delegation and are invalid because they are inconsistent with the provisions of section 176(1) of the Constitution. Any steps taken or decision made pursuant to the provisions of section 8(a) of the Act is inconsistent with the Constitution and equally invalid.<sup>49</sup>

Very pertinent for the present discussion is that the Court was confronted with an argument on behalf of the second Amicus Curiae, the BLA, which as the Court stated "took a novel stance." The BLA mainly confined itself to the question and the appropriate remedy. It acknowledged that the act was unconstitutional. However, the adoption of the act and the reappointment of the Chief Justice were based on a *bona fide* mistake acknowledged by all parties concerned and should for that reason be excused in terms of certain notions of restorative justice in customary

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47 47 of 2001

48 *Justice Alliance of South Africa v President of the RSA* 2011 5 SA 388 (CC) par 20.

49 *Ibid* par 69.

African jurisprudence. It contended that a mistake has been made in good faith by all concerned and should for that reason be “forgiven”. It argued that the notion of “*tshwarelo*” or “*tshwarela*” in African jurisprudence, as applied in “*Lekgotla*” (African traditional courts), meaning “excusable” or “excuse” and translates to “erasing the wrong permanently”,<sup>50</sup> ought to be applied in the instant case.

The court rejected the BLA’s argumentation (which is dealt with in more detail in 6. *Infra*), stating that it is difficult to envisage how the rule of law will be served in this instance by protecting future constitutionally invalid uncertainty.<sup>51</sup>

## 6 Another Rule of Law (Decisionism)

### 6 1 Outlining Decisionism

It was argued above that the minority decisions of the JSC in both Hlophe matters were strictly in line with the applicable law and therefore firmly rooted in the rule of law. On the other hand, the majority decisions (and the views of those who supported the majority, which are now under consideration) were incompatible with the rule of law. This is a serious indictment against a highly esteemed constitutional institution that carries hefty responsibilities for the South Africa’s judiciary. As indicated in 5 *supra* the Constitutional Court in *Justice Alliance* also rejected the views of the BLA as incompatible with the rule of law. The question to be considered is whether there is an alternative explanation for the majority approach of the JSC, and for those who supported this approach as well as for the stance that the BLA took in the *Justice Alliance* case – one that could somehow be justified in pursuance of a deviating notion of the rule of law.

If we assume that there could be a conception of the rule of law deviating from the outline in 2 *supra* and from the stances taken by the minority of the JSC in the Hlophe matters, the SCA in the *Freedom under Law* case and the Constitutional Court in *Justice Alliance* clearly subscribe to the classical conception of the rule of law, while those who differ subscribe to a deviating notion of the rule of law. As also indicated there, the bare minimum (core content) of this classical (Western) rule of law is strict adherence to the principle of legality.

The question could arise whether the majority decisions discussed above were not possibly the best in the circumstances. It might be argued that given the circumstances they were the most feasible and prudent regardless of the fact that the applicable law was not adhered to in the manner insisted on in the minority decisions of the JSC, by the critics of these decisions and as decided in *Justice Alliance* and in *Freedom Under Law*, in other words, that in the circumstances the decisions were the

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50 *Ibid* par 108.

51 *Ibid* par 111.

best in spite of the fact that the rule of law (in the classical) sense was flouted.

This is where the alternative – “another rule of law” – could come into the picture. Unlike the (classical) rule of law the focus here is not on the integrity of legal rules contained in the corpus, and on their strict and consistent application. The protection of the impersonal and abstract character of the rule of law is also of lesser importance in terms of this *alternative rule of law*. In terms of this approach legal rules are but the first guidelines, yet not the decisive factor in legal decision-making. They might be points of departure but not decisive binding law. Considerations of fairness, feasibility, policy, politics, strategy, ideology, et cetera may justify deviation from the law. The crucial concern of this approach is the *best* (individual) decision, not the integrity of the legal rule in question. In every case the best possible decision should be taken. The *good* decision is the decisive criterion (to the extent that *criterion* is the suitable term). That means that if strict application of the applicable legal rule could ensure a good decision, the rule should be applied. But if adherence to the rule would produce a *bad* decision, be harsh to the person/s in question or would lead to unacceptable (short term) political or other consequences, it should be departed from so that the best possible decision, viewed from the perspective of the parties in the case or considerations of strategy, tactics, politics, et cetera can be reached. Since the individual decision stands at the centre of this approach, it is described as decisionism.

