

# Judicial Education and Training

Journal of the International Organization for Judicial Training

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# JUDICIAL EDUCATION AND TRAINING

Journal of the International Organization for Judicial Training

## MISSION

The journal *Judicial Education and Training* publishes topical articles on the education and training of judges and justice sector professionals around the world.

This journal aims to stimulate a community of learning in judicial education by showcasing selected papers presented to the biennial conferences of the International Organization for Judicial Training (IOJT). Additionally, it solicits original research, practical experience, and critical analysis on issues and trends in judicial education. It also provides a medium for informed discussion, the exchange of professional experience, and the development of knowledge in judicial education for a global readership.

Contributions are invited from chief justices and senior judges, judicial educators and academic researchers with an interest in this field. Earlier issues of this online journal may be found at:

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# JUDICIAL EDUCATION AND TRAINING

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# Contents

Introduction	7
Working together for the rule of law: practical partnerships across borders for strategic and sustainable judicial training <i>Sir Robin Knowles, CBE</i>	9
The dark side of artificial intelligence: challenges for the legal system <i>Willem Gravett</i>	13
Artificial intelligence: a paradigm shift in legal norms and the impact on judicial training <i>Brian Spilg</i>	29
Social media and judicial training <i>Cagney John Musi</i>	47
Judicial training challenges — over-abusive use of social media <i>André Gustavo Corrêa de Andrade</i>	57
The communication policy of a judicial training institution <i>Maxime Antier</i>	63
Institutional actors in globalised society: the role of judicial schools, ENAMAT and its training axes <i>Luiz Philippe Vieira de Mello Filho, Augusto César Leite de Carvalho, Giovanni Olsson</i>	69
Evaluating the impact of training on judicial practice in the Netherlands <i>Bastian de Jong, Frank Cornelissen, Joost Jansen in de Wal, Remco van Tooren</i>	77
Interprofessionalism in judicial training <i>Oliver Leurent</i>	91
Public confidence in the judiciary: a South African perspective <i>Chris Oxtoby and Matthias Krönke</i>	99



# Introduction

## Introduction

The 7<sup>th</sup> edition of *Judicial Education and Training: Journal of the International Organization for Judicial Training* reproduces a number of papers presented at the 9<sup>th</sup> International Conference which was held in Cape Town, South Africa, 2019, with the theme of “Judicial training: a key to successful transformation of the judiciary.”

The IOJT was established in 2002 to promote the rule of law by considering common issues for the training and education of judges, promoting and advancing cooperation among judicial training institutes, and facilitating the international exchange of information. The first article, by **The Hon Justice Sir Robin Knowles, CBE**, focusses on how to promote the rule of law through sharing expertise with other jurisdictions, and explores practical partnerships across borders, providing examples of strategic and sustainable judicial training.

The development of artificial intelligence (AI) has the potential to transform lives and work practices, raise efficiency, savings and safety levels, and provide enhanced levels of services. Our second article by **Dr Willem Gravett**, of the University of Pretoria, discusses the current trend towards developing smart and autonomous machines, with the capacity to be trained and make decisions independently. While this trend has economic advantages, there are a variety of concerns regarding their direct and indirect effects on society as a whole. This paper examines some of these concerns, specifically in the areas of privacy and autonomy, State surveillance, and bias and algorithmic transparency. It concludes with an analysis of the challenges that the legal system faces in regulating the burgeoning field of AI.

The third article, by **Judge Brian Spilg**, advocates a significant departure from conventional methods when dealing with artificial intelligence (AI) training. It also argues that the methodology to achieve this requires both a departure from simply extending or adapting existing legal norms and principles within the area of law where an AI issue arises, and also the need to discern whether the case in fact involves an AI issue.

**Judge Cagney Musi**, in the fourth article, discusses the different training methodologies and suggestions of the best strategy to follow in training judges as a result of the exponential increase in social media platforms. The article illustrates, by way of a few examples, how South African courts have harnessed social media platforms in the interests of justice.

The abusive use of social media is the focus of our fifth article by **Judge André de Andrade**. New problems created by social media are discussed, including those created by fake news, the use of bots and hate speech, all of which have the potential to be a serious threat to democracy due to their influence. It is therefore the responsibility of the judicial schools to conduct training courses to help judges deal with these problems involving the protection of individual and collective rights, and the civil and criminal liability of internet service providers and users of social networks.

To fully play its role in the rule of law, as well as providing basic teaching on communication, a judicial training school must communicate as an institution. In our sixth article, Chief of Staff to the Director of the French National School for the Judiciary (the ENM), **Mr Maxime Antier**, draws on the French experience at the ENM regarding its development of a proactive

communication policy. Examples are provided of how the EMN judicial training institution deals with communication in order to provide opportunities as well as giving it considerable leverage over its own development.

In the context of a globalised and highly complex contemporary society, with growing conflicts and great interdependence of transnational social, economic, political and legal matters, judicial training schools must act as authentic institutional players. In our seventh article, **Justice Luiz Philippe Vieira de Mello Filho, Justice Augusto César Leite de Carvalho** and **Judge Giovanni Olsson** describe how ENAMAT, based in Brazil, has been promoting changes in the focus of its professional development, emphasising the dimensions of ethics and alterity as necessary guidelines for professional training for the Brazilian magistrate.

Every year, large amounts of money and time are spent on training activities to improve the quality of the judiciary. However, the evaluation of training practices rarely includes an evaluation of the impact of the training on work practice. In our eighth article **Bastian de Jong, Bastian de Jong, Dr Frank Cornelissen, Dr Joost Jansen in de Wal** and **Remco van Tooren** present their findings in their evaluation of the impact of training on judicial practice in the Netherlands.

Our ninth article addresses one of the strong trends among the changes taking place in the training of the judiciary in France: the development of interprofessionalism in training courses. The author, **Mr Oliver Leurent**, is Director of the French National School for the Judiciary (the ENM). The ENM has organised many interprofessional training sessions and courses, with diverse themes ranging from forensic medicine (judges and prosecutors/doctors) to interprofessional ethics (judges and prosecutors/journalists/lawyers) and reflection on the digital dimension of the law with lawyers and business law specialists. This article focusses on the theme of counter-terrorism.

Despite the importance of public confidence in the judiciary, relatively little research has been done by legal scholars to explore what levels of public confidence in African judiciaries actually are, and what might inform these views. In our final article, **Chris Oxtoby** and **Matthias Krönke** aim to offer some thoughts on this issue by analysing data from Afrobarometer public opinion surveys relating to public confidence in the judiciary in South Africa.

**Ernest Schmatt AM PSM and Dr Rainer Hornung-Jost, Joint Editors-in-Chief**

# **Working together for the rule of law: practical partnerships across borders for strategic and sustainable judicial training**

Sir Robin Knowles, CBE\*

## **Introduction**

The focus of this article, presented at the close of the 9th International Conference on the Training of the Judiciary, is on sharing expertise with other jurisdictions, and on working together to do this.

Of course we do share already; the IOJT stands testimony to that. Ideas, techniques and insights, have been shared, and each country will take those home and hopefully they will use them well.

This article goes further — it discusses countries deciding to work with one another. About actively training across borders. About concerted partnerships between two or three countries to help a third or fourth. In some ways about realising the full potential of IOJT.

This is because sometimes a country and its judiciary need more than the idea, technique or insight, or even the materials. They need another judiciary, or other judiciaries, to work alongside them.

This might be to help a country to develop its system for appointing judges. Or actively to help another country to tackle a serious problem such as delay or backlog, including by exploring enhanced case management possibilities. Or to assist a country to build its capacity in commercial dispute resolution, intellectual property cases or more. Or to work with countries on a cross border or global judicial issue — identifying victims of modern slavery is an example. Trying complex terrorism cases is another. Insolvency is a third. Enforcement a fourth.

## **Case management**

Looking briefly at case management, training in judicial case management is frequently a practical foundation for the contribution by one country to another. It has something to offer in every area of judicial endeavour. It can make judging in a new or difficult legal area more successful. It is absolutely central when the problem or part of the problem is delay in the system. It is a strength of focus on case management that work is required by the profession in addition to the judges. This author has yet to find a country, his own included, that does not have something to learn as well as something to teach about case management.

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\* The Hon Justice Sir Robin Knowles is a judge of the High Court of England and Wales, and Chairman of the International Committee of the Judicial College of England & Wales.

## **Training and resources**

Training of judges should be judge-led. That is wisely declared at Principle 9 of the IOJT Declaration of Judicial Training Principles,<sup>1</sup> and reinforced by Scotland this morning. To start with, any single country only has the judges it has. The whole point may be that a judiciary is trying to develop an expertise it does not yet have. We have discussed training the trainers but the trainers of trainers have to get their skills from somewhere. The point is that between us, as an international community of judges, we can identify and deploy and share the very best to help develop the expertise required. This is by and large a contribution that money cannot buy.

There is the question of resources. Resources are of course a practical constraint for us all. There is so much to do in our home countries. Is there really much left for other countries? However, it is almost always possible to contribute something within the resources available. If ever there was an area where you get out more than you put in, this is it.

There was wisdom in the observation from Brazil that lack of money encourages thinking outside the box. The more countries that join in, the more the load is spread between countries and between judges. The more the load is shared, and success is experienced, the readier judges will be to contribute from their own time. One thing is for sure and that is that limited resources means we cannot afford duplication of effort. Nor the inefficiency of leaving everyone to reinvent the wheel. All this points to working together.

Before leaving the subject of resources, this work does not always involve the time and expense of travelling from one country to another. That can help greatly, not least in building relationships and understanding. But it is only one means. Indeed it may be valuable to remind ourselves that when we talk of training, we do not mean simply the classroom. Training comprises all forms of interaction from which we can learn. That is why it is not just there for the young judge or the junior judge. A call from a mentor; an email of advice; catch-up by skype or shared materials; an exchange of decisions between courts; a film that prompts thought or a debate; an online discussion group; peer to peer dialogue; even those moments when judicial leaders exchange experiences or identify shared problems and pool knowledge to find a solution. These can all make a difference, always respecting independence, and different traditions and contexts. In their own way they are all part of training or learning.

## **Countries working together**

If one or more countries will actively help with training in another it is remarkable how one thing can lead to another. For example, we are in times when many countries wish to develop their commercial dispute resolution capability. It is a key to inward investment, as the World Bank points out with real clarity. Some observers might say to us, “but the priority is human rights. Tackle that first; commercial law can wait”. But it may be the business law engagement that will make the relationship and build the trust that can lead in time to the engagement on human rights.

The crucial thing is a starting point that will build trust and respect. Good teachers know that. Sometimes, with trust and respect built, and with care, the law can open the conversation on a difficult subject in a way that politics cannot. Sometimes it is the indirect path that is the strategic path.

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<sup>1</sup> See [www.iojt.org/~media/Microsites/Files/IOJT/Microsite/2017-Principles.ashx](http://www.iojt.org/~media/Microsites/Files/IOJT/Microsite/2017-Principles.ashx), accessed 28 January 2020.

The following are some examples of working together in the way and to the depth that should be considered.

First, a modest bilateral example from Sierra Leone. It sought assistance with judicial encouragement of mediation. Arrangements were made for its commercial fast-track judges to be paired with judges from the Commercial Court in London so that, for a period, examples from the day could be discussed online.

Second, a multilateral example from Central and South America. A number of countries expressed interest in developing an adversarial element to their criminal justice system. Some training began with judges from one country, Colombia. By the second year, Colombia had invited two others to join in the training. By the third year the first country, Colombia, was itself developing training materials. By the fourth year, the judges of seven countries were involved in the training.

The next example is a multifaceted one. The Standing International Forum of Commercial Courts (SIFoCC), the global forum of the world's commercial courts.<sup>2</sup> This is now 36 countries strong, with membership from every continent bar one. Last year SIFoCC commenced an intensive program of training for judges of countries introducing or developing commercial courts. In the first instance, judges nominated by the Chief Justices of Uganda, Sri Lanka and The Gambia sat with the Commercial Court in London for a week. Now Singapore has offered to host judges nominated from three other countries. Already the judges hosted in London are sharing with each other the ways in which they are applying some of the techniques they have learned. Peer-to-peer relationships were formed across The Gambia, Uganda and Sri Lanka. The latter was supported by a WhatsApp group. And in time we will have an increasing and self-sustaining alumni of those who have undertaken this training. Some early changes in practice by these judges were revealed to an audience of the judiciaries of all member countries of the Standing International Forum of Commercial Courts, meeting in New York. The audience included the Chief Justice of Iraq, who declared his interest in the training.

My last example follows The Gambia a little further. One of its judges is now a member of SIFoCC's first international working group on case management, co-chaired by the Chief Justice of Australia's Federal Court and a senior member of the Court of Appeal of England and Wales. A scoping visit at the invitation of its Chief Justice was followed by training by the Judicial College of England and Wales for all magistrates in The Gambia on case management and judicial reasoning and judgment writing. The Commonwealth Magistrates and Judges Association has worked as a partner. Law books and help with technology have both been delivered through other partners. As The Gambia prepares for its first inquests, the former Chief Coroner from England and Wales has delivered training and stands by as a mentor to the judges. And a first sentencing guideline has been facilitated, prepared and is being used. Relationships have built further and there is more to come.

Further examples could be provided from France to China, from Nigeria to South Korea, from Kazakhstan to the Phillippines, and more. But more importantly, you will be able to add examples too.

There are such powerful reasons to do these things, for all involved. As previously mentioned, getting out more than you put in. Time and again in this endeavour everyone learns. Every

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<sup>2</sup> See further at [www.sifocc.org/](http://www.sifocc.org/), accessed 28 January 2020.

teacher knows how much they learn from teaching. No law, legal system, or legal practice can stand still — we need to keep learning. And here is the opportunity. However, there are other gains too:

- More effective arrangements for cross border legal cooperation can result, including enforcement and in the fields of family law and crime and commerce.
- Morale can be raised in all participating judiciaries.
- Diversity can be enhanced, the diversity that comes from deeper understanding through experience of the world.
- Relationships between the judiciary and the profession can build, as well as those with the public.

Again you will be able to add to the list.

But it does not stop there. At the heart of our shared endeavour is the rule of law. That is what binds us. That is the fundamental reason why it makes sense for us to help each other in this extended way.

## **Conclusion**

The moment is right. Rule of law has won its place in UN Sustainable Development Goal 16.<sup>3</sup> It was high time when it did. Now it is there let us make the most of it. It is one of the most powerful forces for change and good that we know. It also provides a shared strategic focus for shared endeavour of the kind urged by the author.

Of course, there are different interpretations of what is meant by the rule of law. Increasingly, and correctly, the connection between the rule of law and increased safety, stability and prosperity is made. Those alone are attractive outcomes to all. Additionally, there is the connection between the rule of law and equality, accountability and reduced poverty. Fairer transactions, fewer conflicts and greater responsibility in development and more.

It's worth working for. We all know the part that training, defined broadly, can play. IOJT has brought our countries together. Let's encourage our countries to work together. Not just through us but through our judicial colleagues too. An enduring international partnership for training in the full sense of the words is worth working for. Let's see what we can add by the time we get to the 10th International Conference in Ottawa in 2021.

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<sup>3</sup> See <https://sustainabledevelopment.un.org/sdg16>, accessed 28 January 2020.

# The dark side of artificial intelligence: challenges for the legal system

Willem Gravett\*

## Introduction

There can be no doubt that development of robotics and artificial intelligence (AI) has the potential to transform lives and work practices, raise efficiency, savings and safety levels, and provide enhanced levels of services in the short to medium term. Robotics and AI promise to bring benefits of efficiency and savings, not only in production and commerce, but also in areas such as transport, medical care, rescue, education and farming, making it possible to avoid exposing humans to dangerous conditions such as those faced when cleaning up toxically polluted sites.<sup>1</sup>

In the long term, however, the current trend towards developing smart and autonomous machines with the capacity to be trained and to make decisions independently, holds not only economic advantages, but also a variety of concerns regarding their direct and indirect effects on society as a whole,<sup>2</sup> including challenges to ensure privacy and autonomy, non-discrimination, due process, transparency, and understandability in decision-making processes.<sup>3</sup>

## Privacy and autonomy

We are already willing to wear or carry devices that provide great detail about our circumstances to databases.<sup>4</sup> Our cellphones are capable of providing real-time spatial location data,<sup>5</sup> as well as retaining a secret record of every location that we visit.<sup>6</sup> Similarly, Fitbit will soon add glucose monitoring to its products, which currently track, among other things, steps, sleeplessness, heart rate and distance.<sup>7</sup> In late 2018, Apple rolled out a feature on the Apple Watch that enables it to take the wearer's electrocardiogram (ECG) through specially designed sensors.<sup>8</sup> And we have

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<sup>1</sup> European Parliament Committee on Legal Affairs, *Report with recommendations to the Commission on civil law rules on robotics*, Report 2015/2103(INL), 2017.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

<sup>4</sup> B Sheppard, "Warming up to inscrutability: how technology could change our concept of law" (2018) 68 *University of Toronto Law Journal* 41.

