Studying legal history through courtroom architecture: scattered comments on the Palace of Justice, Church Square, Pretoria

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In this article the author argues that the Palace of Justice is a rich source for the study of South African legal history. He demonstrates how both President Paul Kruger and Chief Justice John Kotzé attempted to exploit the design and construction of the Palace of Justice in order to strengthen their own positions in the Republic. He also goes on to show how Sytze Wierda, the Chief Architect in the Department of Public Works and designer of the Palace, struggled to protect the integrity of his own architectural design. The author concludes that Kotzé’s confrontations with Wierda about the design of the Palace are unique in South African legal and architectural history, and is paralleled only by the time and energy recently invested by Constitutional Court judges, most prominently Albie Sachs, in the design and construction of the new Constitutional Court building in Braamfontein.

Ukufunda umlando wezomthetho ngokubeka ukungcwele bokwakhiwa kwenzindlu zaseenkantolo: ukuphawula okusabalele ngenkantolo eyaziwa ngokuthi yiPalace of Justice, eChurch Square, ePitoli

Kulo mbhalo ovusa isasasa, umbhali ubeka ukuthi iPalance of Justice ingumthombo onothile okungafundwa ngawo umlando wezomthetho waseNingizimu Afrika. Ukhombisa ukuthi ngabe uMongameli Paul

1 Paper delivered on 17 January 2003 at the University of Stellenbosch during the Bi-annual Conference of the ‘Southern African Society of Legal Historians.’
Kruger noMahluleli oMkhulu uJohn Kotze bobabili bazama kanganakani ukusebenzisa umklamo nokwakheka kwePalace of Justice ukuze baqinise izikhundla zabo eRiphabliki. Ubuye aqhubeke akhombise ukuthi uStyze Wierda, okwakunguchweshe omkhulu kwezokwakhiwa kwezinidlu eMnyangweni wezimebezeni kaHulumeni, nowaklama iPalance, wazabalaza kanjani ukuvikela isithunzi somklamo wakhe waleso sakhwo. Umbhali uphetha ngokuthi ukungqubuza na kukaKotze noWierda mayelana nokukla nywa kwePalace, akukho okufana nakhoko emlandwini wezomthetho nowokwakhiwa kwezakhiwo eNingizimu Afrika, futhi un gamane uhambisekane kuhle sa nesikhathi namandla okusetshenziswe ngamajazi eNkantolo yoMthetho sisekelo, okuvelile kuvu u Albie Sachs, ekuklanye nasekwa kweZimbabwe eni kwezakhiwo esisha sENkantolo yoMthetho sisekelo eBraamfontein.

1 Introduction

The first court sitting in the Palace of Justice on Church Square in Pretoria took place on 9 May 1902. It was an event that brought to a close a decade of heated debate, violent struggle and eventually even war over the rule of law in the South African Republic (ZAR). At the centre of this struggle stood the question of the status, power and independence of the Supreme Court and its judges (much as the rule of law and the independence of the courts are today burning issues in the debate about Zimbabwe’s political future). The discovery of gold in the late 1880s brought the forces of Afrikaner nationalism, British imperialism, white capitalism and black labour into conflict for the first time. It was in the ensuing years that the foundations of the South African legal order were laid out. The struggle about the status of the court was nothing but the first disagreement about the best way to manage the forces which were to shape the legal history of colonial and apartheid South Africa for decades to come.

The two strong willed protagonists of the struggle were President Paul Kruger and Chief Justice John Kotzé. It was not long, however, before Sytze Wierda, the Chief Architect of the Department of Public Works and designer of the Palace of Justice, became embroiled in the politics surrounding the court and its powers. On the one hand, Kruger and Kotzé both attempted to exploit the design and construction of the Palace of Justice in order to strengthen their own positions in the Republic. Wierda, on the other hand, struggled to protect the architectural integrity of his design. The finished product bears the marks of this three way power struggle. To this day the architecture of the Palace of Justice tells an important story about the conflicts and politics built into the foundations of South African law. It is a rich source for the study of legal history.