In terms of this deviating approach to the rule of law the classical notion of the rule of law may be criticised for its alleged static, abstract, decontextualised nature and for its alleged excessive preference of rules over processes. It may be said to be excessively rule-driven and scripturally-based; dealt with as a fixed system of detailed defined rules (or similar legal precepts) that are *enforced* as it were on factual situations, regardless of the specific contexts – the individual contingencies – of each factual situation. The rules are static – they do not assume a different meaning in accordance with different contexts – and they are deductively applied to all factual situations. The deviating “rule of law” is exactly the opposite. It is pragmatic and context-bound. It allows for decisions to be taken as required by each situation, more in particular with reference to the nature of the relationships (and to strategic, political and other considerations) in each case. Matters are approached and disputes are resolved not through deductive reasoning on the basis of strict and static legal rules, recorded in the corpus but rather by way of an open-ended communicative process that allows matters to be talked through and thus for solutions to be reached in a manner that allegedly accommodates everyone. The focus in this case is not on the deductive application of pre-determined rules but rather on an on-going discourse and rhetoric that could pave the way to reaching

creative solutions in concrete and changing contexts,<sup>52</sup> instead of demarcating rights in terms of the relevant predetermined legal rules contained in the sovereign corpus.

But is decisionism not mindful of the risks of the hard case that classical rule of law is so wary of? Isn't decisionism aware that hard cases must not be allowed to compromise the applicable legal rules? Is decisionism unaware that exceptions and inconsistencies create bad – haphazard, unstable and inconsistent – law that is destined to haunt future decision-makers? In terms of the premises of the (classical) rule of law all these objections are obviously valid. However, in terms of the premises of decisionism, these “objections” are of no moment. This is so because decisionism rejects the notion that hard cases make bad law. In terms of decisionism no cases, neither hard, nor easy ones, make law. This is so because for decisionism a decision pertains and has consequences only for the case at hand. It applies *inter partes* but never goes beyond that. It does not set a precedent, does not serve as authority and does not create law for future cases. Unlike the rule of law, in terms of which decisions are made on the basis of existing law that originated in the past and with due consideration of possible future consequences – all in order to guard over the integrity of existing (corpus of) law – decisionism is neither disciplined by existing rules nor scared by future consequences.

It is not dependent on the memory of a previously recorded corpus of law; on the contrary, if the need for the good decision so requires, it is rather based on forgetting. Decisionism is purely *present-centred*.

The charge might be levelled that decisionism paves the way to unbridled arbitrariness that sacrifices the very notion of law. If the parameters provided by the corpus of law are not present and not respected there can be no consistency, no predictability and finally no legal order at all. Decisionism dispenses with adherence to the predetermined corpus of law. It allows considerations that are irrelevant to the rule of law to co-determine (and to be decisive for) decisions. In some cases namely when the “good” decision so requires, applicable legal precepts that might otherwise be decisive for reaching a decision might – or must – be disregarded.

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52 See in this regard amongst others Mazrui ‘Globalism and Some Linguistic Dimensions of Human Rights in Africa’ in *Human Rights, the Rule of Law and development in Africa* (eds Zeleza & McConaughay)(2004) 52 *et seq* (specifically 68); Weissbourd and Mertz ‘Rule-centrism versus legal creativity: the skewing of legal ideology through language’ 1985 *L and Soc R* 623 623 *et seq*.

## 6 2 The JSC's Majority Decisions and Forgiveness/ *Tshwarela* as Applied in African Jurisprudence According to the BLA in *Justice Alliance* in a Decisionist Framework

I now proceed to place the decisions of the majority of the JSC and its supporters as well as the argumentation of the BLA in *Justice Alliance* in the decisionist perspective that was outlined in the previous section.

### 6 2 1 *Oasis Matter*

In the *Oasis* matter the majority of the JSC, instead of making a finding of gross misconduct, opted for a confidential discussion with Hlophe. In doing so Hlophe's subjection to cross-examination and the ensuing risks of embarrassment in a formal public inquiry and the possibility of eventual impeachment were avoided. In doing so the majority, instead of applying the applicable law, opted for a friendly settlement, which it regarded as the best decision in the circumstances.