<sup>5</sup> Y Chen and M Ahn (eds) *Routledge Handbook of Information Technology in Government*, Routledge, 2017, p 109.

<sup>6</sup> C Arthur, "iPhone keeps record of everywhere you go", *The Guardian*, 20 April 2011 at [www.theguardian.com/technology/2011/apr/20/iphone-tracking-prompts-privacy-fears](http://www.theguardian.com/technology/2011/apr/20/iphone-tracking-prompts-privacy-fears), accessed on 8 January 2020.

<sup>7</sup> G von Portz and S Misra, "Medtronic & Fitbit partner to connect activity data with continuous glucose monitoring", *iMedical Apps*, 24 January 2017, at [www.imedicalapps.com/2017/01/medtronic-fitbit-partner-connect-activity-data-continuous-glucose-monitoring/](http://www.imedicalapps.com/2017/01/medtronic-fitbit-partner-connect-activity-data-continuous-glucose-monitoring/), accessed 9 January 2020.

<sup>8</sup> L Goode, "A guide to using Apple watch's heart rate features, including ECG", *Wired*, 6 December 2018, at [www.wired.com/story/how-to-take-an-ecg-reading-on-apple-watch/](http://www.wired.com/story/how-to-take-an-ecg-reading-on-apple-watch/), accessed 9 January 2020.

already embraced highly contextualised and automated directives in the travel context, eagerly (and sometimes blindly) accepting directions from Google Maps.<sup>9</sup> The capability of machines to invade human privacy will only increase.<sup>10</sup>

The major issue is that the more convenient an agent is, the more it needs to know about a person (preferences, timing, capacities, etc). This creates a tradeoff — more help requires more intrusion. The record to date is that convenience overwhelms privacy. I suspect that will continue<sup>11</sup> — autonomy and/or independence will increasingly be sacrificed and be replaced by convenience.<sup>12</sup>

Researchers are also working on a variety of technologies aimed at what can loosely be referred to as “mind reading”.<sup>13</sup> For example, based on measurements of brain activity, researchers can make remarkably accurate predictions about what images are shown to subjects in a brain scanner, be it a still image,<sup>14</sup> or even, to a more limited extent, a video.<sup>15</sup> One study demonstrated that subjects under fMRI can be taught to mentally spell words in a manner that can be decoded in real time by the experimenters.<sup>16</sup> In 2012, Jack Gallant, professor of psychology at the University of California at Berkeley, predicted that “[w]ithin a few years, we will be able to determine someone’s natural language thoughts using fMRI-based technology”.<sup>17</sup>

These new brain imaging techniques point to a future in which our thoughts will not be as private as they are now.<sup>18</sup> People could be scanned for one purpose, for example to see how advertising campaigns affect their brains, while they inadvertently generate information that bears on their racial biases, sexual orientation or other sexual preferences. In 2012, a group of researchers demonstrated that the very simple electroencephalography (EEG) sensors in certain mass-market video games can already be used to make plausible inferences about gamers’ “[private] information related to credit cards, PIN numbers, the persons known to the user, [and] the user’s area of residence, and may enable more confident inferences as these sensors improve.”<sup>19</sup>

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<sup>9</sup> Sheppard, above, n 4.

<sup>10</sup> A Casey and A Niblett, “Self-driving laws”, (2016) 66 *University of Toronto Law Journal* 429 at 438.

<sup>11</sup> M Roberts as quoted in J Anderson and L Rainie, “Artificial intelligence and the future of humans”, Pew Research Center Internet and Technology, 6 December 2018 at [www.pewinternet.org/2018/12/10/artificial-intelligence-and-the-future-of-humans/](http://www.pewinternet.org/2018/12/10/artificial-intelligence-and-the-future-of-humans/), accessed 9 January 2020.

<sup>12</sup> K Alexandridis as quoted in J Anderson and L Rainie, *ibid*.

<sup>13</sup> A Kolber, “Will there be a neurolaw revolution?” (2014) 89 *Indiana Law Journal* 807 at 835.

<sup>14</sup> See, for example, K Kay et al, “Identifying natural images from human brain activity” (2008) 452 *Nature* 352.

<sup>15</sup> See, for example, S Nishimoto et al, “Reconstructing visual experiences from brain activity evoked by natural movies” (2011) 21 *Current Biology* 1641.

<sup>16</sup> B Sorger et al, “A real-time fMRI-based spelling device immediately enabling robust motor-independent communication” (2012) 22 *Current Biology* 1333.

<sup>17</sup> Kolber, above, n 13 at 835.

<sup>18</sup> *ibid* at p 836.

<sup>19</sup> I Martinovic et al, “On the feasibility of side-channel attacks with brain-computer interfaces”, paper presented at the 21st Usenix Security Symposium Conference, 10–12 August 2012, Washington at [www.usenix.org/system/files/conference/usenixsecurity12/sec12-final56.pdf](http://www.usenix.org/system/files/conference/usenixsecurity12/sec12-final56.pdf), accessed 8 January 2020.

AI can also facilitate the creation of “deep-fakes”, which are AI-enhanced photorealistic pictures and videos.<sup>20</sup> These AI-enhanced deep fakes leverage:<sup>21</sup>

[M]achine-learning algorithms to insert faces and voices into video and audio recordings of actual people and enables the creation of realistic impersonations out of digital whole-cloth.

It has become a worrying symbol of the power of AI to generate misinformation and fake news.<sup>22</sup>

The current imperfect, deep-fake technology makes for funny videos that caricature celebrities and political figures. But as technology improves — as it does every single day — the human eye will soon find it impossible to distinguish between real and fake.

Deep-fake technology is becoming pervasive. For example, Philip Wang, a software engineer at Uber, developed a website called *ThisPersonDoesNotExist.com*, that creates an endless stream of fake portraits. The algorithm that powers it is trained on an enormous dataset of real images, and then uses a neural network known as a generative adversarial network (or GAN) to fabricate new examples. In a Facebook post, Wang wrote:<sup>23</sup>

Each time you refresh the site, the network will generate a new facial image from scratch ... Most people do not understand how good AIs will be at synthesizing images in the future.

In February 2019, the creators of a revolutionary AI system that can write news stories and works of fiction — nicknamed “deep fakes for text” — took the unusual step of not releasing their research publicly, for fear of potential misuse. OpenAI, a nonprofit research company backed by, among others, Elon Musk, stated that its new AI model, called GPT2, is so good and the risk of malicious use so high, that it is deviating from its normal practice of releasing the full research to the public in order to allow more time to discuss the ramifications of the technological breakthrough.<sup>24</sup>

GPT2 is fed text — anything from a few words to a whole page — and is then asked to write the next few sentences based on its predictions of what should come next. GPT2 is capable of writing plausible passages that match what it is given in both style and subject.<sup>25</sup>

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<sup>20</sup> The first use of deep fake technology was to paste people’s faces onto target videos, often in order to create nonconsensual pornography. See J Vincent, “*ThisPersonDoesNotExist.com* uses AI to generate endless fake faces”, *The Verge*, 15 February 2019 at [www.theverge.com/tldr/2019/2/15/18226005/ai-generated-fake-people-portraitsthispersondoesnotexist-stylegan](http://www.theverge.com/tldr/2019/2/15/18226005/ai-generated-fake-people-portraitsthispersondoesnotexist-stylegan), accessed 8 January 2020.

<sup>21</sup> B Chesney and D Citron, “Deep fakes: a looming challenge for privacy, democracy, and national security”, Draft (2018) at <https://pdfs.semanticscholar.org/18ef/a0e60fe51cb8f9b8db7665627cf3f4ead6b0.pdf>, accessed 9 January 2020.

<sup>22</sup> Researchers have developed tools that lets one perform face swaps in real time; Adobe is creating a “Photoshop for audio” that lets users edit dialogue as easily as a photo; and a Canadian start-up company Lyrebird, offers a service that lets users fake someone else’s voice with just a few minutes of audio. J Vincent, “Watch Jordan Peele use AI to make Barack Obama deliver a PSA about fake news”, *The Verge*, 17 April 2018 at [www.theverge.com/tldr/2018/4/17/17247334/ai-fake-news-video-barack-obama-jordan-peeel-buzzfeed](http://www.theverge.com/tldr/2018/4/17/17247334/ai-fake-news-video-barack-obama-jordan-peeel-buzzfeed), accessed 8 January 2020.

<sup>23</sup> Vincent, above, n 20.

<sup>24</sup> A Hern, “New AI fake text generator may be too dangerous to release, say creators”, *The Guardian*, 15 February 2019 at [www.theguardian.com/technology/2019/feb/14/elon-musk-backed-ai-writes-convincing-news-fiction](http://www.theguardian.com/technology/2019/feb/14/elon-musk-backed-ai-writes-convincing-news-fiction), accessed 9 January 2020.

<sup>25</sup> For example, fed the opening line of George Orwell’s *Nineteen Eighty-Four* — “It was a bright cold day in April, and the clocks were striking thirteen” — the system recognised the vaguely futuristic tone and the novelistic style, and continued with: “I was in my car on my way to a new job in Seattle. I put the gas in, put the key in, and then I let it run. I just imagined what the day would be like. A hundred years from now. In 2045, I was a teacher in some school in a poor part of rural China. I started with Chinese history and history of science.” Hern, *ibid*.

Having previously created an AI that could generate realistic-looking facial images, the scientists at DataGrid, a start-up company based at the Kyoto University in Japan, have now developed an AI system that is the first ever to fabricate images of full humans, including their clothes, hairstyles and even the way in which they pose.<sup>26</sup>

The ability to manipulate and generate realistic imagery at scale is going to have a huge effect on how modern societies think about evidence and trust. Such software could also be extremely useful for creating political propaganda and influence campaigns.<sup>27</sup> Technologist Aviv Ovadya summed up the fears created by this technology:<sup>28</sup>

What happens when anyone can make it appear as if anything has happened, regardless of whether or not it did?

This technology implies, of course, that anyone with a vendetta can create a deep-fake that depicts someone doing something unsavoury or illegal. The courtroom is not immune to misleading evidence. This fake evidence will inevitably leak into the courtroom, and it could dupe fact-finders into believing that an innocent person committed a crime.

Bobby Chesney and Danielle Citron predict a development stemming from deep-fake evidence — “immutable life logs” as an alibi service.<sup>29</sup> Because deep-fake technology will be able to portray people saying and doing things that they actually never did or said, alibis will become essential for digitally ensnared accused to prove their innocence in the courtroom. Hence, deep-fakes will create a heightened demand for proof of where a person was and what they were doing at all times. Thus, companies (and perhaps even the government) will enlist in the lifelogging business, through which wearable technology (for example, an Apple Watch) could track its user around the clock.<sup>30</sup> Lifelogging’s potent solution to deep-fake evidence, however, might very well destroy privacy.

## The AI surveillance state

One possibility of new technological developments under increased state regulation is what the French social theorist, Gilles Deleuze, called a “society of control”,<sup>31</sup> that is, a world in which human actions are increasingly managed and monitored by machines.<sup>32</sup>

In the United States, both the federal and State governments have outsourced many regulatory and legal decisions to computation. Tax returns are too voluminous for IRS personnel to examine manually; “audit flags” are programmed to determine which returns should receive

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<sup>26</sup> I Randall, “First ‘deepfake’ AI that can replicate people moving creates footage of crowds of imaginary humans that are indistinguishable from the real thing”, *Mail Online*, 8 May 2019 at [www.dailymail.co.uk/sciencetech/article-7001293/Deepfake-AI-replicate-bodies-motion-creates-footagecrowds-imaginary-people.html](http://www.dailymail.co.uk/sciencetech/article-7001293/Deepfake-AI-replicate-bodies-motion-creates-footagecrowds-imaginary-people.html), accessed 9 January 2020.

<sup>27</sup> Vincent, above, n 20.

<sup>28</sup> See C Warzel, “He predicted the 2016 fake news crisis. Now he’s worried about an information apocalypse”, *BuzzFeed News*, 11 February 2018 at [www.buzzfeednews.com/article/charliewarzel/the-terrifying-future-of-fake-news](http://www.buzzfeednews.com/article/charliewarzel/the-terrifying-future-of-fake-news), accessed 17 January 2020.

<sup>29</sup> Chesney and Citron, above, n 21.

<sup>30</sup> D Rankin, “How artificial intelligence could change the law in three major ways”, *The Journal of Law and Technology at Texas*, 14 October 2018 at <http://jolttx.com/2018/10/14/how-artificial-intelligence-could-change-the-law-in-three-major-ways/>, accessed 9 January 2020.

<sup>31</sup> As quoted in F Pasquale and G Cashwell, “Four futures of legal automation” (2015) 63 *UCLA Law Review* 26 at 30.

<sup>32</sup> L Solum, “Artificial Meaning” (2014) 89 *Washington Law Review* 69.

greater scrutiny or be rejected outright. Homeland Security officials are using big data and algorithms to determine which travellers pose a security risk and who can pass unmolested to their flights. So called “predictive policing” deploys law enforcement resources before crimes as committed. And, once perpetrators are convicted, “evidence-based sentencing” may quantify punishment by using data and algorithms to adjust the length of prison sentences based on myriad factors.<sup>33</sup>

It is possible to imagine whole areas of law relegated to computational implementation.<sup>34</sup> Lawrence Solum, for example, has posited the development of an “Artificially Intelligent Traffic Authority”, which could “adapt itself to changes in driver behaviour and traffic flow.”<sup>35</sup> As imagined by Solum:<sup>36</sup>

Violations would be detected by an elaborate system of electronic surveillance [and offenders would be] identified and immediately ... removed from traffic by a system of cranes located at key intersections.

Privacy proponents will recoil upon learning that AI is also increasing the effectiveness of state surveillance techniques.<sup>37</sup> Before AI, cameras were useful only to the extent that someone either observed a live feed or reviewed recorded footage. That time has passed. With the assistance of AI, cameras can now navigate three dimensions and make sense of what they “see” — all without any human intervention or assistance. Moreover, AI-augmented cameras are beginning to operate beyond ordinary human capability — they can identify millions of faces and predict human behaviour.<sup>38</sup>

The advent of China’s social credit system (“SCS”) is a sign of what is likely to come. Our rights and affordances as individuals will be determined by the SCS. This is the Orwellian nightmare realised.<sup>39</sup> Chinese companies already have:<sup>40</sup>

[C]onsiderable resources and access to voices, faces and other biometric data in vast quantities, which would help them develop their technologies.

New technologies make it possible to match images and voices with other types of information, and to use AI on these combined data sets to improve law enforcement and national security. Through its Sharp Eyes program, Chinese law enforcement is matching video images, social media activity, online purchases, travel records and personal identity into a “police cloud”.<sup>41</sup> This integrated database enable authorities to keep track of criminals, potential law-breakers and terrorists.<sup>42</sup>

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<sup>33</sup> Pasquale and Cashwell, above, n 31 and the sources cited there.

<sup>34</sup> *ibid* at 30.

<sup>35</sup> Solum, above, n 32 at p 75.

<sup>36</sup> *ibid*.

<sup>37</sup> Rankin, above, n 30.

<sup>38</sup> *ibid*.

<sup>39</sup> S Biggs as quoted in J Anderson and L Rainie, above, n 11.

<sup>40</sup> P Mozur and K Bradsher, “China’s AI advances helps tech industry, and state security”, *New York Times*, 3 December 2017 at <https://www.nytimes.com/2017/12/03/business/china-artificial-intelligence.html>, accessed 9 January 2020.