2 Sir John Gilbert Kotzé and the politics of law reform

2.1 The background to the legal reforms of the 1890s

John Kotzé first arrived in Pretoria in the autumn of 1877 as a highly ambitious

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2 Adolph Landman ‘A Palace in the veld the centennial anniversary of the Palace of Justice’ 9 May 1902 2002 Advocate 32.
3 Martin Channock The making of South African legal culture 1902 1936: Fear, favour and prejudice (2001) situates the foundational period slightly later, in the years immediately following the South African War. The important point is that Channock refuses to place the foundation of South Africa’s legal past in Rome and Renaissance Europe (xi).
27 year old lawyer.\textsuperscript{4} He had been invited there by President Burgers and hoped he would soon be sworn in as the first Chief Justice of the South African Republic. Kotzé discovered that a system of lay justice was in force throughout the Republic. The landdrots (‘magistrate’) of Pretoria was a builder by trade and the State Attorney was a doctor in divinity. The courts’ accommodation was in no better position. Even the Hoog Gerechts hof van Landdroste (the Supreme Court of those days) frequently heard cases in a thatched roof building with white washed dung smeared walls. The state of the administration of justice in the South African Republic of the 1870s was, in the words of Ellison Kahn, ‘a lay judiciary at its worst, Jacksonian democracy at its lowest ebb’.\textsuperscript{5} While Kotzé was struck by the common sense of many of the illiterate magistrates, he harboured great reservations about the competence, independence and status of the judiciary which he encountered on his arrival in the Transvaal. After the British annexation of 1877 (justified in part as an attempt to counter the inherent weakness of the Republic and restore the image of the white race in the eyes of the savage warlike tribes of Africa), Kotzé energetically set out on an extensive programme of law reform. It was Kotzé’s zeal to refashion the power and public image of the republican judiciary which eventually brought him into direct conflict with Kruger and Wierda nearly 20 years later.

Kotzé’s first reforms were restricted to a number of measures to improve the competence of the judiciary and the legal practitioners.\textsuperscript{6} In place of the old Supreme Court constituted of lay magistrates, a High Court was created, staffed by judges who had to be legally qualified. Legal practitioners were forced to specialise and were divided into a Bar and Side Bar. Only qualified attorneys and advocates could join the profession. A law library was created and judgments of the High Court were soon published in a set of law reports. If the personnel doing service in the courts of the Republic underwent rapid and much needed professionalisation, little seems at first to have changed as far as the court buildings were concerned. The new High Court held its first session in the Old Raadsaal, and or the ‘barn parliament’ as it was known in the English press on 22 May 1877.

The professionalisation of the legal fraternity was hugely successful and seems to have satisfied, for the moment, Kotzé’s aspirations to become Chief Justice (which he became on 8 August 1881, after the triumvirate of Boer leaders had once again assumed administration of the Republic). Thus, when he was invited in 1884, in the case of Executors of McCorkingdale v Bok,\textsuperscript{7} to extend the Supreme Court’s existing powers and exercise constitutional review over the actions of the Volksraad (legislature), Kotzé saw no need for such a development and declined the invitation.\textsuperscript{8}

The discovery of gold on the Witwatersrand a few years later, and the rapid industrialisation of the South African

\textsuperscript{4} The best description of Kotzé’s experiences in the old Transvaal can be found in John Kotzé Memoirs and reminiscences: Volumes 1 and 2 (1955).
\textsuperscript{5} Ellison Kahn ‘The history of the administration of justice in the South African Republic: Part 1’ 1958 SALJ 294 at 309.
\textsuperscript{7} (1884) 1 SAR 202.
\textsuperscript{8} For a discussion of the Autilian philosophy which informed Kotzé’s decision see Derek van der Merwe ‘Brown v Leyds recalled: what does a constitution constitute and what constitutes a constitution?’ 1995 THRHR 661.
Republic presented the administration of the state with new challenges. The political oppression of the *uitlander* 'foreign' community, increasing executive high handedness and, finally, a bribing scandal involving a leading judge, led Kotzé to rethink the position and status of the Supreme Court in the Republic. He now came to understand that the reform project he launched in 1877 had to be extended and intensified. The rights of minorities without effective political representation had to be actively protected by the court. The legitimacy and thus the political future of the Boer Republic demanded that the minorities had to be given some constitutional protection and that the independence of the court in the eyes of the world had to be established and maintained. To achieve these dual aims, Kotzé felt it was imperative that his court assumed powers of constitutional review over the actions of the Volksraad (the legislature) and of the heavy handed, executive minded President Kruger.