### 6 2 2 *CC/Hlophe Matter*

In the *CC/Hlophe* matter the majority took a similar course. Here it also concluded that there was no case of gross misconduct on Hlophe's side. It also went out of its way to avert an open public inquiry and the accompanying risk of embarrassment that cross-examination could have caused both Hlophe and the Constitutional Court judges concerned. By ruling that there were no grounds for a finding of gross misconduct against either Hlophe or the said judges the majority once again brought the disputes to a quick and friendly settlement instead of following the process prescribed by the applicable law. Hence, in both cases the best decision in terms of decisionism was made in disregard of the (classical) rule of law.

The defenders of the two majority decisions were arguably more forthright and came closer to an express articulation of decisionism than the majority of the JSC itself. They mention additional considerations, more in particular political considerations, such as the transformation of the judiciary, for ensuring the best decision in the circumstances: the best decision that would avoid any disruption of the transformation of the judiciary by acting against black incumbents of the bench. In some cases these political considerations were mentioned fairly tactfully and in other cases forthright and rather blatant.

In its submission to the JSC concerning the *CC/Hlophe* on behalf of the Advocates for Transformation (AFT) of the Witwatersrand, (the AFT submission) the AFT is described as an association that among other things, are committed to "advocacy of the rule of law."<sup>53</sup>

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53 *AFT submission* par 2 *AFT submission*. The submission was signed by Advv Semenya SC, Madima, Pillay and Maenetje.

The predominant aim of the AFT is to avoid any disciplinary action against any of the judges concerned as that would, according to the AFT, erode the public confidence, integrity and dignity of the judicial officers involved in the matter and of the judiciary as such, which must be avoided.<sup>54</sup> That would, the AFT says, undermine the gains that have been made with the transformation of the judiciary.<sup>55</sup> (De Lange, ANC MP, former Chairperson of the Justice Portfolio Committee, deputy minister of justice and a former member of the JSC explained in the national assembly that the transformation of the judiciary comprises: First, the realisation of the objective of equitable representation of blacks and women, described as *diversity, personnel or symbolism transformation*, and, second, transformation relating to the intellectual and ideological approach adopted by judicial officers, when implementing the letter and spirit of our Constitution – referred to by De Lange as *intellectual content or substantive transformation*.)<sup>56</sup>

In order to avoid disciplinary action the AFT argues that the complaints of the Constitutional Court judges and that of Judge Hlophe should be mediated in private, thus avoiding a public hearing accompanied by cross-examination and the ensuing public interest and media scrutiny in the matter. The fact that the most senior judges are implicated in the complaints made against each other, is the crucial reason for them calling for an extraordinary response in dealing with the complaints.<sup>57</sup>

A striking feature of the AFT 's moving for mediation is that it deals with this full-fledged public-law dispute, involving the responsibilities and duties of public office-bearing, namely the public office-bearing of judges, almost as if it is a pure private tussle between individuals with no public responsibilities in terms of the description of their positions of public office. It is precisely for that reason that the AFT can argue that complaints had to be dealt with privately and not as a hearing that revolved around the question whether the judges had acted in disregard of their responsibilities as public (judicial) office-bearers. This becomes even more apparent when the further argumentation and the accompanying vocabulary of the AFT submission are considered. Reference is made to the "resolution of both complaints"; "the impasse between Hlophe and the Justices of the Constitutional Court"; "the issue between the parties"; that mediation would enable the "parties" to

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54 *Ibid* par 6, 8, 44, 45, 57.

55 *Ibid* par 60.

56 Hansard (2003-2-17) 128-134. The litmus test, according to De Lange, for intellectual transformation –

"... would be how individual judges and magistrates will pursue their legitimate and genuine constitutional obligations, without wittingly or unwittingly going out of their way to frustrate or undermine the legitimate and genuine choices and aspirations of the majority of South Africans to create a fully functioning democracy and a socio-economic and ideologically transformed country".

57 *AFT Submission* par 9.