<sup>41</sup> D West and J Allen “How artificial intelligence is transforming the world”, *Brookings Report*, 24 April 2018 at <https://www.brookings.edu/research/how-artificial-intelligence-is-transforming-the-world/>, accessed on 9 January 2020.

<sup>42</sup> *ibid*.

Facial recognition technology is nothing new. We see it, for example, on the iPhone X with its face-scanning technology.<sup>43</sup> But, thus far, China is the world leader in using facial recognition technology as a surveillance tool. Under the Sharp Eyes program, China's goal is to recognise all Chinese citizens within seconds of their faces appearing on a camera.<sup>44</sup> To that end, China has scattered cameras across the country.<sup>45</sup> Its comprehensive face database has already led to one Chinese city capturing 375 suspects and 39 fugitives since its inception.<sup>46</sup> By 2020, China aims to have a file on every Chinese citizen that includes all the data collected on their behaviour.<sup>47</sup> China has become the world's leading AI-powered surveillance state.<sup>48</sup>

The Chinese government has policies in place to monitor individuals and punish bad behaviour. A citizen's social ranking in the government's eyes might be lowered if they evade taxes, swindle other people, or create fake advertisements. The SCS is also supposed to help prevent annoying behaviour on public transportation, such as one well-publicised case in which a passenger who took up another person's reserved seat refused to get up.

In May of 2018, the government of China introduced a travel ban on people with poor "social credit". According to a report from China's National Public Credit Information Center during the last week of February 2019, people have been blocked 17.5 million times from purchasing airplane tickets, and 5.5 million times from buying high-speed train tickets. These people had become "discredited" for unspecified "behavioural crimes".

In the world of technology, facial recognition has become a known commodity. Behaviour prediction, on the other hand, is the latest trend. In addition to recognising who you are, AI-augmented cameras will be "intelligent" enough to predict your behaviour. This technology already exists, and it is improving by the day.<sup>49</sup>

One company claims that it has created a machine that can predict an individual's sexual orientation. The machine has already proven its ability to determine sexual orientation by using algorithms based on facial features and expressions, to an accuracy of 91%.<sup>50</sup>

Another company, Faception in Tel Aviv, created a program that purports to determine whether someone is a criminal — only by looking at a face. The camera does not simply run the

<sup>43</sup> Conceptually, the way in which it works is simple: the camera looks at a face, extracts distinguishing facial features (such as the size and width of the nose, for example) and then compares those features against a database of pictures (sometimes taken from driver's licence photos). See further, Rankin, above, n 30.

<sup>44</sup> See, generally S Denyer, "In China, facial recognition is sharp end of a drive for total surveillance", *The Sydney Morning Herald*, 16 January 2018 at <https://www.smh.com.au/world/in-china-facial-recognition-is-sharp-end-of-a-drive-for-total-surveillance-20180108-h0f3jb.html>, accessed 9 January 2020.

<sup>45</sup> There are more than 360 000 surveillance cameras installed in Linyi City, out of 2,930,000 surveillance cameras in all Shandong province: see O Lam, "With 'Sharp Eyes', smart phones and TV sets are watching Chinese citizens", *ADVOX*, 8 April 2018 at [www.hongkongfp.com/2018/04/08/sharp-eyes-smartphones-tv-sets-watching-chinese-citizens/](http://www.hongkongfp.com/2018/04/08/sharp-eyes-smartphones-tv-sets-watching-chinese-citizens/), accessed 9 January 2020.

<sup>46</sup> T Chan, "One Chinese city is using facial-recognition to help police detect and arrest criminals in as little as 2 minutes", *Business Insider*, 20 March 2018, <https://www.businessinsider.com.au/china-guiyang-using-facial-recognition-to-arrest-criminals-2018-3?r=US&IR=T>, accessed on 9 January 2020.

<sup>47</sup> S Liao, "China banned millions of people with poor social credit from transportation in 2018", *The Verge*, 1 March 2019 at <https://www.theverge.com/2019/3/1/18246297/china-transportation-people-banned-poor-social-credit-planestrains-2018>, accessed on 9 January 2020.

<sup>48</sup> West and Allen, above, n 41.

<sup>49</sup> Rankin, above, n 30.

<sup>50</sup> S Levin, "New AI can guess whether you're gay or straight from a photograph", *The Guardian*, 8 September 2017 at [www.theguardian.com/technology/2017/sep/07/new-artificial-intelligence-can-tell-whether-youre-gay-or-straight-from-a-photograph](http://www.theguardian.com/technology/2017/sep/07/new-artificial-intelligence-can-tell-whether-youre-gay-or-straight-from-a-photograph), accessed 9 January 2020.

photo of a person against a criminal database. Based on the premise that facial features reveal personality traits (called “physiognomy”), the program reads a face and assigns the probability of criminal intent. In one demonstration, the program achieved 90% accuracy.<sup>51</sup>

New AI software is being used in Japan to monitor the body language of shoppers for signs that they are planning to steal. This software, developed by Japanese company, Vaak, differs from similar products that match faces to criminal records. Instead, VaakEye uses algorithms to analyse footage from security cameras to spot fidgeting, restlessness and other body language cues that could be suspicious, and then alerts shop employees about potential thieves via an app.<sup>52</sup>

Using AI to apprehend thieves raises ethical questions. For example, even though the incentive of such software may be to prevent theft, is it legal, or even moral, to prevent someone from entering a shop based on this? It is concerns such as these that have led the human rights NGO, Liberty, to advocate for the banning of facial-recognition technology in the United Kingdom. The NGO is concerned that a retail environment — a private sphere — is starting to perform something akin to a police function.<sup>53</sup>

To exacerbate these concerns, there is also the potential of AI being used to fuel discrimination. A 2018 study by researchers from the Massachusetts Institute of Technology and Stanford University found that various commercial facial-analysis programs demonstrate skin type and gender biases, depending on the types of data that is used.<sup>54</sup> Amazon has also recently incurred the ire of legislators and privacy advocates over bias in its AI-based facial recognition systems.<sup>55</sup> Technologies that rely on algorithms, particularly in regards to human behaviour, have the potential for discrimination. After all, humans have to train the algorithms what or whom to treat suspiciously.

One way in which the police arrest suspects is through arrest warrants, which, in most common law jurisdictions at least, is based on a “reasonable grounds” standard. If an AI-equipped camera identifies someone as a likely criminal, will that be enough to meet the reasonable ground standard? If so, and assuming the technology assigns a percentage of criminality to an individual, how much will satisfy reasonable grounds — 90%, 70% or 50%? This, of course, also raises the question of whether it is even ethical to arrest a person before they commit a crime.<sup>56</sup>

What about the role of this technology as evidence in the courtroom? Would it be too prejudicial to show the fact-finder that AI software determined that an accused is a criminal? What if, instead, prosecutors used the technology during a trial to buttress their arguments?

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<sup>51</sup> G Lubin, “‘Facial-profiling’ could be dangerously inaccurate and biased, experts warn”, *Business Insider*, 13 October 2016 at [www.businessinsider.com/does-facepion-work-2016-10](http://www.businessinsider.com/does-facepion-work-2016-10), accessed 9 January 2020.

<sup>52</sup> The company fed the algorithm 100,000 hours of surveillance data to train it to monitor everything from facial expressions of shoppers to their movement and clothing. VaakEye was launched in 50 shops in Japan during March 2019, and the company plans to expand to 100,000 shops in Japan within three years. Proponents of systems such as this claim that they could help reduce global retail costs from shoplifting, which reached \$USD 34 billion in 2017. See further, N Lewis, “Should AI be used to catch shoplifters?”, *CNN Business*, 18 April 2019 at <https://edition.cnn.com/2019/04/18/business/ai-vaak-shoplifting/index.html>, accessed 9 January 2020; C Carbone “Creepy AI will reportedly spot shoplifters before they steal”, *Fox News*, 6 March 2019 at <https://foxnews.com/tech/creepy-ai-will-reportedly-spot-shoplifters-before-they-steal>, accessed 9 January 2020.

<sup>53</sup> Lewis, above, n 52.

<sup>54</sup> Carbone, above, n 52.

<sup>55</sup> *ibid.*

<sup>56</sup> Rankin, above, n 30.

In closing address, for example, the prosecutor might argue: “Based on all the eye-witness testimony, along with the determination that the accused, considering his facial features, has an 80% likelihood of having committed the crime charged, you should find the accused guilty.”<sup>57</sup>

These types of arguments could be commonplace in the future. Yet there currently is no regulatory framework in place to regulate these technologies. There is a need for clarity from lawmakers and regulators regarding who will ultimately need to decide in what circumstances the use of this technology will be appropriate or desirable as a matter of public policy.<sup>58</sup>

## Bias and algorithmic transparency

Developments in technology raise important policy, regulatory and ethical issues.<sup>59</sup> For example, how should we promote data access? How do we guard against biased or unfair data utilised in algorithms? What types of ethical principles are introduced through software programming, and how transparent should designers be about their choices? What about legal liability in cases in which algorithms cause harm?<sup>60</sup>

It must be remembered that technology is not necessarily neutral and objective. A software design may expressly, through its programming, reflect a preference for certain values over others. eBay’s online dispute resolution mechanism offers an example. eBay has been accused of favouring buyers over sellers through explicit adoption of a “buyer-is-always-right” policy.<sup>61</sup>

AI systems can also be inadvertently programmed to have bias because of the biases of the programmers or, with the development of self-learning algorithms, actually learn to be biased based on the data it is learning from.<sup>62</sup> In addition, AI systems find it more difficult to generalise findings from a narrower dataset, with minor differences from a training set potentially making larger-than-intended impact on a prospective set of data, creating potential bias.<sup>63</sup>

A recent study demonstrated that AI can learn to have racist or sexist biases based on word associations that are part of data it was learning from, and sourced from the internet that reflected humanity’s own cultural and historical biases.<sup>64</sup>

Algorithms — the set of instructions according to which computers carry out tasks — have become an integral part of everyday life, and they have immersed themselves in the law.<sup>65</sup> In the United States, judges in certain states use algorithms as part of the sentencing process to assess recidivism risk. Many law enforcement agencies use algorithms to predict when and where crimes are likely to occur (so-called “predictive policing”).

Most algorithms are created with good intentions, but questions have started surfacing over algorithmic bias on employment search websites, in credit reporting bureaus, on social media

<sup>57</sup> *ibid.*

<sup>58</sup> Lewis, above, n 52.

<sup>59</sup> West and Allen, above, n 41.

<sup>60</sup> O Osoba and W Welsler IV, “The risks of artificial intelligence to security and the future of work”, *RAND Corp.*, December 2017.

<sup>61</sup> M Beazley, “Law in the age of the algorithm”, paper presented at the State of the Profession Address, NSW Young Lawyers, 21 September 2017, Sydney, p 9.

<sup>62</sup> E Loh, “Medicine and the rise of the robots: a qualitative review of recent advances of artificial intelligence in health” (2018) 2 *BMJ Leader* 59 at 61.

<sup>63</sup> *ibid.*

<sup>64</sup> A Caliscan, J Bryson and A Narayanan, “Semantics derived automatically from language corpora contain human-like biases” (2017) *Science* 183.

<sup>65</sup> L Millan “Artificial intelligence”, *Canadian Lawyer Magazine*, 3 April 2017 at [www.canadianlawyeromag.com/article/artificial-intelligence-3585](http://www.canadianlawyeromag.com/article/artificial-intelligence-3585), accessed 9 January 2020.

websites and even the in criminal justice system, where sentencing and parole decisions seem to be biased against African Americans.<sup>66</sup> These issues are likely to become exacerbated as machine learning and predictive analytics become more sophisticated, particularly because with deep learning (which learns autonomously), algorithms can quickly reach a point where humans can often no longer explain or understand them. Nicolas Vermeys, of the Cyberjustice Laboratory in Montreal, stated that:

We have no idea how [algorithms] arrive at their decisions and, therefore, cannot evaluate whether the decisions have value or not ... There is a risk to relying completely on machines without necessarily understanding its reasoning.<sup>67</sup>

No human is completely objective,<sup>68</sup> and so it is with algorithms, which, after all, have been programmed by human programmers. Programmers operate on certain premises and assumptions, which are not tested by anyone else, and this leads to results based on those premises and assumptions, which, in turn, give rise to bias.<sup>69</sup>

Moreover, it is very difficult to challenge a computer's decisions, because whomever owns the algorithms owns the trade secrets associated with them, and is neither going to reveal the source code, nor likely be willing to even discuss the secret source and how it makes the algorithm functions.<sup>70</sup> What justifies the algorithm from an economic viability perspective is its success or perceived success, which is an entirely different question from whether or not it operates in biased ways.<sup>71</sup>

In some instances, certain AI systems are thought to have enabled discriminatory or biased practices.<sup>72</sup> For example, Airbnb has been accused of hosting home-owners on their platform who discriminate against racial minorities. A research project undertaken by Harvard Business School found that:

Airbnb users with distinctly African-American names were roughly 16 percent less likely to be accepted as guests than those with distinctly white names.<sup>73</sup>

Racial issues also arise in facial recognition software. Most such systems operate by comparing a person's face to a range of faces in a database. As pointed out by Joy Buolamwini, a researcher at the MIT Media Lab:<sup>74</sup>

If your facial recognition data contains mostly Caucasian faces, that is what your program will learn to recognize.

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<sup>66</sup> *ibid.*

<sup>67</sup> as quoted in Millan, above, n 65.

<sup>68</sup> See generally W Gravett, "The myth of rationality: cognitive biases and heuristics in judicial decision-making" (2017) 134 *South African Law Journal* 53.

<sup>69</sup> Millan, above, n 65.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

<sup>72</sup> Executive Office of the President, *Preparing for the future of artificial intelligence*, National Science and Technology Council Committee on Technology, 2016, pp 30–31.

<sup>73</sup> E Glusac, "As Airbnb grows, so do claims of discrimination", *New York Times*, 21 June 2016 at [www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html](http://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html), accessed 9 January 2020.

<sup>74</sup> A Cohen, "The digital activist taking human prejudice out of our machines", *Bloomberg Businessweek*, 3 July 2017, p 80.

Unless the databases have access to diverse data, these programs perform poorly when attempting to recognise African-American or Asian-American features. Many historical datasets reflect traditional values, which may or may not represent the desired preferences in a current system. As Buolamwini notes, such an approach risks repeating inequities of the past:

The rise of automation and the increased reliance on algorithms for high-stakes decisions such as whether someone gets insurance or not, your likelihood to default on a loan or somebody's risk of recidivism means this is something that needs to be addressed. Even admission decisions are increasingly, automated — what school our children go to and what opportunity they have. We don't have to bring the structural inequalities of the past into the future we create.<sup>75</sup>

Algorithms embed ethical considerations and value choices into program decisions. As such, these systems raise questions concerning the criteria used in automated decision-making. Some people want to have a better understanding of how algorithms function and what choices are being made.<sup>76</sup>

As algorithms have become an established part of high-stakes projects, there has arisen concerns that they are not adequately transparent to allow for accountability, especially if they are used as the basis for harmful or coercive decisions.<sup>77</sup> In 2012, the principal researcher at Microsoft Research New England, Tarleton Gillespie, stated: “There may be something in the end impenetrable about algorithms.”<sup>78</sup> Others are not quite as fatalistic, but there is growing consensus among computer scientists that it would take aggressive research to cut through algorithmic opacity, particularly in machine learning, where opacity is at its densest.<sup>79</sup>

One of the major problems is that classic values of administrative procedure, such as due process, are not easily coded into software language. In the United States, many automated implementations of social welfare programs, ranging from state emergency assistance to the *Affordable Care Act* (“Obamacare”) exchanges, have resulted in erroneous denials of benefits, lengthy delays and troubling outcomes.<sup>80</sup> Financial engineers may quantify risks in ever more precise ways for compliance purposes, but their models have also led to financial instability and even financial crisis. As the recession of 2008 has shown, even when structured securities, parsed by proprietary software, proved good for the investment banks' bottom lines, they did not contribute to overall economic productivity — in fact, quite the opposite. The most fully automated part of the financial sector — high frequency trading — has generated considerable controversy.<sup>81</sup> Consider for instance, the flash crash of 6 May 2010, when the stock market lost hundreds of points and close to \$1 trillion in market value in a matter of minutes. Traders had programmed split-second algorithmic strategies to gain a competitive edge, but soon found themselves in the position of sorcerer's apprentice, unable to control the technology they had developed. Although prices returned to normal later that same day, there is no guarantee that in future the markets would be so lucky.<sup>82</sup>

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<sup>75</sup> *ibid.*

<sup>76</sup> M Purdy and P Daugherty, “Why artificial intelligence is the future of growth”, *Accenture*, 2016.

