BOOK REVIEW

Cora Hoexter and Morné Olivier (eds) The Judiciary in South Africa (2014)

This is such a good book that I have two copies: one in my office and the other one at home. One I consult for solid, current scholarship on the judiciary, the other I simply read for pleasure. My reading an academic work as entertainment (I confess I seldom or never do this) may well be irrefutable proof that I have succumbed either to middle age, middle-class pretentiousness or academic eccentricity. On the other hand, as I console myself, it really is a very good read. Not only because the elegant and eloquent writing so clearly bears the hallmarks of the (in)famous Hoexter editorial hand, but few lawyers can remain indifferent to the intriguing questions of who gets appointed to which bench, who hands down which judgments on which political issues and who agrees or disagrees with whom. The book concerns both the salacious subjects of daily legal gossip around the tea urn and the complicated, contested and serious issues which are crucial to the future of the country.

As the contributing editors note in their introduction, the pervasive sense of tension and the barely concealed animosity in statements by politicians and media reports on the relationship between members of the judiciary and the executive in the past decade has meant that ‘there had never been a more opportune time to start working on a book about the South African judiciary’. Lawyers seem to share the uneasy sense that this is a crucial time which will determine, not only the future of our judicial institutions, but of our democratic project. For this reason, I really appreciated the parts of the book setting out the history of the judiciary. Despite my unpleasant memories of wading through the history of our courts as a student (education is indeed wasted upon the young), I needed to be reminded that in a sense our judiciary and our legal system have always been at the crossroads and that the courts have seldom chosen the high roads of humanity, courage and principle. The broad historical surveys of our judiciary and the recounting of specific incidents are gripping reminders of our despair about the dreadful state of the legal system in the 1980s and early 1990s. Take for instance the packing of the Senate in the 1950s, the almost universal judicial faintheartedness in the face of treason trials, detentions without trial and states of emergency – found in many chapters, particularly in Christopher Forsyth’s chapter on the judiciary under apartheid and the first part of Hoexter’s chapter on the structure of the courts. Placing our current troubles within their historical framework is an essential reminder of how far our institutions have come and how precious our gains are.

Happily, this sense of context does not, however, turn this book into an uncritical celebration of our nation’s rainbow jurisprudence or the splendour

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of its institutions. When writing about contemporary events which involve sitting judges, it can be quite difficult to maintain a balance between, on the one hand, being polite to the point of blandness or, on the other hand, being blunt to the point of rudeness. The authors of the various chapters are respectful, but eloquent and straightforward in freely and frequently expressing criticism on many points. Hugh Corder, for instance, comments that the Judicial Service Commission (JSC) in Judge-President Hlophe’s matter ‘has betrayed a degree of incompetence as well as an arrogant pursuit of political interests by the majority in the JSC’. Hoexter’s comment on the Seriti Commission of Inquiry on the arms deal, that ‘[o]ne can only wonder what further notoriety will attach to the commission by the time it makes its report – and what damage may have been done to the judiciary and to public perceptions’, speaks of a degree of clairvoyance in addition to robust comment.

Situated within the context of our less than glorious legal history, a central theme of the book is the transformation of the judiciary and other legal institutions. Several chapters are devoted to this theme, including excellent contributions on transformation of the judiciary and the administration of the judicial system. The much discussed issues surrounding judicial appointments and failures to appoint particular people, and the unfinished disciplinary matters involving Judges Hlophe and Motata are covered soberly in the chapters on the JSC, the selection of judges and judicial accountability. These issues remain fascinating despite, or perhaps because of, the time which has since elapsed. The chapter by Catherine Albertyn gathers the themes of these chapters together by situating the theoretical discussion of judicial diversity in the appropriate historical background. These contexts explain the importance of race in the debate on judicial transformation, even as Albertyn cautions against essentialism and argues for a richer and more complex notion of judicial diversity which would contribute ‘a variety of perspectives and experiences to the task of adjudication and in doing so assist individual judges to confront and overcome their particular and partial ideas and assumptions’.5

Possibly my favourite chapter, however, concerns those ‘poor relatives’ of the more glamorous High Court judges, the magistracy, written by Morné Olivier. Not only are they more numerous than High Court judges and hear the vast majority of cases in our courts, but magistrates represent, for most of the population, the only face of law with which they will ever interact. Their hybrid roles, blurring the functions of judges and civil servants can be traced back to the 17th century ‘landdrosten’ and ‘heemraden’. As courts of appeal for certain customary decisions, magistrates’ courts operate at the interface between customary and civil law. Together with their geographic location throughout the country and their historical function as lower order criminal courts, these courts serve the largest numbers of people and probably those

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2 Ibid 219.
3 Ibid 303.
4 Ibid 266.
5 Ibid 320.
most in need of justice. Nevertheless, magistrates are seldom the subjects of academic study, public interest or press coverage.

Neatly juxtaposed with the account of the overworked foot soldiers of the law is the chapter on the Constitutional Court by Hugh Corder and Jason Brickhill, particularly enjoyable in its revelation of arcane information such as the duties and working lives of the judges’ multiple clerks, along with more well-trodden material on the court’s internationally celebrated jurisprudence and its relationship with other branches of government. I can’t help wondering whether similar amounts of money, effort and public concern spent on the magistracy would not yield equally worthwhile results.

Read this book.

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