“endeavour to settle the disputes in an environment that is not adversarial”; and “to engage in discussion without prejudice”.<sup>58</sup> Obviously, this was not a matter that could merely be “settled” between the “parties” since the alleged wrongdoing complained of was not directed against another person; it revolved on the question whether or not the terms of the public office-bearing – judicial office-bearing in the present case – were transgressed.

The AFT basically argued that the mediation by the Heads of Court would be the best way to resolve the complaints. That would “stave off” a full hearing and cross-examination. Through mediation, the AFT argues towards the end of its submission:

[t]he parties will be able to endeavour to settle the disputes in an environment that is not adversarial. The nature of the process ensures that all discussion are ‘without prejudice’, and that information divulged at mediation cannot be used against a party at another forum should mediation fail.<sup>59</sup>

The AFT is particularly concerned that the conversations that took place in judges’ chambers should not become the subject of public scrutiny (which would have been the case in an open hearing). It states:

We submit that both complaints result in the undesirable public scrutiny of a dialogue between judicial colleagues. Such dialogue ought to be protected from disclosure in view of the sanctity of judges’ chambers which protects discussions between judges and enable them to freely and robustly voice their opinions.<sup>60</sup>

*Bona fide* conversations that take place in judges’ chambers should certainly not become the subject of public scrutiny. However, this case differs as the conversations that took place were allegedly precisely not *bona fide*; they allegedly constituted a serious transgression of the terms of the judicial office-bearing; it was improper, illegal and unconstitutional. Hence it did not qualify for protection from public scrutiny, but precisely calls for such public scrutiny.

It is clear that political objectives and ideology were the most relevant and crucial considerations for the AFT moving for the resolution of the matter through mediation, thus preventing disciplinary action for (gross) misconduct. This clearly emerged from the AFT stating towards the end of its submission:

The matter has begun to undermine the transformation imperatives of the Constitution. If not handled properly, the matter could reverse the gains of the transformation of the judiciary.<sup>61</sup>

The best decision in the circumstances, in terms of this decisionist approach, was one that best serve the political consideration of the need

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58 *Ibid* parr 7, 8, 46, 50, 51, 61.

59 *Ibid* par 61.

60 *Ibid* par 43.

61 *Ibid* par 60.

for transformation of the judiciary, regardless of the fact that it would be ignoring the relevant (legal) factor in terms of the rule of law (and the JSC's own rules, namely whether the judges have acted in accordance with what their public office-bearing required.)

The heads of argument on behalf of the first respondent (the Acting Chairperson of the JSC) in the Freedom under Law case in the SCA bear traces of a similar argument. One of the reasons, it is argued, why the JSC's decision concerning the complaints should not be reversed, was because both the judges of the Constitutional Court and Judge Hlophe had accepted that the complaints had been finalised. Another was that considerations of pragmatism and practicality required that the Court should not exercise its discretion in favour of granting the review, even if the grounds of review may be well founded.<sup>62</sup>

The former chairman of the Justice and Constitutional Development Portfolio Committee (subsequently appointed deputy minister of correctional services) advocate Ngoako Ramatlhodi, also supported the majority of the JSC. He argued that the rule of law had been deployed as a sword to decapitate the JSC.<sup>63</sup> Ramatlhodi, like the AFT, therefore did not part with the rule of law but proffered his own interpretation of it. For Ramatlhodi, commenting on the majority decision in the *CC/Hlophe* matter, said there were considerations that clearly showed that the majority took the best decision in the circumstances. He also dealt with the need for the transformation of the judiciary but in terms much more outspoken than that of the AFT referred to above. Ramatlhodi highlighted the need for transformation of the judiciary and particularly for the judiciary to be racially representative of the South African population and refers to section 174(2) of the Constitution in support of his argument. This provision provides that the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed. It should be noted that this is neither the only, nor the overriding factor for judicial appointments.<sup>64</sup> However, in Ramatlhodi's view the need for transformation was the crucial factor for reaching the best decision in the circumstances. Hence, decisions that could somehow impede *transformation* and jeopardise the position of black incumbents on the bench,<sup>65</sup> should be avoided, regardless, it would seem, of the suitability of the individual judge in question. A public interrogation of all the judges involved in the *CC/Hlophe* matter

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62 *Ibid* par 81.

63 Ramatlhodi "Rule of law deployed as sword to decapitate the JSC" (2009-09-13) *Sunday Times*.

64 S 174(2) Constitution of the Republic of South Africa 1996: "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed".