<sup>77</sup> B Sheppard, “Warming up to inscrutability: how technology could challenge our concept of law” (2018) 68 *University of Toronto Law Journal* 36 at 47.

<sup>78</sup> *ibid* at 48.

<sup>79</sup> *ibid.*

<sup>80</sup> Pasquale and Cashwell, above, n 31.

<sup>81</sup> *ibid.*

<sup>82</sup> Note also the disastrous \$440 million loss of Knight Capital in August 2012 that was traced to IT and software issues at the firm that took nearly an hour to fix. *ibid* at 39.

Depending on how AI systems are set up, they can assist people to discriminate against individuals they do not like, or help to screen or to build lists of individuals based on unfair criteria. The types of considerations that go into programming decisions matter a lot in terms of how the systems operate and how they affect customers.

For these reasons the European Union has implemented the General Data Protection Regulation in May 2019. The rules specify that people have “the right to opt out of personally tailored ads” and “can contest ‘legal or similarly significant’ decisions made by algorithms and appeal for human intervention” in the form of an explanation of how the algorithm generated a particular outcome. Each guideline is designed to ensure the protection of personal data and provide individuals with information on how the “black box” operates.<sup>83</sup>

Machine learning is the ability of a computer to modify its programming to account for new data and modify its operations accordingly. It uses computers to run predictive models that learn from existing data to forecast future behaviours, outcomes and trends.<sup>84</sup> Machine learning, therefore, is dependent on data. The more data it can access, the better it can learn. However, the quality of the data, the way the data is inputted into the system, and how the system is “trained” to analyse the data can all have dire effects on the validity, accuracy and usefulness of the information generated by the algorithm.

In short, not only can an otherwise perfect algorithm fail to accomplish its set goals, but it may also prove affirmatively harmful.<sup>85</sup> For example, the algorithm employed by Google to answer user questions erroneously declared that Barack Obama, a Christian, was a Muslim.<sup>86</sup> The algorithm simply did what it was “trained” to do — it gathered information from the internet, “feeding” on websites that propagated false information. Its data pool was polluted, and the algorithm could not discern between “good” and “bad” data. This was also brought to light, for example, by the Microsoft chatbot, “Tay”, which learned to interact with humans via Twitter.<sup>87</sup> Within 24 hours, the chatbot became racist, because internet trolls had bombarded it with mostly offensive and erroneous data in the form of inflammatory tweets, from which the chatbot had “learned”.<sup>88</sup>

Even if the data were accurate, the person “training” the AI could infuse their own biases into the system. This may have been a factor in the crime predicting software that has led to

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<sup>83</sup> C Kuang, “Can AI be taught to explain itself”, *New York Times Magazine*, 21 November 2017, at [www.nytimes.com/2017/11/21/magazine/can-ai-be-taught-to-explain-itself.html](http://www.nytimes.com/2017/11/21/magazine/can-ai-be-taught-to-explain-itself.html), accessed 9 January 2020.

<sup>84</sup> I Giuffrida, F Lederer and N Vermerys, “A legal perspective on the trials and tribulations of AI: how artificial intelligence, the internet of things, smart contracts, and other technologies will affect the law” (2018) 68 *Case Western Reserve Law Review* 747 at 753.

<sup>85</sup> *ibid* at 754.

<sup>86</sup> J Nicas, “Google has picked an answer for you — too bad it’s often wrong”, *Wall Street Journal*, 16 November 2017 at [www.wsj.com/articles/googles-featured-answers-aim-to-distill-truth-but-often-get-it-wrong-1510847867](http://www.wsj.com/articles/googles-featured-answers-aim-to-distill-truth-but-often-get-it-wrong-1510847867), accessed 9 January 2020.

<sup>87</sup> Tay was able to perform a number of tasks, such as telling jokes to users and commenting on pictures that users sent it. Nisith Desai Associates, “The future is here: artificial intelligence and robotics”, May 2018, p 12 at [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/Artificial\\_Intelligence\\_and\\_Robotics.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Artificial_Intelligence_and_Robotics.pdf), accessed 9 January 2020.

<sup>88</sup> D Victor, “Microsoft created a twitter bot to learn from users. It quickly became a racist jerk”, *New York Times*, 24 March 2016 at [www.nytimes.com/2016/03/25/technology/microsoft-created-a-twitter-bot-to-learn-from-users-it-quickly-became-a-racist-jerk.html](http://www.nytimes.com/2016/03/25/technology/microsoft-created-a-twitter-bot-to-learn-from-users-it-quickly-became-a-racist-jerk.html), accessed 9 January 2020.

the arrest of an unjustifiably high number of African-Americans and other minorities in the United States,<sup>89</sup> as well as sentencing tools that predict higher rates of recidivism for these same individuals.<sup>90</sup>

Accordingly, the effective accuracy of an algorithm is dependent on both the programming and the data. This dictates a further, legally troubling conclusion. If there are doubts about the results of an algorithm, one can at least theoretically inspect and analyse the programming that constitutes the algorithm. However, given the sheer volume of data available on the internet, however, it may be impossible to adequately determine and inspect the data used by the algorithm.<sup>91</sup>

Consider, for example, that a computer performing trades on a stock exchange monitors and responds to internet-derived data relating to financial transactions occurring all over the world.<sup>92</sup> Needless to say, given the immense number of devices and the vast amount of data available on the internet, a computer that relies on internet-derived data can yield unpredictable results. As stated, one of the most difficult issues inherent in AI is how to ensure that the data relied on by the computer is in fact accurate. Not only is information originating on the internet often inaccurate, such as information on social media, but the internet also contains data that is intentionally false, and that is often spread extensively by “bots” and similar technologies that run automated tasks — such as spreading deliberately false and inflammatory content — at a rate much higher than humanly possible.<sup>93</sup>

Because AI-enabled devices frequently use data from the internet or implement their algorithms via the internet, AI functions are especially vulnerable to cybersecurity threats.<sup>94</sup> In July 2017, for example, *Forbes* reported that criminals hacked a fish tank to steal data from a casino.<sup>95</sup> The fish tank was connected to the internet to permit remote monitoring of water conditions, and the thieves used that connection as a route into the casino’s computers.<sup>96</sup>

Bias and discrimination are serious issues facing AI. There already have been a number of cases of unfair treatment linked to historic data, and steps need to be undertaken to make sure that does not become prevalent in AI. Existing statutes governing discrimination in the physical economy need to be extended to digital platforms. This will help protect consumers and build confidence in these systems as a whole.<sup>97</sup>

<sup>89</sup> C O’Neil, *Weapons of math destruction*, Crown Books, 2017, pp 85–87.

<sup>90</sup> J Angwin et al, “Machine bias”, *ProPublica*, 23 May 2016 at <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>, accessed 9 January 2020.

<sup>91</sup> Giuffrida, Lederer and Vermerys, above, n 84 at 755.

<sup>92</sup> *ibid* at 758.

<sup>93</sup> Consider the allegations that the US and other national elections have been intentionally influenced by false data, such as computer-produced or “bot” social media communications. See, eg, S Shane, “The fake Americans Russia created to influence the election”, *New York Times*, 7 September 2017 at [www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html](http://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html), accessed 9 January 2020; K Kupferschmidt, “Social media ‘bots’ tried to influence the US election. Germany may be next”, *Science*, 13 September 2017 at [www.sciencemag.org/news/2017/09/social-media-bots-tried-influence-us-election-germany-may-be-next](http://www.sciencemag.org/news/2017/09/social-media-bots-tried-influence-us-election-germany-may-be-next), accessed 9 January 2020.

<sup>94</sup> Giuffrida, Lederer and Vermerys, above, n 84 at 776.

<sup>95</sup> L Mathews, “Criminals hacked a fish tank to steal data from a casino”, *Forbes*, 27 July 2017 at [www.forbes.com/sites/leemathews/2017/07/27/criminals-hacked-a-fish-tank-to-steal-data-from-a-casino/#acdc732b96d](http://www.forbes.com/sites/leemathews/2017/07/27/criminals-hacked-a-fish-tank-to-steal-data-from-a-casino/#acdc732b96d), accessed 9 January 2020.

<sup>96</sup> *ibid*.

<sup>97</sup> West and Allen, above, n 41.

For these advances to be widely adopted, more transparency is needed in how AI systems operate.<sup>98</sup> Andrew Burt of Immuta argues:<sup>99</sup>

The key problem confronting predictive analytics is really transparency. We're in a world where data science operations are taking on increasingly important tasks, and the only thing holding them back is going to be how well data scientists who train the models can explain what it is their models are doing.

Some individuals argue that there needs to be avenues for humans to exercise oversight and control over AI systems. For example, Oren Etzioni, CEO of Allen Institute for Artificial Intelligence, posits that there should be rules for regulating these systems. Firstly, AI must be governed by all the laws that already have been developed for human behaviour, including regulations concerning “cyberbullying, stock manipulation or terrorist threats”, as well as “entrap[ping] people into committing crimes”.<sup>100</sup> Second, he believes that these systems should disclose that they are automated systems and not human beings. Third, he states that an AI system “cannot retain or disclose confidential information without explicit approval of the source of that information”.<sup>101</sup> The rationale he provides is that these tools store so much data that people have to be cognisant of the privacy risks posed by AI.<sup>102</sup>

## The challenge of regulating AI

The first question that arises is whether we have indeed reached the point at which we need to devise a legislative instrument on robotics and AI.<sup>103</sup> The classic line of thinking is that legislation becomes necessary once a societal or technological change calls for an adequate legal framework.<sup>104</sup> Once every home and business is equipped with an autonomous robot, society will change dramatically. People will work, collaborate, interact, live, and perhaps even fall in love with, highly sophisticated machines.<sup>105</sup> We will need to consider humanity's place in the face of these technologies.<sup>106</sup>

In considering how to legislate in the face of the staggering rate of technological advancement, the Committee on Legal Affairs of the European Parliament takes a pragmatic approach. It proposes to adopt a legislative instrument for a period of 10–15 years, because any document that concerns a field that advances at the pace of robotics and AI would soon become obsolete. Thus, the legislative instrument will take account only of foreseeable, and not unforeseeable, progress. It would then, of course, be imperative to review the legislative instrument once technological changes overtake current forecasts.<sup>107</sup>

Innovations such as the internet and networked AI have enormous short-term benefits, along with long-term negative effects that could take decades to become recognisable. AI

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<sup>98</sup> *ibid.*

<sup>99</sup> E Siegel, “Wise practitioner — predictive analytics interview series: Andrew Burt”, *Machine Learning Times*, 14 June 2017.

<sup>100</sup> O Azioni, “How to regulate artificial intelligence”, *New York Times*, 1 September 2017.

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*

<sup>103</sup> The Legal Affairs Committee of the European Parliament has called for the immediate creation of a legislative instrument governing robotic and AI: European Parliament Legal Affairs Committee, N Nevejans, *European civil law rules on robotics*, Report noPE 571.379, 2016 at p 6.

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid* at p 7.

will drive a vast range of efficiency optimisations, but also enable hidden discrimination and arbitrary penalisation of individuals in areas such as insurance, job seeking and performance assessment.<sup>108</sup> Without significant changes in our political economy and governance regimes, AI is likely to create greater economic inequalities, more surveillance and more programmed and non-human-centric interactions.<sup>109</sup> As to liberty, there are clear risks. AI affects agency by creating entities with meaningful intellectual capabilities for monitoring, enforcing and even punishing individuals. Those who know how to use it will have immense potential power over those who do not or cannot.<sup>110</sup>

Governments around the world are already mobilising. In 2015, the Japanese government announced a “New Robot Strategy” which has strengthened collaboration between industry, government and academia. In late 2016, the government of the United Kingdom created a parliamentary group — the All Party Parliamentary Group on Artificial Intelligence — to explore the impact and implementation of AI, including machine learning.<sup>111</sup> Also in late 2016, the Obama administration released two reports, “Artificial Intelligence, Automation, and the Economy” and “Preparing for the Future of Artificial Intelligence”. These reports consider the challenge for policymakers in updating, strengthening and adapting policies to respond to the economic effects of AI.<sup>112</sup> In February 2017, the European Parliament approved a report of its Legal Affairs Committee, calling for the review of draft legislation to clarify liability issues, especially for driverless cars. It also called for consideration of creating a specific legal status for robots (so called “electronic persons”), in order to establish who would be liable if they cause damage.<sup>113</sup>

There are, broadly speaking, two schools of thought on the issue of the regulation of AI. The first is based on the premise that regulation is bad for innovation. Entrepreneurs in the camp do not want the field of AI to be defined too soon, and certainly not by non-technical people. Among their concerns are that bad policy creates bad technology, regulation stifles innovation, and regulation is premature because we do not yet have any clear sense of what we would be regulating.<sup>114</sup>

The other school of thought seeks to protect against potentially harmful creations that “poison the well” for other AI entrepreneurs. Subscribers to this school believe that national governments should act expeditiously to promote existing standards and guidelines or, where necessary, create new guidelines, to ensure a basic respect for the principle of “first, do no harm.”<sup>115</sup>

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<sup>108</sup> A McLaughlin as quoted in J Anderson and L Rainie, above, n 11.

<sup>109</sup> M Gorbis as quoted in *ibid.*

<sup>110</sup> G Shannon as quoted in *ibid.*

<sup>111</sup> Relatedly, the House of Commons Science and Technology Committee has stated: “While it is too soon to set down sector-wide regulations for this nascent field, it is vital that careful scrutiny of the ethical, legal and societal dimensions of artificially intelligent systems begins now.” See also House of Lords Select Committee on Artificial Intelligence as referred to in M Deem, “Law vital to the future of artificial intelligence”, *ICAEW *Economia**, 18 October 2017.

<sup>112</sup> C Piovesan, “Speaker’s corner: lawyers need to keep up with AI”, *Law Times*, 5 June 2017 at <https://www.lawtimesnews.com/author/na/speakers-corner-lawyers-need-to-keep-up-with-ai-13408/>, accessed on 9 January 2020.

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.*

Rapid innovation in technology far exceeds the ability of the world's domestic and international legal systems to keep pace.<sup>116</sup> The law is often criticised for trailing technology by decades. Given the pace of technological innovation and its potential implications, we cannot afford to be in the same boat this time.<sup>117</sup>

The key for humanity in general and lawyers specifically, will be to develop the positive aspects of the technology, while managing its risks and challenges.<sup>118</sup> AI regulation will be a necessity, particularly in the areas of safety and errors, liability laws and social impact.<sup>119</sup> Policy-makers will have to embrace the benefits that AI can bring, but at the same time be sensitive to pre-empt the dramatic and potentially devastating effects of misusing AI.<sup>120</sup>

Countries should develop a data strategy that promotes innovation and consumer protection. Currently, there are no uniform standards in terms of data access, data sharing or data protection.<sup>121</sup> Almost all the data is proprietary in nature and not shared very broadly with the research community, and this limits innovation and system design. AI requires data to test and improve its learning capacity. Without structured and instructed data sets, it will be nearly impossible to gain the full benefits of AI.<sup>122</sup>

## Conclusion

AI may well be a revolution in human affairs, and become the single most influential innovation in history.<sup>123</sup> There is already significant deployment of AI and data analytics in finance, national security, health care, criminal justice, transportation and smart cities, that have altered decision-making, business models, risk mitigation and system performance.<sup>124</sup> These developments are generating substantial economic and social benefits.

By the same token, the manner in which AI systems unfold has major implications for society as a whole. It matters how policy issues are addressed, ethical conflicts reconciled, legal realities resolved, and how much transparency is required in AI and data analytic solutions.<sup>125</sup>

Human choices about software development affect the way in which decisions are made and the manner in which they are integrated into organisational routines. Exactly how these processes are executed need to be better understood, because they will have substantial impact on the general public soon, and for the foreseeable future.<sup>126</sup>

There is an ancient Chinese saying: "May you live in interesting times." We can say without doubt that we do. We would do well, however, to recognise that the saying is usually uttered as a curse. Let us work proactively to ensure that, legally at least, AI might prove to be a blessing and not a curse.<sup>127</sup>

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<sup>116</sup> C Rice, "Artificial Intelligence", 6 January 2016 at [www.claytonrice.com/artificial-intelligence](http://www.claytonrice.com/artificial-intelligence), accessed 9 January 2020.