Kotzé’s new vision for the Supreme Court implied a dramatic shift of power in the Republic and required fundamental constitutional and political reforms. Kotzé initially ventured to bring about these reforms by standing as a candidate in the 1893 presidential elections, without resigning as Chief Justice. He suffered a humiliating political defeat. This forced him to rethink his strategy. While the re-elected President Kruger busied himself with the growing *uitlander* (‘foreigner’) problem, Kotzé set out to use his influence and position on the bench as Chief Justice, to unilaterally bring about the political and constitutional reforms he desired. To this end, he exploited both the legal doctrines his court was applying and the architectural design of the building which was to house his court.

### 2.2 Kotzé’s manipulation of constitutional doctrine

Kotzé immediately set out to revisit the doctrinal position of the court on the question of its powers of constitutional review. At first, tentatively in the form of a number of obiter dicta, but later boldly and decisively in the case of *Brown v Leyds*, Kotzé held that the Supreme Court indeed had the constitutional power to test both the form and the content of Volksraad decisions and to declare those decisions, if found wanting, invalid. Understandably, Kotzé’s unilateral constitutional reform met with fierce resistance. The Volksraad adopted legislation requiring Kotzé and the other judges, on pain of dismissal, to renounce their power of review and accept the Volksraad as the highest authority in the Republic. When Kotzé insisted on exercising the power of review he abrogated for himself, he was summarily dismissed as Chief Justice by President Kruger. This dismissal poured oil on the fire of the *uitlanders* and contributed directly to the outbreak of the South African War a year later. After the war, Kotzé’s doctrinal position fell out of favour.

Kotzé tried once more, at the National...
Convention before unification in 1910, to raise the issue of a powerful constitutional court with extensive review powers. Again his idea found little support. Kotzé had become his own worst enemy. Years later, at the height of apartheid, John Dugard would still blame Kotzé’s unilateral attempt at constitutional reform for the South African aversion to judicial activism. It was only in 1994, when the Interim Constitution granted the judiciary in South Africa extensive powers of constitutional review, that Kotzé’s doctrinal position on the matter was finally vindicated.

2.3 Kotzé’s manipulation of courtroom architecture

If Kotzé’s understanding of the nature of constitutionalism was ahead of his time, the same can be said of his understanding of the power and importance of courtroom architecture in the establishment and symbolic maintenance of a legal system. From the outset Kotzé realised that the new powers he envisaged for his court had to be backed up by more than sound legal arguments (such as there were). The new status and independence of the Supreme Court in the Republic had also to be supported symbolically. The design and construction of the Palace of Justice became a key element of Kotzé’s political and legal aspirations. He knew very well that in the frontier republic, with its largely rural and unqualified population, law impressed itself on the mind of the citizens, not in the form of well-known documented rules, but as a rich network of images and symbols. Law reform entailed the manipulation of these symbols just as much as it entailed changes to the content of the law.

Kotzé’s involvement in the design and building process of the Palace of Justice started even before the building was conceived. The Volksraad decided in 1892 to terminate the lease agreement for the building in which Kotzé and his judges were accommodated, and to relocate the Supreme Court to the newly completed Raadsaal on Church Square. The intention was, it seems, to unite all three branches of government under one roof, increasing the possibilities of centralised control under a powerful executive president. Kotzé, with the help of the Bar and Side Bar, immediately objected to the decision, claiming that it would adversely impact on perceptions regarding the independence of the court. The resistance by the legal community was successful and stayed off the implementation of the initial decision. When the issue of the lease agreement was raised again a year later, Kruger informed the Volksraad that he had instructed Wierda, the Chief Architect of the Public Works Department, to draw up plans for a new Supreme Court building on Church Square. Kotzé thus secured his first victory: a separate building for the Supreme Court on a prominent site on Church Square, directly opposite the Raadsaal. Kotzé must have hoped that the site of the new building would visibly confirm the important place his court was increasingly assuming in the constitutional affairs of the South African Republic.