65 In Ramatlhodi's logic the position would have been vastly different with white judges. They are not instrumental in judicial transformation. If they did what Hlophe had done a formal hearing, cross-examination and impeachment, all according to the book would have been perfectly fine – arguably another example of the best decision in the circumstances.

(including the outgoing chief justice) all of whom are black, should therefore as far as possible be avoided. If there were to be a formal hearing, Ramatlhodi warned, that would lead to "... public wrestling among the most senior black jurists in the country, as each side will seek to prove the other to be less forthcoming with the truth." This, Ramatlhodi clearly wanted to avoid almost at all cost even in spite of the evidence of gross misconduct against Hlophe.

Ramatlhodi found it frightening that those who criticised the majority for not ordering a formal inquiry could not "... comprehend the damage being visited upon our fragile democracy by a systematic assault upon our nascent institutions such as the JSC".<sup>66</sup>

In another defence of the majority decision in the *CC/Hlophe* matter another lawyer, Ngidi,<sup>67</sup> defended the majority's decision on account of the fact that it would not be in the interest of the justice system to have senior judges at each other's throat for a protracted period. He argued that "... the ugly spat in the judiciary, the continuation of which puts us all to shame, had to be brought to an end as soon as possible". It is significant that Ngidi admitted that the rule of law was not adhered to, but he downplayed that. He accepted that the JSC in the process of resolving the dispute committed "minor procedural transgressions". These transgressions were, according to him, not serious. From Ngidi's argumentation it is clear that the avoidance of conflict, the reaching of a friendly settlement and the mending of bad relations (between the senior judges involved in the dispute) were important ingredients of a good decision.

In the assessment of these views in support of the majority of the JSC the best decision necessitated that the broad political objective of transformation be protected; that the possibility of disciplinary action and impeachment be avoided; that a further quarrel between the judges involved in the matter, all of whom are black, be brought to an end and that the embarrassment that would follow for some or all of these (black) judges if a formal inquiry was to be held, be avoided. All these considerations fell outside the corpus of law that ought to govern the decisions of the JSC. Under the (classical) rule of law they are entirely irrelevant. Yet, to decisionism they were crucial in the circumstances: in order to reach the best decision in the circumstances it was imperative that they be carefully accounted for; and if strict application of applicable legal rules in terms of rule of law would stand in the way of a "good" decision, it is not only acceptable but imperative to depart from it.

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66 Ramatlhodi "Rule of law deployed as sword to decapitate the JSC" (2009-09-13) *Sunday Times*.

67 Ngidi "It's time crusading Kriegler hang up his boots" (2009-09-20) *Sunday Independent*. Ngidi also said that the JSC is an institution established in terms of a democratically adopted constitution and suggested that questioning the majority's decisions was an assault on the legitimacy of the JSC.

### 6 2 3 *Tshwarela*

In 5 *supra* mention was briefly made of the submission made by the second Amicus, the Black Lawyers Association in the Justice Alliance case in which it argued that the mistaken renewal of the term of office of the Chief Justice was excusable in terms of the African notion of *tshwarela*. I now proceed by reflecting in more detail on what was argued, thus revealing how this argumentation reflected the decisionist mode of thinking: The BLA explained as follows:

The term 'excusable' or 'excuse' is applied in African jurisprudence and as applied in Lekgotla (African Court) meaning 'tshwarela' (the literal English equivalent is "hold for me). Ttshwarela or tshwarelo means erasing the wrong permanently as you would hold that wrong permanently on behalf of the wrongdoer (it should be noted that 'forgive' or 'forgiveness' is not equivalent to 'tshwarela'). In African jurisprudence the wrongdoer who has been '*tshwareled*' is deemed not to have committed any wrongdoing. The wrongful conduct is expunged by the victim and/or Lekgotla by 'holding it' ('tshwarela') for the wrong doer. Tshwarela is preceded by an unequivocal acceptance of the wrong doing by the wrong doer.<sup>68</sup>

The BLA submitted that the submission of an amendment act by Parliament amounted to an unequivocal acceptance on the part first respondent (the president) of his wrong-doing: "The first respondent is therefore saying to the nation 'ntshwareleng' (hold this for me)".<sup>69</sup>

In the premises the BLA submitted that renewal of the term of office of the Chief Justice should be countenanced.<sup>70</sup> In spite of the legal position as set out in the applicable law governing this question, this was in the view of the BLA the best decision in the circumstances.