<sup>117</sup> Piovesan, above, n 112.

<sup>118</sup> A Botha, "Artificial intelligence II: the future of artificial intelligence", *Foresight For Development* at [www.foresightfordevelopment.org/featured/artificial-intelligence-ii](http://www.foresightfordevelopment.org/featured/artificial-intelligence-ii), accessed 9 January 2020.

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.*

<sup>121</sup> West and Allen, above, n 41.

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.*

<sup>124</sup> *ibid.*

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid.*

<sup>127</sup> Giuffrida, Lederer and Vermerys, above, n 84 at 781.



# Artificial intelligence: a paradigm shift in legal norms and the impact on judicial training

Brian Spilg\*

*We shall not cease from exploration*

*And at the end of all our exploring*

*Will be to arrive where we started*

*And know the place for the first time*

TS Eliot, Four Quartets

## Introduction

### General

The Declaration of Judicial Training Principles adopted by the IOJT in November 2017 recognises that judicial training is fundamental to judicial independence, the rule of law and the protection of the rights of all people.<sup>1</sup>

This article advocates a significant departure from conventional methods when dealing with artificial intelligence (AI) training. It also argues that the methodology to achieve this requires not only a departure from simply extending or adapting existing legal norms and principles within the area of law where an AI issue arises, but also the need to discern whether the case in fact involves an AI issue.

An AI issue may not be immediately apparent at face value. However if it does arise, then it may take the case beyond say, a simple contract or the exercise of an administrative power, to one involving a constitutional issue of unfair discrimination.

This will be illustrated later by an episode involving residency allocations for medical students.

The reason for advocating a different methodology is to avoid forcing the proverbial square peg into a round hole. A failure to adopt a different training strategy is likely to inhibit, if not stifle, the technological leap which has already commenced.

In the most fundamental way, AI is a voyage into the unknown. For the first time we will be abdicating the process of finding solutions to attain a desired objective to machines.

Implicit in doing so is the premise that AI systems, whether operated within government agencies or commercially, will produce rational and socially beneficial outcomes.

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<sup>1</sup> IOJT, principle 1 at [www.iojt.org/~media/Microsites/Files/IOJT/Microsite/2017-Principles.ashx](http://www.iojt.org/~media/Microsites/Files/IOJT/Microsite/2017-Principles.ashx), accessed 4 March 2020.

At some stage it will also be necessary to legally classify data and decide whether it is to be confined within a particular branch of law or whether it straddles a number of branches, whether it requires its own unique classification or should itself be subdivided into separate categories.

Moreover AI development is not gradual. “J” shaped graphs abound showing the exponential development of AI systems. Every 18 months there has been a doubling up on chip performance, on data gathered, and on computer power — all at a reduced cost.<sup>2</sup>

Currently we can feed an AI system with vast quantities of data. Even then, an AI system, rather than human researchers, can identify the type of data required. An AI system can devise algorithms by means of advanced machine learning independent of human involvement.<sup>3</sup> It is also able to self-drive a car on motorways, engage in unscripted conversations with a human and can outplay the world’s top chess and Go<sup>4</sup> masters.

The fundamental difference between what humans have done until now and current AI systems is that humans are no longer involved in the computer’s process of reasoning, nor appear particularly interested in how it resolves the problem asked of it — apparently trusting that it will do so rationally and optimally.

Moreover the gathering of data cannot be regarded as a glorified accumulation of statistical information subject only to the laws of copyright.

AI provides scope for great advances in all aspects of our lives, such as health care, safety and security, as well as enjoying a more focused selection of options. But if left unchecked or if potentially pre-existing bias within the data used is not acknowledged or the values and norms which underpin its algorithms are not understood, AI has the potential of trampling on fundamental rights such as privacy, dignity, freedom of choice, rights of equality/non-discrimination and the presumption of innocence.

AI may also block attempts to override its own malfunctions.<sup>5</sup> And perhaps two of the most frightening prospects, if not already a reality: *Are we as humans being reduced to a commodity and are we unwittingly being deprived of free will?*

The last may come as a surprise, however the Cambridge Analytica revelations indicate that voters in the last presidential elections in the United States were unknowingly manipulated by AI.<sup>6</sup> The same is being said about the Brexit referendum.

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<sup>2</sup> Statistic of the arXiv pre-print server maintained by Cornell University: see <https://arxiv.org/>, accessed 3 March 2020. See generally, Stanford University Artificial Intelligence Index (AI100) at <https://ai100.stanford.edu/ai-index>, accessed 3 March 2020. (See also Moore’s Law and Fontama, Barga and Tok, *Predictive Analytics with Microsoft Azure Machine Learning*, 2nd edn, Apress, ch 1.

<sup>3</sup> See below, Illustration of advanced machine learning — detection of banking fraud and money laundering.

<sup>4</sup> Go is an abstract strategy board game for two players, in which the aim is to surround more territory than the opponent. The game was invented in China more than 2,500 years ago. Whereas there are some 35 possible moves in each turn of Chess, Go has about 250 with 361 possibilities for the first player’s opening move. See A Hern, “Google AI in landmark victory over Go grandmaster”, *The Guardian*, 27 January 2019 at [www.theguardian.com/technology/2016/jan/27/google-hits-ai-milestone-as-computer-beats-go-grandmaster](http://www.theguardian.com/technology/2016/jan/27/google-hits-ai-milestone-as-computer-beats-go-grandmaster), accessed 13 March 2020.

<sup>5</sup> For example, the two Boeing 737-800Max disasters during late 2018 and early 2019. Investigators determined that the MAX’s new Maneuvering Characteristics Augmentation System (MCAS), which was omitted from flight manuals and crew training, automatically and repeatedly forced the aircraft to nosedive.

<sup>6</sup> The campaign was covert and the messages insincere as each profiled group of persuadable voters was targeted with a different message to the other. The information used to identify who fitted into which profile consisted of the

### **Illustration — an automobile accident in the near future**

Before delving more deeply into the subject, a simple illustration may provide food for thought. Postulate an automobile accident between a driverless car and a pedestrian (who so happens to be human!).

In jurisdictions where fault is a requirement for tort (delictual liability) the pedestrian must demonstrate that the driverless car was being “driven” negligently.

In the absence of legislative intervention a number of problems become apparent.

Firstly, who is the negligent party? Second, can there be negligence on the part of the owner or occupant of the vehicle if the basis of the algorithm upon which the vehicle was being navigated by the AI system is by definition the optimal risk aversion profile possible? Does this mean that where the car’s systems are functioning properly, there will be a presumption of negligence against the pedestrian unless the algorithm can be shown to be flawed?

Completely unique issues will arise.

It appears that AI requires us to consider the immaterial nature of the algorithm and that a far deeper analysis is required of who holds the rights to an algorithm or where one should look to attribute blame if an AI system causes harm, whether it be physical or the invasion of other protected rights.

If we go no deeper then we may simply conclude that there is no culpability because the AI system in the driverless car acted in accordance with a rational algorithmic determination based on adequate data and sensory information.

However, if we recognise that the algorithm itself was created autonomously by deep learning (which in turn was reliant on the scope of the data amassed, its quality and quantity), that it equates to the inner workings of our mind and therefore is also to be considered immaterial, we will better understand that there are some preceding questions which we have not really been required to consider until now and which should form part of an analytical training.

The question is likely to proceed along these lines:

Since liability cannot attach to something immaterial but only to a person (including a legal entity on the basis of vicarious liability) is there any person whose physical act or omission can be regarded as causing or contributing to the invasion of the innocent person’s right and if so, did he or she have the necessary degree of culpability<sup>7</sup> recognised by law in order to attract criminal or civil liability?

By asking these questions it will become apparent that we are entering a field as foreign to us as quantum physics. But we cannot avoid the engagement.

The answer to the first part of the question is likely to be found in either the data provided or in the foundational algorithm — if the AI system applied machine learning or deep learning.

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data footprint left by some 70 million US Facebook users. This had been obtained by Cambridge Analytica, a data analytics firm, from Facebook without real user consent. The documentary “The Great Hack”, released January 2019 by Netflix, provides much insight on this and the role of Cambridge Analytica.

<sup>7</sup> In South African case law, where culpability in the form of “intention” is required (in general terms), it suffices if the perpetrator foresaw the consequences of his or her actions yet recklessly persisted with it — termed *dolus eventualis*.

As to the former we would ask; “What data was fed into the AI system and (assuming questions such as adequate quantity, quality and validation for bias and accuracy<sup>8</sup> are satisfactorily answered) was its scope comprehensive enough to enable the system to identify the proximity of humans and deal with false negatives?”

With regard to the algorithm, the enquiry would be: “Was the originating data corrupted by bias or was any impermissible bias introduced whether in the originating data or in the algorithmic formulation?” If so, then it would have emanated from the data scientist either independently or on instruction.

Once these questions are answered we would be able to consider the question of culpability. The programmer may simply have transposed their own unconscious bias into the program or may have been directed to do so. The latter situation is readily resolvable. In the case where the programmer was unaware of their bias, the enquiry into culpability may then lead us to the company which hired them and the adequacy of its screening procedures.

We would then ask whether the business was culpable in law for not properly screening its data scientists, for not having a sufficiently diverse team of data scientists or because it was unduly restrictive in selecting data scientists from only one demographic pool bearing in mind that it knew it was creating a potentially dangerous instrument which required special care and diligence. The enquiry may then also take us to the corporation which outsourced the creation of the algorithm to a business which it had not properly vetted.

One of the most interesting judgments on attributing a duty of care for the purposes of establishing a *delictual* claim where the person sued was engaging in a potentially hazardous activity is the South African case of *Durr v Absa Bank Ltd.*<sup>9</sup> Its then highest court held:

It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity.<sup>10</sup>

This brings me to the third and perhaps potentially the most disconcerting aspect. Generally, law is an incremental development, starting cautiously with a casuistic case by case approach from which, after a while, a principle may emerge. We then adopt this principle, countenancing a few exceptions which may come too late for many, as it did for the child labourers of Victorian England.

If we do not keep the driverless car accident in mind, we may be attracted to the argument that algorithms are to be treated as the Gospel or that it is too remote to attribute legal causation to the inner workings of a data scientist’s mind, let alone attach a duty of care to a corporation which produces a potentially dangerous AI system or a system which produces unfairly discriminatory outcomes.

If we do not scrutinise these arguments carefully, we will not be able to expose actual discrimination, expose grossly inadequate screening processes, expose a failure to input all data that would reasonably be expected, having regard to the outcome the system was required to resolve while bearing in mind its potentially prejudicial consequences or failing to test the reliability of the source data.

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<sup>8</sup> Validating for bias and accuracy would include ensuring that the source of the data is reliable. An illustration would be if published crime statistics and profiling from law enforcement agencies which are used as part of the source data were skewed.

<sup>9</sup> [1997] ZASCA 44; 1997 (3) SA 448 (SCA).

<sup>10</sup> *ibid* at 63.

## **Beneficial v detrimental outcomes and the process of judicial reasoning**

The benefits of AI technology are far reaching; however it is also evident that AI will result in a tumultuous upheaval within society. It will require as dramatic a conceptual and normative shift, as those experienced during the original Industrial Revolution. That revolution was marked by the spread of factories, urbanisation and the exploitation of labour brought about by mechanisation.

Without judicial or legislative intervention, the degradation wrought to so many by the first Industrial Revolution may repeat itself. If this materialises then individual rights will be placed in jeopardy because of the initially imperceptible but inexorable changes that AI, in the name of progress, will bring to our value system. We are already experiencing loss of autonomy, loss of privacy and of dignity while acquiescing to and becoming more dependent on the decisions of the algorithms. AI may also concentrate economic power to unacceptable levels.

## **Basics of judicial training in AI**

The first part of judicial training in the field of AI therefore requires a recognition that an AI system is not readily classifiable in law as a single inanimate object which functions under human control, or that data is simply a commodity by another name.

To this end it is perhaps advisable to briefly describe an AI system, and then consider legal methodologies which can be applied when considering the nature of data, the algorithmic construct and the risk of hidden bias or irrationality.

## **The essential nature of AI**

### **Basics**

AI is said to be the flag bearer of the Fourth Industrial revolution. It is defined in the Oxford English Dictionary as, “the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.”

More simply put, it is “... a system that makes autonomous decisions.”<sup>11</sup>

As with everything else, AI exists or is brought into existence utilising one or more sources which are processed by way of conversion to produce certain desired outcomes.

A functioning AI system requires:

- *data* as its source input
- processing of that data, which is likely to include the use of *natural language processing*<sup>12</sup>
- an *algorithm* or series of algorithms designed to optimally resolve a problem or series of problems in order to produce the desired outcome, and
- a means of communicating the outcome, or to implement the solution itself.

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<sup>11</sup> A Webb, *The big nine: how the tech titans and their thinking machines could warp humanity*, Hachette UK, 2019.

<sup>12</sup> See M Garbade, “A simple introduction to natural language processing”, *Becoming Human: Artificial Intelligence Magazine*, 16 October 2018 at <https://becominghuman.ai/a-simple-introduction-to-natural-language-processing-ea66a1747b32>, accessed 3 March 2020. Natural language processing “is the technology used to aid computers to understand the human’s natural language” so that computers understand language just as we do and in that manner can interact with us.” Siri is a good example.

AI systems are provided data by processing masses of digitised information to devise algorithms which then produce an outcome by analysing current information whether provided by external sources or from its own sensors. Its own sensors may equate not only with our senses, but also enter the realms of accurately analysing among other things pressure, body heat, chemicals, gases, torque and velocity.

### **Algorithms, machine learning and deep learning**

Algorithms are a sequence of instructions used to solve a problem. They are developed by programmers to instruct computers in a task. Algorithms organise massive quantities of data into information and services. However computer programmers, perhaps now more generally described as data scientists, are no longer required to give step by step instructions. An AI system can itself learn from the data it has acquired to create its own learning algorithms. This is called machine learning.

Both AI and machine learning have developed due to the mass of data available, more powerful computers and algorithmic innovations. Turning to data, some three billion people are online with an estimated 17 billion connected devices or sensors. This mass of data can be used for machine learning which in turn enables the system to develop new rules to perform increasingly complex tasks. Powerful computers already allow for the processing of enormous amounts of data and for some time there has been advanced machine learning techniques known as deep learning.<sup>13</sup>

As can be seen, at the heart of AI are data and algorithms, and neither necessarily requires human assistance or intervention; certainly not at a second generational level.

### **Illustration of advanced machine learning — detection of banking fraud and money laundering**

Alison Jacobson, a global strategy advisor on emerging technology, provided this example. A bank in the Pretoria CBD employs Mrs B who is only one of seven people considered to have sufficient expertise to identify fraudulent claims. She can process 200 claims a day. An AI system was brought in to “observe” through its sensors the documents she considers and how she deals with them.

Over a period of time, the system then devised its own algorithm on how to identify a fraudulent claim by simply “watching” and “learning” from Mrs B. It then started processing claims. It is called TOM. TOM is said to process 2000 claims a second with 100% accuracy.

This gives us some idea of the socio-economic upheaval and regional inequalities which the AI revolution can precipitate. Just as the farm labourer who could not adapt to industrialisation lost his job to mechanisation, banks are replacing thousands of employees with robotics and other AI technology. The harsh reality is that AI does not have to be paid sick leave, nor do they take annual or maternity leave.

We are therefore at a stage where a robot only has to observe an expert performing his or her designated task sufficient times to be able to reverse engineer and create its own algorithm which will perform the same task.

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<sup>13</sup> Deep learning applies a method of learning which mirrors the functioning of the human brain by using layers of artificial “neurons”. However deep learning’s neural networks are infinitesimal in number when compared to our brain’s neurons and synapses. Internet Society, “Artificial intelligence and machine learning: policy paper”, 18 April 2017 at [www.internetsociety.org/resources/doc/2017/artificial-intelligence-and-machine-learning-policy-paper/](http://www.internetsociety.org/resources/doc/2017/artificial-intelligence-and-machine-learning-policy-paper/), accessed 3 March 2020.