Buoyed by this success, Kotzé made his presence felt once more when Wierda first submitted his design for the proposed new court building. The judges unanimously rejected the plans

14 John Dugard ‘Legal milestones (9) Chief Justice versus President: does the ghost of Brown v Leyds NO still haunt our judges?’ 1981 De Rebus 421 at 422.
15 The architectural history of the Palace of Justice is discussed by Landman (op cit) and D Holm and A Holm ‘Paleis van Justisie Kerkplein, Pretoria’ 1984 Restorica 9.
and suggested that a building commission should be appointed to assist Wierda and his department with the finalisation of the design. Kotzé’s aim was apparently to ensure that no further architectural expertise would be available for the project. The commission which was eventually appointed consisted exclusively of leading members of the legal community. The intention behind Kotzé’s move, it would seem, was rather to secure the further hold of the legal community, headed by himself, over the design process of this key symbol of law in the young republic.

While the commission did make some helpful comments about the operational requirements of the court rooms and their administration, it soon became clear, as was suggested above, that they had bigger aspirations for, and interests in, the proposed building. After a set of plans had finally been approved, and with Wierda and his staff working feverishly to complete the tender documents, the plans were suddenly recalled by the commission. The commission explained that they had come to the conclusion that the style and façade of the proposed building did not do justice to the status and prestige of the Supreme Court. The commission suggested that the building be re designed in the style of the Old Dutch Renaissance, as it had found expression in the Ministry of Justice building in The Hague a decade or so earlier. In support of their proposal, the commission cited the fact that the Roman Dutch law was in force in the Republic. The legal community thus wished to purchase instant status for the law and legal administration in the Republic by citing the Dutch doctrinal and aesthetic traditions as reference points.

Wierda was understandably upset by this attempt of the legal fraternity, through the commission, to manipulate the architectural design of the Palace of Justice in this overtly political fashion. He urgently met with the commission and insisted that the Dutch Renaissance
style was inappropriate for the South African Republic, not least because it was too expensive. Wierda’s compromise was what he called the Italian Renaissance style. This style was cheaper, he suggested, but at the same time capable of fully expressing the status and dignity of the Supreme Court. Wierda’s compromising realism about the style and façade of the building prevailed. This was not the end of the struggle between him and the Chief Justice, however.

Kotzé also exerted pressure on Wierda as far as the interior design of the building was concerned. Wierda designed the office space in the building in such a manner that it could also house other state departments. When Kotzé was informed of this fact, he again objected to Kruger that the administration of justice and the independence of the court would be severely compromised if the judiciary was not housed in a separate building. Once more, the Kruger administration backed off, assuring Kotzé that the building would be reserved for the exclusive use of the Supreme Court and its staff.

This is not to say that Kotzé’s efforts to further his own aspirations through the design and construction of the Palace of Justice went by unchallenged. A clear indication of an attempt by Kruger to downplay the symbolic significance of the new building can be found in the crisis surrounding the laying of the cornerstone. Shortly after Kotzé had delivered his judgment in Brown v Leyds, and while he was on leave, the Kruger administration gave notice that the ceremony would be performed by the Commander General. All the judges of the court objected and insisted that the ceremony should be performed by either the State President or the Chief Justice himself. The power struggle between Kotzé and Kruger about the status and design of the new building resulted in Kruger himself laying the cornerstone on 8 June 1897.

Kotzé’s attempts at manipulating the architectural design of the Palace of Justice into the symbolic supplement to his doctrinal reforms received a death blow when, shortly after his dismissal as Chief Justice in 1898, a decision was suddenly taken to add a third floor to the partly completed court building. The decision was in all likelihood initiated by President Kruger and taken in order to alleviate the acute shortage of offices in the republican civil service. The decision clearly constituted a breach of Kruger’s earlier undertaking to Kotzé that the building would be reserved exclusively for the administration of justice. With Kotzé no longer around to drive the issue of the Supreme Court’s status and independence, the addition of the third floor severely compromised his dream of a building in an appropriate style, exclusively devoted to the administration of justice, and symbolically supporting the authority of the Supreme Court. Not only did the third floor invite other state departments into the space Kotzé wished to reserve for his court, but it also disrupted the balance of the façade, resulting in what appears to many as an eclectic mix of elements without any integrating context.\(^\text{16}\)