## 7 Does Decisionism Qualify as an Alternative Rule of Law?

Could there be any credibility in decisionism's claim discussed in 6 *supra* to be an alternative rule of law? The answer depends on whether the norm proffered by decisionism – the norm of the best decision in the circumstances – can stand the test of a genuine legal norm. Hence, is this alternative so-called norm of the best decision really a legal norm or is it but a disguise for uncontrolled arbitrariness? Precisely this would be the charge of the (classical) rule of law against decisionism.

In terms of the (classical) rule of law protection of rights in modern society is inconceivable without legal certainty and predictability. This is precisely what the rule of law should achieve. For that reason the law must be well-defined and pre-announced, demarcating in precise terms

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68 *BLA submission* parr 15, 16.

69 *Ibid* par 17.

70 *Ibid* par 20.

what state organs, must and may do and what they are precluded from doing. In this way the prerequisites for limited government and constitutionalism are complied with. By the same token the citizenry are enabled to foresee with a fair degree of certainty when and how (coercive) authority will be enforced in given circumstances. The citizenry can therefore go about freely knowing what their legal position is and when their conduct will go beyond the limits of their rights.

If the legal norms are so vague that its nature and extent is unpredictable, the so-called norm is non-existent. If the factors relevant for decision-making are not settled before-hand, but only determined by the decision-maker on a case by case basis, genuine normative decision-making is out of the question. If the law which is supposed to determine the outcome of decisions changes from decision to decision and person to person depending on the judgment of the decision-maker, the decision-maker that applies the law is also the case by case law-maker of (unpredictable) law. For this very reason decisionism cannot constitute an alternative rule of law since any prediction based on the *norm* of the best decision is impossible. Moreover, the decision-maker, whose decisions are supposed to be regulated by law, becomes the law-maker. In this way the separate functions of law-making, execution and adjudication are combined in one act that occurs at the moment the decision is arrived at. And all this takes place under the guise of the norm of the best decision, a decision which is not law-based and amounts to nothing more than an arbitrary decree. The *norm* allows for unqualified casuistic and arbitrary decision-making which is precisely what the rule of law and constitutionalism seek to avoid.

The classical rule of law does not claim to secure absolute certainty and predictability as if decisions are taken in an almost mechanical-like fashion. Therefore there could be no grounds for presenting discretionary decision-making in administrative law as an example of decisionism. Administrative decision-making, like all (public) decision-making in the constitutional state must still carefully be accounted for in terms of the existing recorded law. In the case of administrative law decisions must amongst others be based on the applicable empowering legal provisions; not be affected by an error of law or made with an ulterior purpose; it must be taken in good faith and the decision must be reached on the basis of a fair procedure (which in itself is set out in detail in existing law); it must be rational, reasonable and based solely on carefully defined relevant considerations, et cetera. Decision-makers must explain their stance on previous decisions and set out the legally relevant grounds for differing from or agreeing with them. Hence, administrative decision-making is governed and/or disciplined by, and accounted for in terms of existing authoritative legal literature comprising all applicable law, including case law, contained in the

authoritative corpus of law.<sup>71</sup> This existing legal literature – the corpus of law – is the object of the rule of law’s focus on the past as explained in 2.2 *supra*. This goes a long way towards assuring consistency, rationality, rights-protection and the predictability of future legal decision-making, thus contributing to a legally-based dispensation. This constitutes compliance with the rule of law. Decisionism, on the other hand, is devoid of all that. With its exclusive present-centeredness, devoid of the disciplining effect of existing binding legal literature, decisionism entails total lack of any consistency, predictability and certainty. It may well be that that decisionism may occasionally facilitate amiable settlements, restore bad relationships, avert politically awkward consequences and avoid personal embarrassment to esteemed public figures by resorting to so-called best *decisions*, but such results are purely arbitrary in nature and are in no way compatible with the basic tenets of the rule of law.