## **ANI and AGI**

There are two main divisions within AI; one exists and the other does not as yet. They are Artificial Narrow Intelligence and Artificial General Intelligence. The acronyms are ANI and AGI. Beyond AGI is a third contemplated division which has been labelled Artificial Super Intelligence or ASI.

ANI, or weak AI, can interact with us and process human language. However it only operates within a pre-defined range. It does not replicate human intelligence. Everyday examples are Siri and weather forecasting.

Advanced ANI systems represent the current state of technology.

It is anticipated that AGI or strong AI will successfully perform intellectual tasks. In general terms an AGI operating system will be able to “understand and reason its environment as a human would”.<sup>14</sup> It is more specifically defined on the University of Queensland website as a system which “is expected to be able to reason, solve problems, and make judgements and plan, to learn and to use prior knowledge in decision-making. AGI will be self-aware but lack emotion”.<sup>15</sup>

In short, AGI is intended to be as flexible and as generally intelligent as humans.

Today ANI can achieve remarkable robot dexterity, beat humans easily and decisively in every conceivable board and card game and can write anything from lyrics and short stories to fake news and identify what is fake news; however it is as yet “unable to transfer that competency from one task to another... we can’t even build something as smart as a rat.”<sup>16</sup>

## **Judicial training — the need to deconstruct legal precepts**

If we as judges cannot be assisted through training to know what to look for, understand the competing issues raised by AI at this relatively formative stage of its development and apply tools and reasoning best able to balance them, then we may unwittingly lurch from surrendering basic human rights to the machine at the one extreme to impeding the development of an invaluable tool in human progress on the other.

By way of illustration, AI can transform health care by improving the detection of disease and predicting who is most likely to be at risk.<sup>17</sup> However where an AI robotic drone, being used for military purposes for example, acts entirely autonomously, then the decisions it makes will be entirely dependent on internal lines of enabling codes — codes which lack moral content or inhibitors.

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<sup>14</sup> B Dickson, “What is narrow, general and super artificial intelligence”, TechTalks, 12 May 2017 at <https://bdtechtalks.com/2017/05/12/what-is-narrow-general-and-super-artificial-intelligence/>, accessed 3 March 2020.

<sup>15</sup> University of Queensland, “Artificial intelligence: 2. types of AI”, at <https://web.library.uq.edu.au/node/4385/1#1>, accessed 3 March 2020. The site describes ASI as a system which “hypothetically possesses intelligence far surpassing that of humans. It is purely theoretical at this point in time and there is debate about whether or not this level of AI will ever be achieved or realised.”

<sup>16</sup> J Vincent, “Microsoft invests \$1 billion in OpenAI to pursue holy grail of artificial intelligence”, The Verge, 22 July 2019 at [www.theverge.com/2019/7/22/20703578/microsoft-openai-investment-partnership-1-billion-azure-artificial-general-intelligence-agi](http://www.theverge.com/2019/7/22/20703578/microsoft-openai-investment-partnership-1-billion-azure-artificial-general-intelligence-agi), accessed 3 March 2020. The comparison was made by Yann LeCun, the Facebook AI chief.

<sup>17</sup> In July 2019, DeepMind, a company acquired by Google claimed to have developed an algorithm which can detect life threatening kidney damage before it occurs. See “Using AI to give doctors a 48-hour head start on life-threatening illness”, Deep Mind, 31 July 2019 at <https://deepmind.com/blog/article/predicting-patient-deterioration>, accessed 3 March 2020.

In 2014 Elon Musk considered that AI was humanity's biggest existential threat.<sup>18</sup>

Our common law and civil law jurisdictions have developed outcomes which are generally based on balancing competing interests formulated and then incrementally developed over the centuries. As a result we may apply some legal principles by rote because ordinarily there is no longer the need to consider the assumptions underlying them.

We may therefore not necessarily enquire into whether the competing values which forged our law should still be weighted in the same way, or more specifically, whether changing the dynamic from mechanisation, which is visible and physical, to technology which is neither affects the balance.

Legal training which is able to deconstruct legal precepts so that judges can deal effectively with AI cases requires two major paradigm shifts.

The one concerns the intrinsic nature of an AI system and its input data. Firstly, an algorithm may not be a material thing in law; in addition, it need not produce a rational or optimal result, let alone one that is necessarily fair. Second, an AI system may operate entirely autonomously of human control or intervention. Third, input data can be utilised by an infinite number of people for a limitless number of applications in perpetuity without degradation. In this way, the same data may be used for a beneficial purpose while in other cases it may be invasive.

Finally, data may take on various legal forms, which in turn raises a number of issues. One is that it may be unwise to classify data within any existing legal framework. Another is whether all data should be treated as a single homogenous concept sharing the same legal attributes. Superimposing on it some existing legal classification may have the unintended consequence of excluding rights worthy of protection or obligations which ought to be imposed.

The other concerns judicial introspection. It is about ourselves, and applying what the author refers to as judicial consciousness when testing legal principles that have been accepted for over a century — but in a non-AI world!

## **The first paradigm shift — AI systems are neither completely material nor necessarily rational**

### **Whether the algorithm in an AI system is a material thing**

When the human hand is not readily discernable in the action taken by an AI operating system then the fundamental requirements for both culpability and the entitlement to assert a right are challenged.

At an elementary level only a person (an individual or legal entity) can assert a right or be held accountable in law. Liability ordinarily attaches to a person who has performed the act or who owns or is in control of the material thing in question.

At first blush, it may not appear that AI systems pose too many difficulties; after all the act or omission will be that of some robotic system whose owner can be traced.

But the robotic system will have executed an outcome determined exclusively by the algorithm. We may therefore have to ask, “What is the legal nature of an algorithm which comes into existence without any human intervention but entirely through deep learning?”

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<sup>18</sup> OpenAI, which Musk founded at the end of 2015 as a non-profit organisation committed to a safer AI, warned that AI was already exposed to exploitation by rogue States, criminals and terrorists. See “Elon Musk quits AI ethics research group”, BBC News, 22 February 2018 at [www.bbc.com/news/43154732](http://www.bbc.com/news/43154732), accessed 3 March 2020.

This is not an abstract question. It will impact on whether our patent laws are adequate to deal with innovations created entirely by machine learning. The question may require a rethink on our part regarding the legally relevant point of intersection between the physical and the immaterial. The issue came up when researchers at the University of Surrey filed a patent on behalf of their AI system contending that they as the owners of the AI system should hold the rights to the design it invented.

The EU Patent Office rejected the application on the grounds that the designated inventor must be human. The patent was for a food container based on advanced geometry created by the AI system. With respect, it is inadequate to throw a set of outdated rules or legislation which can only be circumvented by a fiction when it is a given that no human can be defined as having invented the design. With this basic illustration we can already appreciate that our current laws may already be outdated to cater for an AI world.

### **Assumptions of algorithmic rationality**

The greater challenge to attributing culpability in one form or another is the notion that an AI system will adopt the most rational outcome. It would then be argued that any harm occasioned was by definition unavoidable, or at least not due to negligence. This response raises concerns about the opaqueness of the AI process, particularly where there is no apparent human involvement and therefore difficult to pin down a possibility of human error.

Since it is for the legislature to determine whether no fault liability should be introduced, judges will be required in the meantime to determine who of several persons may be individually or jointly be responsible for any harm caused by the act or omission of an AI system.

In order to engage the problem it will be necessary to dust off some of the established tools of trade, such as the “duty of care” principle and that of “remoteness/foreseeability”. It may also become necessary for domestic law to presume wrongfulness on the part of the owner of the system which was involved in the incident unless it can be shown that the data and algorithms meet certain basic criteria.

It will then be necessary to consider the tensions created between society’s norms and prevailing technological standards, asking all the while whether the latter are adequate or simply errors continually perpetuated by an industry with little regard for the inherent dangers.

Some in the AI industry have already thrown down the gauntlet. They contend that their algorithms are confidential trade secrets immune from disclosure. The simple answer is that in order to ensure the protection of the greater right to a fair trial and in the interests of justice, at best that part of the record relating to the algorithmic evidence can be embargoed.

If the algorithm or its application is flawed then the judgment will have to deal with it. By the same token, if there is a fundamental flaw that cannot be cured, then any protectable interest would in any event be rendered virtually worthless.

Where a member of the public is the successful party then there is even more reason not to be attracted to the confidential information argument. Provisional protection from its dissemination beyond the litigating teams ought to suffice in most cases.

**Rationality, optimal outcome and fairness**

Judicial training should reveal that rationality and optimal outcomes alone might be all very well for AI system designers and the tech-giants, but in law at least, fairness is a consideration which must be taken into account when balancing or characterising affected rights and interests.<sup>19</sup>

**The second paradigm shift — judicial consciousness**

Whereas the first paradigm shift relates to legal characterisation, this concerns the appropriate weighting of competing interests.

The one unique feature of AI is the completely autonomous processing capability of advanced machine learning which removes man from de-facto control of the machine.

The fully autonomous capability of AI creates an inherent tension between beneficial and disempowering or manipulative consequences.

At the normative level, judges may be obliged to address fundamental socio-economic issues, since the enquiry is unlikely to yield a clear case of right versus wrong. It is more likely to be along the lines of whether we have learnt our lessons from the laissez faire approach of the mid-18th to early 20th century regarding commercial activity and if so, is it competent for courts to fashion remedies which provide checks and balances without stifling development. Or as occurred during that era, can we only act provided there is legislative or regulatory interference which itself may unfairly favour key industry players or other lobby groups?

At the factual level we will have to determine whether the AI system in question is a single object or comprises distinctive and unrelated components each of which may attract liability independently or jointly with the other.

Nor can we simply assume that issues concerning data or algorithms can be compartmentalised. While in some cases they might, as we have already seen in other instances, they are likely to be umbilically linked much like cogs in a wheel.

**Whose data is it?**

Take the claim that every individual whose data is being harvested should be paid for its use, since data has become a tradable commodity. In the South African legal system everything which has acquired a commercial value becomes a tradable economic asset (whether tangible or not and whether choate or inchoate). There is no closed category.

It is axiomatic that data has become monetized. This readily explains why the largest acquirers of data in the ordinary course of their businesses have become the “Big Nine” tech giants.<sup>20</sup>

Does our legal training tell us that the issue is simply one of purchase and sale, since data is a tradable commodity personal to the individual who is at liberty to either negotiate freely for its use or withhold it?

Would we be comfortable in adopting this perspective if the data was acquired exclusively for medical research in order to enable an AI system to detect major epidemics?

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<sup>19</sup> Tech Titans is the term used by Amy Webb in “The Big Nine”, above n 11, to describe Alibaba, Amazon, Apple, Baidu, Facebook, Google, IBM, Microsoft and Tencent.

<sup>20</sup> *ibid.* It appears that Uber is heading to become the tenth.

If we are not then must we establish whether the company harvesting the data is charging the research institute and whether it should make some profit so as not to be disincentivised? We may also consider asking whether the research institute can hold a government's health authority to ransom by withholding the results unless it is paid vast sums of money. A good illustration is the drug industry which, in submitting to some of the demands of countries in the developing world, had to significantly cut down on the cost of life saving drugs.

These issues expose something which is constantly lurking in the wings, that is, that more and more AI issues are likely to transcend the self-interests of the immediate parties.

It is evident that a value consideration involving the broader interests of society may have to be taken into account, and that, unlike the gathering of data to stave off epidemics, AI may not necessarily always be for the better. Further, the greater good of society need not necessarily coincide with the interests of the State.

The question raised is whether judges are entitled, absent legislative intervention, to introduce the added dimension of the interests of society into their deliberations.

The term "legal consciousness" appears to have been used interchangeably with social conscience. It has also been used "as a theoretical concept and topic of empirical research ... to address issues of legal hegemony, particularly how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action."<sup>21</sup>

The term therefore does not appear to have a clear meaning. I use the word consciousness with reference to gaining a higher state of awareness in relation to one's function. A greater awareness of the legal system's core inner values inevitably produces a better legal outcome.

Judicial consciousness would require an awareness of the underlying values of a particular legal principle which has resolved the tensions that exist between two or more competing rights or obligations. Once the underlying values are extracted, a judge is in a better position to consider whether the weighting attributed to them still holds good when approaching an AI issue.

Three quite different issues appear to arise. The first is who calibrates the scale of values? No legal system permits a court to go on a frolic and apply subjective values. The second is whether the potential outcome may affect broader public interests and the third is the remedy available. These are briefly discussed.

### **Calibrating legal values**

The short answer is that in more and more jurisdictions there is a measuring scale in the judicial arsenal which generally was not available, or sufficiently exercised a century and a half ago — it is a Bill of Rights.

A Bill of Rights contains the core values which are placed on the scales and against which the other interests are to be interpreted or weighted. One therefore has in these jurisdictions an objectively determinable normative code.

The danger of not bringing constitutional values to bear on the problem in appropriate circumstances is evident from the lessons of the first industrial revolution which also demonstrated that it is difficult for legislation to keep pace with a rapidly changing social order.

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<sup>21</sup> S Silbey, "After legal consciousness" (2005) (1) *Annual Review of Law and Social Science* 323.

Unless fundamental values are brought to bear on the problem in the form of the country's Bill of Rights, the risk of exploitation and degradation of the social fabric are real and with grave consequences for the future.

In countries without a Bill of Rights, it may be contended that AI is sufficiently unique for judges to engage in an enquiry as to which one of several legal principles that are impacted is most suited to be applied in, or adapted to, an AI case without undermining established legal principles.

This does not mean that a court is creating law. It is re-characterising the issue to properly fit the underlying values in issue and then applying legal principles to weigh those values in accordance with the general body of law so as to achieve a legally sound and coherent outcome.

As an illustration, courts regularly examine underlying notions, and particularly their weighting, to establish whether they hold good in a particular situation. Written contracts are generally sacrosanct because historically they arose from trading between those with equal bargaining power. Nonetheless, courts have managed to introduce qualifications to deal with bargaining inequalities such as overreaching.

### Public interest doctrine

There is a basic principle that if another party's rights are potentially affected by a court decision then it should be made a party to the proceedings.

There is another principle which has already been touched on; that of *contra bonos mores*.<sup>22</sup> It allows a court in appropriate cases of contract and tort to apply a value judgment based essentially on the concept referred to above as judicial consciousness. In such a case, a broader awareness by the court of the interests of society as expressed in a particular legal norm should properly be taken into account so as to provide an outcome that is not *contra bonos mores*.<sup>23</sup>

These principles can be utilised without a court being accused of judicial law making.

### Rights and remedies

The last part of this section concerns the court's power if it finds, for example, that the individual is entitled to protection or an entrepreneur is entitled to exploit his system.

In English and South African law there is a fundamental principle that where there is a right, the law will provide a remedy. It is based on the trite proposition that a person whose right has been infringed or who is entitled to assert a right cannot be left remediless.<sup>24</sup>

This article has attempted to identify the fundamental distinction between AI and the other forms of technology with which we are familiar. It also suggests that courts have available tools to address the unique problems AI raises in a manner which does not result in judicial law making should legislative intervention be delayed.

<sup>22</sup> Loosely it means contrary to public policy or an act which is harmful to the moral welfare of society. See *Sasfin (Pty) Ltd v Beukes* [1989] (1) All SA 1 (A) at 8.

<sup>23</sup> Aside from English law of tort in the German case of *Lüth* (1958) BVerfGE 7, 198, the court dealt with *delictual* liability under §826 BGB for "intentionally causing harm to another in a manner which is *contra bonos mores*".

<sup>24</sup> In South African law see *Minister of the Interior v Harris* 1952(4) SA 769 (A) at 781A-B which referred to the English law case of *Ashby v White* (1703) 92 ER 126 at 136 and added: "In *Dixon v Harrison*, 124 ER 958 at p 964, it was stated that the greatest absurdity imaginable in law is: 'that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same.'"

## Data as a commodity

Data is harvested or mined to ensure that as much information as is necessary is obtained to enable an AI system to produce the correct outcome in respect of the task or tasks it is expected to perform. Every two days, five quintillion bytes of data are produced; a volume which Eric Schmidt, the former CEO of Google, estimates is as much data as humans produced from the dawn of civilization until 2003.