3 Conclusion

Kotzé’s reform project thus ended in miserable failure. On the one hand, he did not succeed in bringing about the important doctrinal reforms he believed to be essential for the protection of minorities in the face of Boer political supremacy – a Supreme Court with extensive power of substantive and procedural review. On the other, he

\(^{16}\) Holm and Holm (op cit) 12.
failed to secure the architectural design for the Palace of Justice which would symbolically support a court exercising those powers. The fact that Kotzé failed should, nevertheless, not detract from the lasting importance of his far reaching insight into the politics of law reform. It has already been mentioned that Kotzé’s understanding of the importance and nature of constitutional government has been vindicated by post-apartheid democratic developments. What about his insight into the power and importance of the images and symbols of law, and in particular the architectural design of court buildings as an expression of the nature of a legal culture?

Kotzé’s confrontations with Wierda about the interior and exterior design of the Palace of Justice are unique in South African legal and architectural history. It is paralleled only, if at all, by the time and energy recently invested by Constitutional Court judges, most prominently Albie Sachs, in the design and construction of the new Constitutional Court building in Braamfontein, Johannesburg. Taking a leaf from Kotzé’s book, the architectural design of the new court building is rightly understood to be of decisive symbolic significance for the post-apartheid project of law transformation. It is an attempt to dramatise physically the move in South African jurisprudence away from a culture of authority to a culture of democratic dialogue and persuasion. The success of the attempt can be measured when the neo classical style of Kotzé’s Palace of Justice is compared with the style of the new Constitutional Court building. The first is an expression of self contained and eternal authority, captured by aspirations to perfect symmetry in which all the different elements of the design are dominated by an overall harmony. It is the architecture of centralised power and legal authority. The second celebrates the vibrancy, body and variety of street life, which is invited into the building through the dynamics of the design of its outer walls. It is the architecture of diversity, dialogue and persuasion.

An interesting feature of the post-apartheid legal order is that these two conflicting courtroom aesthetics remain in force next to each other. The result is what could be called architectural dissonance – a tension between the new democratic legal and political culture and the old authoritarian public buildings in which this culture is supposed to flourish. Thus one finds that a project for the restoration of the Palace of Justice on Church Square neared completion as construction of the new Constitutional Court building on Constitutional Hill got under way. How can the radical break with the past, which the interim Constitution of 1994 announced, be effected in places where the older legal culture remains inescapably and literally cast in stone? What is the effect of this seemingly intractable contradiction within the post-apartheid legal culture between the intellectual content of the law, and its more popular and established forms of symbolic expression?

These questions have received very little attention from South African legal historians, most of whom still labour under the influence of rule formalism with a strangely Romanised version of South African legal history. This explains why Sir John Kotzé has largely been celebrated by legal historians as an eminent Roman Dutch scholar whose

scientific approach to the common law deserves to be emulated.\(^\text{19}\) In the same light, the administration of justice in the South African Republic during the last decades of the nineteenth century has been celebrated as a victory for the intellectual dignity and worth of Roman Dutch law in the face of British imperialism. It is not surprising that this historiography presents the Palace of Justice as a monument to the value of the Roman Dutch legal heritage of the early republican Afrikaners, a monument defying the military defeat of the Boer Republics at the hands of the British.\(^\text{20}\)

Contrary to this historiography, it is submitted above that Kotzé was also a champion of a controversial (at least in his immediate republican context) liberal version of judicial activism and constitutional government. It is also submitted that Kotzé’s true worth lies in his insight, not into the science of law but into the aesthetics of law. This insight has left a court building in which the latent tensions between liberalism and republicanism are clearly marked out. From this perspective, Kotzé was not simply a champion of Roman Dutch legal science and the Palace of Justice is nothing like an unequivocal monument to a lost (and to be restored) Afrikaner cultural heritage. It was and remains the site of political struggle and dissonance.

\(^{19}\) R Zimmerman and P Sutherland ‘A true science and not a forged one’ J G Kotzé (1849–1940) Chief Justice der Südafrikanischen Republik (Transvaal)’ 1999 Zeitschrift der Savigny Stiftung für Rechtsgeschichte 147 194.

\(^{20}\) This, at least, is how André van der Walt ‘Un-doing things with words: the colonization of the public sphere by private property discourse’ 1998 Acta Jurídica 235 at 280 understands the restoration project of the Palace of Justice.