Decisionism parts with literary-based legal sources contained in a sovereign corpus of law. Decisionism cannot cite (written) sources. Moreover, it must avoid literary-based sources at all costs because if there is an authoritative scripturally recorded source of law, the very idea and purpose of decisionism, namely to take the best decision in the circumstances without being hamstrung by binding legal sources, fall by the wayside as it then gives way to the (classical) rule of law. Once there is an authoritative corpus of law – binding scriptural legal sources – decisions will no longer be present-determined as decisionism would want them to be. Then the past and the future will once again assume its importance for present decisions as the rule of law require them to be. Decisionism cannot be based on authoritative sources of law; on the contrary, it must avoid the authority of a scripturally-based corpus of law at all costs. Decisionism’s “sources” must be kept in obscurity until the moment a specific decision is required to be made. Only then the “law” is suddenly announced. And that announcement must be oral and it must strictly avoid citation of a scriptural source because such written source could serve as the authoritative basis for future legal decision-making, thus dislodging decisionism’s present-centredness. The point is that decisionism’s present-centredness implies oral-centredness and the accompanying aversion to and avoiding of an authoritative scriptural legal source in direct contrast with the Western (and Islam) legal cultures which are rooted in the authoritative scripts of the sovereign legal corpus.

The rule of law, regardless of how liberally defined, cannot accommodate decisionism. Decisionism lacks a normative basis and can never qualify as an alternative rule of law. The rule of law and

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71 The same holds true for constitutional adjudication. Even though it might be argued, that *stare decisis* does not apply in the same measure to constitutional matters, constitutional adjudication still requires that the courts adjudicating such matters must account for their decisions in terms of their previous decisions and reasoning. This is quite clear among others from South African constitutional jurisprudence on the question of *stare decisis*, as evidenced in dicta of judgments of the Constitutional Court cited in footnote 8.

decisionism are simply irreconcilable. In the final analysis there is no choice between various forms of rule of law – more in particular between a classical as opposed to a decisionist rule of law. The choice lies between the rule of law and as opposed decisionism.

## 8 A Clash of (Legal) Cultures and Cleft Constitutionalism

The rule of law might appear to be universal but it is not. Deutsch states that Western civilisation, or what he describes as the Western regions (all regions in the world where Western civilisation has established itself), unlike other world regions, has long-standing inclinations towards the rule of law. The rule of law is possibly the main distinguishing characteristic of the West.<sup>72</sup> Deutsch possibly went too far in this regard, because the notion and consequences of the rule of law have in fact been known to some other cultures. (See the observations by Fukuyama referred to in 2 *supra*). The rule of law does, however, appear to be more refined, advanced and incorporated in Western systems of government. Allowing thus for some exceptions, there is hardly any rule of law-based tradition elsewhere in the world. In its strength, depth and existence over many centuries the Western tradition of the rule of law, despite its breaches and exceptions, is unique.<sup>73</sup> Yash Ghai states that the rule of law has become part of the political and cultural tradition of the Western state, deeply rooted in its organic growth. He emphasised that it is not a universal principle.<sup>74</sup> It has distinct traits. It places the emphasis, as the discussion in 2 *supra* shows, on written law or precedent and it is distinct from equity, religion, expediency, morality and custom. In this tradition as the discussion on the rule of law in 2 *supra* shows law is independent: it exists in an independent corpus of legal sources distinct from other means of controlling social behaviour.<sup>75</sup> In his widely discussed *The Clash of Civilizations and the Remaking of World Order*<sup>76</sup> Huntington also argues that the rule of law is one of the distinguishing features of Western civilisation,<sup>77</sup> which, together with a number of other characteristics, constitutes the essential continuing core of Western

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72 Deutsch 73-74; Also see Watkins *The Political tradition of the West* (1957) 8-9 who describes what he calls *legalism* is a distinguishing feature of the West.

73 Deutsch 75.

74 Ghai "The rule of law, legitimacy and governance" 1986 *Int J of Soc of L* 184.

75 Berman (*op cit*) describes in detail the historical emergence of the particular legal tradition in the West since the latter part of the eleventh century.