Inferring new instructions from data is the core strength of machine learning. It also highlights the critical role of data: the more data available to train the algorithm, the more it learns and the greater its accuracy. In fact, many recent advances in AI have not been due to radical innovations in learning algorithms, but rather due to the enormous amount of data enabled by the internet.

## The nature of data

Data is digitised and therefore is effectively indestructible. Unlike first generation plastic which is haphazardly discarded, digitised personal information is readily located, retrieved, stored, centralised and disseminated.

We are presently grappling with the proprietary nature of data. Some regard it as a new class of ownership from which all other rights flow on the basis that data remains physical tangible matter.<sup>25</sup> However key regulatory instruments treat data either as intellectual property, or as Ritter and Mayer put it, “a series of permissions and constraints tied to specific classifications of data (such as personally identifiable information)”<sup>26</sup> by which the author understands privacy laws to be included.

In March 2017, the German Government proposed a law which will classify data as a material commodity, enable data to be owned by a natural person or legal entity and appropriate it to the persons to whom the data relates, with the right to prevent its dissemination. It provides that if data is used, then its contents must first be anonymised (ie. the data must be rendered anonymous or pseudonymous). In addition public data should be treated as open data. This would include all non-personalised data collected by the State. Aside from this, users should have the alternative of choosing other payment models.<sup>27</sup>

By contrast, under Japanese law, data that is intangible and non-personal data may in principle be freely used, except where it is legally protected; for example, as copyright, trade secrets and other legally protected rights.<sup>28</sup>

It is on this topic that the problem inherent in the legal fraternity arises in trying to dictate classifications.

It is submitted that we should be cautious as different interest groups are likely to promote a legal position that most benefits themselves. We know that data per se is a tradable commodity for those who wish to gather it. It is also personal to the individual whose information it represents. But we also know that data is commercially harvested and therefore time, money and intellectual effort is put into gathering it in various forms.

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<sup>25</sup> J Ritter and A Mayer, “Regulating data as property: a new construct for moving forward” (2018) 16 *Duke Law & Technology Review* 220.

<sup>26</sup> *ibid* at 220.

<sup>27</sup> *ibid* at 229–230.

<sup>28</sup> Ministry of Economy, Trade and Industry, *Contract guidelines on data utilization rights*, Version 1.0, 2017, Background at [www.meti.go.jp/english/press/2017/0530\\_002.html](http://www.meti.go.jp/english/press/2017/0530_002.html), accessed 4 March 2020.

Perhaps at this early stage reference may be had to one of the remarkable aspects in the development of financial instruments in English law, such as negotiable instruments and letters of credit. The courts did not try and define these for commerce but were rather guided by how the industry utilised them, and once its broader impact was understood, fashioned principles around them.

### **Personal data**

Significant strides have been made in attempting to protect personal data. Protection is afforded chiefly by the EU's General Data and Protection Regulation (GDPR) which is a framework aimed at improving Europe's data privacy laws. It requires all entities to adopt adequate technical and organisational measures to protect the personal data which they process.<sup>29</sup>

The GDPR identifies a number of rights which are accorded to an individual whose personal data is subject to use. These include the right to be informed; the right to access; the right to object to a specific use of personal data; and of great importance rights in respect of automated decision making and profiling. Certain safeguards are afforded to individuals against the risk involved with fully automated decisions.

The drafters of the GDPR found a pragmatic way of extending its reach beyond EU member states. In its terms the GDPR requires every organisation, wherever they may be located, which processes the personal data or monitors online activities of EU citizens to comply with its data privacy and protection regulations.

A standard which data companies in many countries, including South Africa, feel compelled to comply with is ISO 27001 and 27701. The former is an international standard for an information security management system (ISMS) while the other extends ISO 27001 to cover privacy management including data in order to meet GDPR privacy and information security requirements.

Many countries have their own statutes which have been modelled on the GDPR or its predecessor. In South Africa it is the *Protection of Personal Information Act*, 4 of 2013 (POPI). Whereas POPI does not afford rights to data portability, it extends to the use of corporate information which the EU regulation does not. Brazil's General Data Protection Law, the LGPD,<sup>30</sup> by contrast recognises 10 lawful grounds for processing data whereas the GDPR has only six. It does, however, provide for a more expansive interpretation of what qualifies as personal data.

The question remains whether the protection of personal information is dependent on finding that the data in which it is embedded is property or whether it suffices to classify it as the invasion of a right to privacy protected either by a Bill of Rights or an extension of the law of tort.<sup>31</sup> The authors of *Big Data* advocate shifting the responsibility of deciding how and by whom personal information may be processed from the individual to the users of data since, among a number of reasons, "they know much more than anybody else, and certainly more than consumers or regulators, about how they intend to use data."<sup>32</sup>

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<sup>29</sup> The GDPR (Eu) 2016/679 replaces the earlier EU Data Protection Directive.

<sup>30</sup> Lei Geral de Proteção de Dados Pessoais no 13.853/19 (Protection of personal data and creation of the National Data Protection Authority).

<sup>31</sup> Ritter and Mayer, above n 25 at 248.

<sup>32</sup> V Mayer-Schönberger and K Cukier, *Big data: the essential guide to work, life and learning in the age of insight*, Hachette UK, 2013, pp173–174.

The GDPR is aimed at protecting data. It did not have to consider any broader issues and appears to have consciously steered clear of engaging in any issue beyond that. It is presumed that the GDPR was framed in conformity with Article 8 of the European Convention of Human Rights. Article 8 protects the right to respect private and family life, the home and correspondence. The author imagines that the advantage of considering personal data in this manner is that Article 8 is a qualified right by reason of sub-Article 2 which subjects the right to the interests of the wider community insofar as it is necessary and proportionate.

The right to privacy and the right to exploit one's own information may not necessarily be treated as two sides of the same coin. One may have to be viewed strictly as a question of privacy law while the other as an unrelated proprietary issue. In short, the questions we are required to answer may yield different results which are not fixed by ordinary commercial considerations and may differ from case to case. It is not unusual for something of commercial value to have a number of different attributes. Ownership is a real right yet it is made up of a bundle of rights which can be dealt with separately; from a right of use for one purpose (when letting) without affecting the right to transfer ownership.

Accordingly, if personal data is used to gather information to predict where a flu epidemic is likely to occur, then the socio-economic benefit is clear. If it is to target a particular category of consumer for trips overseas then the outcome may be different.

Professor David Carroll took on Cambridge Analytica in the United Kingdom to retrieve the data it had collected on him. His legal pursuit together with the way Cambridge Analytica is said to have influenced the outcome of both the American Presidential election and the Brexit referendum in Britain is contained in the documentary called *The Great Hack*, referred to above.

Nonetheless in China, facial recognition and all other digital trails produced by an individual are used to detect patterns of conformity and deviation. This attracts merit or demerit points which can detrimentally affect the individual concerned and his or her family.<sup>33</sup>

## **Reflection**

Data has many facets impacting on different branches of law. While academics will rightfully strive to formulate legal concepts around data, it may be premature and lead to compartmentalisation within an existing and inappropriate single branch of law.

At this stage, perhaps it is preferable to guide judicial training towards a casuistic approach which enables us to first identify the interests that may be impacted irrespective of their legal classification and to remain flexible. Rigidity or being attracted to a particular legal doctrine may exclude certain rights from being fully respected.

## **Algorithms**

Algorithms may have beneficial consequences or have a built in bias, be designed to manipulate human behaviour or have disempowering objectives. Our experiences are unlikely to have provided us with the training to know what questions to ask in order to draw the line between fair algorithmic outcomes and offensive ones.

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<sup>33</sup> A Webb, above n 11 at p 6.

Perhaps the easiest way of introducing the objective of algorithm is by reference to AI dating agencies. Algorithms are reputed to run the most successful dating agencies.<sup>34</sup> In this area of application “the algorithms are trying to match people with preferences that will lead to a stable and happy pairing.”<sup>35</sup>

But as with data something lurks in the wings. Continuing with our purely academic interest in the dating service app it may turn out that the algorithm used is distorted by identifying the man as the suitor rather than the woman.

This played out in respect of the allocation of residencies for medical students in the United States. The students realised that hospitals were using the same algorithm to place them in such a way that the hospitals did the proposing. This meant that the students were getting the worst of the deal. The algorithm was reversed to favour the students only after they had launched a campaign.<sup>36</sup>

The algorithm that drives a decision is likely to be beyond the comprehension of many, including law makers and lawyers. There is a degree of unfathomability which is likely to inhibit probing. This is compounded by the likelihood of arguments that algorithms are protected by confidentiality agreements and possibly copyright. An algorithm’s bias to favour one path over another may be inscrutable and sufficiently subtle to avoid it from being detected. In other instances the “underlying fundamental” may only be revealed if the algorithm runs amok and produces a glaringly absurd results. It is, however, evident that algorithmic racial and gender bias whether unconscious or deliberate is a reality.<sup>37</sup>

Science fiction aside, until recently it was considered that an algorithm was no more than a calculator that sped up functionality which was always under human control.

Human control is the centre of so much of our jurisprudence, which in turn is based fundamentally on two concepts; that of responsibility based on direct or imputed control (eg. vicarious liability) and culpability based on a normative standard ranging from intending a consequence through negligence to no fault liability. Du Sautoy expressed the shift dramatically. He wrote:

But then a new sort of algorithm began to emerge — an algorithm that could adapt and change as it interacted with its data so that, after a while, its programmer might not understand quite why it made the choices it did. These programs were starting to produce surprises: for once we could get more out than we put in. They were beginning to be more creative. These were the algorithms DeepMind exploited in its crushing of humanity in the game of Go. They ushered in the new age of machine learning.<sup>38</sup>

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<sup>34</sup> Much of this section is based on M Du Sautoy, *The creativity code: art and innovation in the age of AI*, Harvard University Press, 2019, pp 48–61.

<sup>35</sup> *ibid* at p 56.

<sup>36</sup> *ibid* at p 57.

<sup>37</sup> N Turner Lee, “Detecting racial bias in algorithms and machine learning” (2018) 16(3) *Journal of Information, Communication and Ethics in Society* 252.

<sup>38</sup> Du Sautoy, above n 34 at p 60.

## Social change

A White paper published by the World Economic Forum, convened in January 2019, cautioned that:

... the nature of technological change, combined with other economic, political and environmental pressures, means that civil society organizations are struggling as they attempt to respond to the Fourth Industrial Revolution.<sup>39</sup>

This would reinforce the concern expressed earlier about judicial consciousness and an awareness of interests that are affected before racing to attach labels. The social changes AI is bringing about already impact on the way in which we strive to balance competing rights and duties based on social values and needs and hopefully reduce existing glaring inequalities to achieve fairness. Nonetheless we already see the eroding of human autonomy,<sup>40</sup> dignity, privacy, presumptions of innocence and rights to equality. The problems that are highlighted by the illustrations given are:

... in this complex field, there are specific challenges facing AI, which include: a lack of transparency and interpretability in decision-making; issues of data quality and potential bias; safety and security implications; considerations regarding accountability; and, its potentially disruptive impacts on social and economic structures.<sup>41</sup>

In South Africa, banks are closing down branches as automation becomes more pervasive. In some countries legislation is being considered to require employers to re-skill their work force. As with the original Industrial Revolution, the first fatalities will be those who become redundant and in populations with high unemployment or limited education the risk of social upheaval increases.

## Conclusion

The original Industrial Revolution resulted in social and economic change. It altered the class structure in Europe, improved longevity and created a more mobile work force. However for a significant time the period was characterised by grim working conditions, with workers enjoying little or no rights. They were treated as expendable commodities and child labour was rife. This may in turn be attributable to existing political, social, legal and philosophical norms remaining unchanged for a considerable time.

We cannot afford to repeat these mistakes because now they are likely to be irreversible — if only because man can no longer claim to be in total control of his destiny; but rather algorithms are being applied to determine, in ways unfathomable to us, mankind's best trajectory. Allan Ginsberg's Howl<sup>42</sup> should not become the cry of a new and disenfranchised society.

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<sup>39</sup> World Economic Forum, *Civil society in the fourth industrial revolution: preparation and response*, White paper, 2019 at [www3.weforum.org/docs/WEF\\_Civil\\_Society\\_in\\_the\\_Fourth\\_Industrial\\_Revolution\\_Response\\_and\\_Innovation.pdf](http://www3.weforum.org/docs/WEF_Civil_Society_in_the_Fourth_Industrial_Revolution_Response_and_Innovation.pdf), accessed 4 March 2020.

<sup>40</sup> In the United Kingdom, Unilever uses AI technology to analyse language, tone and facial expressions to select the best candidate.

<sup>41</sup> Internet Society, above n 13.

<sup>42</sup> A Ginsberg, "Howl and other poems", Martino Publishing, 1956.



# Social media and judicial training

Cagney John Musi\*

## Introduction

The exponential increase in social media platforms has drastically altered the manner in which we communicate.<sup>1</sup> Many institutions have reconfigured their communication strategies to keep abreast with these developments.<sup>2</sup> These platforms already had and will have a great impact on our substantive and procedural law. The manner in which judges<sup>3</sup> utilise these platforms will also have an impact on judicial ethics.

The law and our behaviour will have to evolve with the demands and challenges of modern communication methods. Judicial training institutes will have to reconfigure their curricula in order to ensure that they train judges about social media platforms and their impact on the law. Proper judicial training on these matters will assist in transforming the judiciary to harness social media platforms in the interests of justice and to better adjudicate matters involving social media.

This article briefly discusses the different training methodologies and points out what the author considers is the best methodology to follow in training judges. Illustration, by dint of a few examples, show how South African courts have harnessed social media platforms in the interests of justice; how the law of defamation is changing when dealing with social media defamation; how social media defies territorial jurisdiction and what has been done in order to make sure that the net is cast very wide in order to give South African courts jurisdiction with regard to cybercrimes; and lastly, a few tips on how judges should not behave on social media platforms.

## Training methodology

There are three main methods of teaching: pedagogy, andragogy and heutagogy.

### Pedagogy

Pedagogy literally means the art and science of educating children.<sup>4</sup> It embodies a teacher focussed education where the teacher directs what will be learned, how it will be learned and when it will be learned. The assumption is that the learner has no prior understanding

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<sup>1</sup> There were 2.41 billion monthly active users on Facebook during the 2nd quarter 2019, more than half a billion daily active users on WhatsApp during the first quarter 2019 and, on average, 330 million monthly active users on Twitter during the first quarter 2019. See J Clement, "Global social networks ranked by number of users 2019", *Statista*, 19 November 2019 at [www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/](http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/), accessed 17 January 2020.

<sup>2</sup> Nastascha Harduth, "The legal impact of social media networks — international trends", *Werksmans attorneys*, 3 November 2015 at [www.werksmans.com/legal-updates-and-opinions/the-legal-impact-of-social-media-networks-international-trends/](http://www.werksmans.com/legal-updates-and-opinions/the-legal-impact-of-social-media-networks-international-trends/), accessed 17 January 2020.

<sup>3</sup> All references to judges include magistrates, where applicable.

<sup>4</sup> M Connor, "Andragogy and pedagogy: ageless learner", 1997–2004 at <https://www.yumpu.com/en/document/read/4249117/conner-ml-1997-andragogy-pedagogy-ageless-learner->, accessed 17 January 2020.

or knowledge and that knowledge is derived from the teacher or instructor. It has, however, been pointed out that the strict viewing of pedagogy as a younger learner's style of knowledge engagement is not always accurate.<sup>5</sup> This is so because pedagogy might be a mere epistemological understanding that the learner lacks a knowledge base around a specific subject matter.<sup>6</sup> If pedagogy is seen in this light, it may therefore mean that pedagogy may well be the right teaching method for adults who engage with new knowledge. Judges who have no knowledge, or lack prior engagement with social media platforms, might well benefit from a pedagogical teaching style.

### **Andragogy**

Andragogy was initially defined as the art and science of helping adults learn. It is currently defined as an alternative to pedagogy and refers to learner-focussed education for people of all ages.<sup>7</sup> The andragogic model requires that at least five issues be addressed in formal learning. They include:

- letting learners know why something is important to learn
- showing learners how to direct themselves through information
- relating the topic to the learners' experiences
- realising that people will not learn until they are ready and motivated to learn
- people should be helped to overcome their inhibitions, behaviours and beliefs about learning.<sup>8</sup>

Andragogy assumes that a basic understanding of the subject matter has been achieved and that the learner looks towards the instructor to lead the learner's understanding of the subject matter in new and enhanced ways of understanding.<sup>9</sup> Andragogy may also be an epistemological understanding that the learner has already attained a knowledge base of understanding whereas the learner might be looking towards the instructor to assist him or her to develop a deeper understanding of the subject matter within more real world levels of engagement and understanding.