76 Huntington *The Clash of Civilizations and the Remaking of World Order* (1998).

77 The others are the separation of spiritual and temporal authority, the rule of law, social pluralism, representative bodies, and individualism. Some of these characteristics were not always strictly adhered to and they have not consistently been absent in other cultures. However, the combination of these characteristics has been more prevalent in the West than in any other civilisation. See Huntington 70-72.

civilisation.<sup>78</sup> Huntington also suggests, without discussing it in detail, that there might be a distinctive sub-Saharan (legal) culture. Arguably South Africa more than any other place on the African continent, is the theatre where these two cultures meet and where they may be clashing. Could it possibly be that the conflict between the (classical) rule of law and decisionism suggests something of this clash?

But what about the South African constitution, one may ask. Have the foundational values, more in particular the value of the rule of law in section 1, not pre-emptively settled the *civilisational* question (in Huntington's phraseology) in favour of Western legal culture? After all, as indicated at the beginning of this article, there was no controversy about this and everyone seemed to have agreed that the rule of law was to be one of the foundational constitutional values and also on what it signified. The discussion of the rule of law, as opposed to decisionism, has shown that the question was in fact not settled at all. Elsewhere in Africa, as Yash noted, African states have been created in the image of the West, with national constitutions, bureaucracies, legal systems and Western ideologies of the law.<sup>79</sup> Mazrui specifically highlights the hegemonic and repressive impact of the European languages on African constitutional law. African constitutional law, he said, is almost entirely Eurocentric in the linguistic sense precisely because of the excessive centrality of the imperialist languages.<sup>80</sup> South Africa is not different. Not only is the South African state, like other African states, an inheritance of colonial policy, but the constitution itself is also construed in the image of the notions, structures, processes and parlance that originated and developed in the West. The rule of law is one of these notions. The whole constitutional discourse is conducted and articulated in this Western-based parlance. The constitutional discourse (if not constitutional practice) in South Africa has always been conducted in this parlance. The constitutional transition in 1994 did not bring an end to this.

The (overt) constitutional discourse has been conducted in Western-based constitutional parlance. This also holds true for the jurisprudence of the Constitutional Court. However, this does not imply that there are not (covert) notions alive which are at loggerheads with the principles underpinning the Western-based discourse; on the contrary, the Western-based discourse does have challengers. Decisionism appears to be a challenger and most probably has always been. It was a challenger in 1996 when the constitution was adopted and when the rule of law was accepted as one of its foundational values. However, it is a voiceless challenger and often not articulated in express terms as those set out in 5 *supra*, the reason being that challengers such as decisionism have found it hard to articulate itself under the stifling yolk of the hegemony of the Western-based legal and constitutional discourse. This linguistic hegemony is much more pervasive than visible legal structures and

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78 Huntington 72.

79 Ghai 1986 *Int J of Soc of L* 184 196.

80 Mazrui 62.

procedures (which are also imported or imposed from the West). This hegemony provides the sole linguistic framework for participating in our legal and constitutional discourse.

Those who are not steeped in this tradition of the rule of law and who might experience discomfort or disagreement with it could find it difficult to express themselves because of the absence of an appropriate legal parlance of which they could avail themselves to articulate any alternative legal view that they may hold. This lies at the root of the problem experienced by supporters of decisionism. Lacking its own parlance, it is manipulated into an awkward position to remain silent and not even try to put across its own point of view. This silence may be interpreted as full agreement with the opposing view based on the (classical) rule of law.

Alternatively, when decisionism is articulated, it is articulated in the hegemonic parlance of the classical rule of law. As the discussion in 6 *supra* has shown, this is an impossible task because the legal parlance designed to serve the classical rule of law cannot also be employed to give expression to the unknown, variable, if not secret, content of some or other principle masquerading as a rule of law. This “principle”, which is essentially different from the rule of law is never openly articulated. Its fundamental premises are never revealed, debated or defended. If they do exist, they are safely guarded in obscurity.

Based on the present discussion there appears to be severe clash on the constitutional value of the rule of law in South Africa. This conflict was in all likelihood already present when the Constitution was passed in 1996. However, it was covered underneath the seemingly common constitutional value system provided for in section 1 of the Constitution couched in the hegemonic terms of the Western-based constitutional parlance. This created the impression of universal consensus on values such as the rule of law. But now, a decade and a half later, the second generation factor (in Huntington’s words) is starting to take effect. The fault line that has always been there is now emerging.