In the andragogical space, the learner has more control over the learning environment and the subject matter. The instructor allows a level of self-directed learning and the learner has more control over the learning process. However, if the learner does not have the required level of basic understanding of the subject matter, the andragogical approach might not be the most appropriate teaching method. Therefore, the more judges interact with or develop an understanding of social media platforms, the more success an instructor might achieve with the andragogical approach.

### **Heutagogy**

Heutagogy is essentially based on self-directed learning and self-determined learning. The underlying assumption is that the learner is knowledgeable about the subject matter and

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<sup>5</sup> C Crawford, et al, "Rethinking pedagogy, andragogy and heutagogy", (2018) 22 (4) *Academic Exchange Quarterly* 15.

<sup>6</sup> *ibid*, 17.

<sup>7</sup> Connor, above, n 4.

<sup>8</sup> *ibid*.

<sup>9</sup> Crawford, above n 5, 17.

enhanced revelations and understanding of the subject matter can be attained by the learner's own efforts to investigate further. The learner works independently or through distant learning in order to engage further with the subject matter and to discover new and different ways of understanding and developing the subject matter.

Although the author has not done a scientific study of the interaction of South African judges with social media, normally at the beginning of all the social media workshops facilitated by the author, judges are asked to indicate how many of them use social media platforms. It is always clear that most of them are not active on Facebook, Twitter or other platforms but almost all use WhatsApp.

Heutagogy will therefore not be an appropriate training method as most South African judges lack the required level of understanding and knowledge of the subject matter.

It is suggested that a hybrid training method should be developed in order to get judges to gain more knowledge and understanding of social media platforms. A proper understanding of these platforms will help them to develop the law and to embrace this era. They can only be enabled if they understand or are willing to comprehend the impact of the internet and social media platforms.

## **Social media and jurisdiction**

The training of judges to navigate some social media platforms needs to be a very practical process geared at inculcating or enhancing their skills. It should not be theoretical education. The risk of judges finding such training as irrelevant and meaningless is just too high. The training programs should be well researched and planned and they should deal with everyday challenges and solutions created by social media.

The advent of internet-based communication like social media has not only made transnational transactions and crimes the new normal, it has also put some legal concepts under severe strain and stress. One of the low hanging fruit is jurisdiction.

This is poignantly illustrated by the case of the gentleman who, while on holiday in Greece, made a video of himself uttering racially offensive words. He sent the video to a WhatsApp group and somehow it went viral. A few legal experts were asked by journalists whether the gentleman may be prosecuted in South Africa. There were divergent views. One expert pointed out that as a general rule, the country where the offence was committed has jurisdiction to prosecute. However, because Greece does not have the same laws pertaining to hate speech and racism and also because the racist rant is not considered a crime in Greece, he cannot be prosecuted there or extradited to South Africa for prosecution. She said that this is a unique case because it was streamed worldwide including in South Africa and as such, some experts "think that this may be an exception to the general rule which could possibly give South African jurisdiction".<sup>10</sup>

The other expert opined that it matters not whether the gentleman was out of the country when he uttered the racist slur because it all comes down to where his place of residence or domicile was. Since he was domiciled in South Africa and he was referring to South Africans

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<sup>10</sup> S Ngqakamba and R Grobler, "Prospects of Adam Catzavelos' prosecution for k-word slur video are slim — expert", *News 24*, 24 May 2019 at [www.news24.com/SouthAfrica/News/prospects-of-adam-catzavelos-prosecution-for-k-word-slur-video-are-slim-expert-20190524](http://www.news24.com/SouthAfrica/News/prospects-of-adam-catzavelos-prosecution-for-k-word-slur-video-are-slim-expert-20190524), accessed 17 January 2020.

in the video, then South Africa would therefore have jurisdiction. So, in essence, South Africa would have jurisdiction to prosecute an offence which was committed in another jurisdiction, as the offender is domiciled in South Africa and the impact of the crime is felt in that country.

On the issue of his right to privacy, because the video was taken from a WhatsApp group and that he himself had not posted it on social media, another expert was of the opinion that this was a valid infringement of his right to privacy. As there is a lot of public interest in eliminating racism, his right to privacy is therefore outweighed by the public interest. This goes to show how a single social media event can trigger such varying responses from legal experts.

This case is still the subject of a court case, however, it is clear that judges too will have to be given the opportunity to consider similar issues in a training environment.<sup>11</sup>

Territorial jurisdiction for many crimes will become a thing of the past. It is for that reason that the Cybercrimes and Cybersecurity Bill (SA) contains a “long arm” definition with regard to most cybercrimes mentioned therein.<sup>12</sup> Prof Svantesson stated that:<sup>13</sup>

When jurisdictional rules are broad in scope, they risk capturing conduct with which there is an insufficient degree of contact to justify a State’s jurisdictional claim ... At the same time, when jurisdictional rules are narrow in scope, they risk leaving victims without judicial redress. Striking the right balance is no easy task, and focusing on distinctions between territoriality and extra territoriality frequently leads to both of these problems.

The Bill endeavours to strike that balance in s 5 thereof by stating that all cybercrimes committed on foreign soil may only be instituted with the written permission of the National Director of Public Prosecutions.

Establishing that a court, where the publication happened, has jurisdiction in internet-based, civil, extra-territorial defamation cases has also proven to be very difficult. In the Australian case *Dow Jones and Co Inc v Gutnick*<sup>14</sup> the facts were briefly as follows: Mr Gutnick, who lived in Victoria and had businesses outside Australia, including in the United States of America, instituted a defamation action against Barron’s Online, an online magazine printed and published by Dow Jones. He alleged that he was defamed in an article entitled “Unholy Gains” which was published in Barron’s Online. It was common cause that he downloaded and read the article in Victoria. He contended that the publication happened at Victoria. The magazine argued that the article was published in South Brunswick, New Jersey when they became available on the servers which it maintained at that place. It further argued that the most convenient court to resolve the dispute would be in New Jersey.

The court held that it is not where the information is uploaded on the world wide web but where it is downloaded that is important. The information is not in comprehensible form when it is uploaded. It is in comprehensible form when it is downloaded from a device of a person who accesses the material from the web server. It is therefore with the person who downloads the

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<sup>11</sup> Mr Catzavelos was reported to the Human Rights Commission (HRC). He admitted guilt at the HRC. He apologized and agreed to pay R150,000 to the Seth Mazibuko legacy foundation.

<sup>12</sup> See proposed s 23 of the Cybercrimes and Cybersecurity Bill at [justice.gov.za/legislation/bills/CyberCrimesBill2017.pdf](http://justice.gov.za/legislation/bills/CyberCrimesBill2017.pdf), accessed 17 January 2020.

<sup>13</sup> D Svantesson, *Global status report 2019*, Internet & Jurisdiction Policy Network, 2019, p 50.

<sup>14</sup> (2002) 210 CLR 575.

material that the damage to reputation may be done. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged.<sup>15</sup>

Justice Kirby determined that the common law doctrine of *forum non conveniens*, in terms of which a party may object to the jurisdiction of one country in cross-border matters based on the fact that it is not the appropriate forum to adjudicate the dispute, is appropriate to solve cross-border internet defamation cases. He pointed out that the House of Lords<sup>16</sup> had stated the test for the doctrine is whether the court in which the proceedings are pending is the natural forum for the trial or whether there is another forum that is “more appropriate”. In Australia, however, the test was stated as whether the party objecting to the forum had showed that the court selected was a “clearly inappropriate forum”.<sup>17</sup> He further warned judges to exercise judicial restraint when considering which forum is clearly the most appropriate to adjudicate a cross-border dispute.<sup>18</sup>

The Supreme Court of Canada also used the *forum non conveniens* doctrine to solve a cross-border defamation dispute.<sup>19</sup> Mr Goldhar, a prominent Canadian businessman, also owned a popular professional soccer team in Israel. Haaretz.com is a newspaper which is published in print and online in Israel. The newspaper published an article about Mr Goldhar which he alleged was defamatory. Mr Goldhar instituted an action for libel in Ontario, Canada, alleging damage to his reputation. The newspaper brought a motion for the stay of the action on the basis that Ontario courts lacked jurisdiction or, alternatively, that Israel was clearly the more appropriate forum to deal with this matter.

Justices Cote, Brown and Rowe said:<sup>20</sup>

Central to a proper understanding of the conflict rules of Canadian private international law ... is an appreciation of the distinct roles played by *jurisdiction simpliciter* and *forum non conveniens*. The *jurisdiction simpliciter* analysis is meant to ensure that the court has jurisdiction. This will be the case where a “real and substantial connection” exists between a chosen forum and the subject matter of the litigation. The *forum non conveniens* analysis, on the other hand, is meant to guide courts in determining whether they should decline to exercise that jurisdiction in favour of a “clearly more appropriate” forum.

They pointed out that there is a two-stage approach in Canada. First, one should determine jurisdiction *simpliciter*. At this stage, the question is whether a real and substantial connection exists in the chosen forum and the subject matter of the litigation. In this case the connection had been established because the defamation was committed in Canada where the publication was read. After establishing *jurisdiction simpliciter*, the second stage of *forum non conveniens* kicks in and the burden shifts to the defendant to satisfy the court that the alternative forum is clearly more appropriate. The second stage of analysis is a factual analysis in order to establish which forum is more appropriate.

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<sup>15</sup> *ibid* at [44].

<sup>16</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478.

<sup>17</sup> *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [95].

<sup>18</sup> *Dow Jones v Gutnick*, above, n 14 at [76].

<sup>19</sup> *Haaretz.com v Goldhar* [2018] 2 SCR 3.

<sup>20</sup> *ibid* at [27].

Justice Cote recognised that in internet defamation actions where the tort may have occurred in multiple jurisdictions, the *lex loci delicti* rule may allow courts in multiple forums to assume jurisdiction and apply their own law. This is so in our interconnected world where international players with global reputations may be defamed through global publications.<sup>21</sup>

Justices Abella and Wagner were of the view that the jurisdiction *simpliciter* rule should not serve as a basis for choice of law under the *forum conveniens* analysis in internet defamation cases. They opined that the framework for choice of law should therefore be modified by replacing *lex loci delicti* with a test based on the place where the most substantial harm to the plaintiff's reputation occurred. Justice Abella stated that a more realistic approach would be one that narrows the range of potentially applicable law in a rational way.<sup>22</sup>

Chief Justice McLaclain and Justices Moldaver and Gascon, in a dissenting judgment, held that the *forum non conveniens* test sets the bar high. They stated: They pointed out that the adverb “clearly” in the test was not a stylistic caprice. It serves the purpose of indicating the high threshold.<sup>23</sup>

given this history and the consistent application of the test we should not lower the purposefully stringent threshold set by the “clearly more appropriate” test, whether through lenient application or through a “robust and carefully scrutinized review”.

They criticised the most substantial harm rule and pointed out that it would be of limited use in curbing forum shopping (and it is highly subjective which) and would also lead to uncertainty. It was further pointed out that the substantial harm test will result in the proliferation of mini trials requiring substantive evidence at the preliminary stage of the proceedings. They emphasised that the *lex loci delicti* rule is still the applicable law. After applying the *forum non conveniens* test, they concluded that Ontario had jurisdiction.

The different interpretations and application of the test clearly show that even applying well established common law rules lead to uncertainty and unpredictability. It has been said that every problem has a solution, but every solution has a problem.<sup>24</sup>

## Social media and defamation

Judges will be faced with more multi-jurisdictional cases emanating from social media and internet defamation. Judicial training should train judges now to meet those future challenges. Judges should be taught how to approach and apply certain common law doctrines in order to meet the challenges posed by multi-jurisdictional or cross-border internet defamation.

We are more often being requested to resolve “twibel” disputes: defamation committed via twitter.<sup>25</sup> Our courts recently decided two prominent twibel cases.<sup>26</sup> Although, at first glance it seems that the same approach was used in both cases, careful scrutiny shows that the test for determining whether a statement is defamatory has been modified in one of the judgments to meet the twitter reality.

<sup>21</sup> at [92].

<sup>22</sup> at [107].

<sup>23</sup> at [188].

<sup>24</sup> Svantesson, above, n 13, at p 46.

<sup>25</sup> The word “twibel” is a combination of twi for twitter and bel for libel.

<sup>26</sup> *Manuel v Economic Freedom Fighters* [2019] 3 All SA 584 and *Hanekom v Zuma* (D6316/2019) [2019] ZAKZNDHC 16 (6 September 2019).

In both matters the test enunciated in *Le Roux v Dey*<sup>27</sup> to determine whether a statement is, in itself, defamatory was applied. The test was stated as follows:<sup>28</sup>

Where the plaintiff is content, rely on the proposition that the published statement is defamatory per se, a two-stage inquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether the meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then sought less of the plaintiff. The test to be applied is an objective one. In accordance with the subjective testing criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have regard not only to what is expressly stated but also to what is implied.

In *Zuma*<sup>29</sup> the judge used the above test and concluded that the tweet was indeed defamatory. In *Manuel*, however, the judge went a step further and said the following:<sup>30</sup>

It is important in this case to point out that the tweet was not a publication on a newspaper or broadcast. It was a publication on Twitter. The hypothetical ordinary reader must be taken to be a reasonable representative of users of Twitter who follow the EFF and Mr Malema and share his interest in politics and current affairs.

In *Manuel*, the judge modified the test because he was dealing with twibel and not defamation in a publication. Although the learned judge did not cite any authority for the proposition, his modification is in line with what was said by Tugendhat J in *The Lord of McAlpine of West Green v Bercow*.<sup>31</sup> That case was also a twibel case. He said:<sup>32</sup>

The Tweet was not a publication to the world at large, such as a daily newspaper or broadcast. It was a publication on Twitter. The hypothetical reader must be taken to be a reasonable representative of users of Twitter who follow the Defendant. What the characteristics of such people might be is in part agreed, and in part for submissions by the parties as to what I should infer from what is agreed.

Does this mean that in all twibel cases the judge must assess the followers of the defendant on Twitter and decide what characteristics a reasonable representative of the defendant's followers will have? Is there a need for this development? Only time will tell. However, these developments are indicative of the fact that social media has an impact on our law and judges must be trained to better understand the social media platforms and their impact.

In *Tsedu v Lekota*,<sup>33</sup> Nugent JA held that a newspaper that publishes a defamatory statement that was made by another is as much a publisher of the defamation as is the originator. Does this mean that a person who retweets a defamatory tweet is a publisher as much as the originator is? What about the person who likes a defamatory tweet?

Posting defamatory material on your Facebook wall will amount to defamation. That is uncontroversial. Should a person who is tagged by another on Facebook be as liable as the

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<sup>27</sup> (2011) (3) SA 274.

<sup>28</sup> *ibid* at [89].

<sup>29</sup> *Hanekom v Zuma*, above, n 26.

<sup>30</sup> above, n 26 at [49].

<sup>31</sup> [2013] EWHC 1342 (QB).

<sup>32</sup> *ibid* at [58].

<sup>33</sup> [2009] 3 All SA 46 (SCA) at [5].

person who tagged him or her? If you are tagged, the defamatory material would appear on your Facebook wall. You did not put it there. The other party did not need your consent to tag you. In *Isparta v Richter*<sup>34</sup> the court found that a person who knows that he was tagged and therefore allowed his name to be coupled with that of the publisher of the defamatory material is as liable as the person who tagged him.<sup>35</sup>

Lord Bingham of Cornhill wrote that the impact of the internet on the law of defamation will require “almost every concept and rule in the field ... to be reconsidered in the light of this unique medium of instant worldwide communication”.<sup>36</sup> Justice Kirby, on the other hand, warns against expressing a common law rule in terms of a particular technology because that technology might be overtaken by fresh developments. He points out that a legal rule expressed today, in terms of the internet, might soon be out of date.<sup>37</sup>

## Social media and justice

Courts have used social media in the interests of justice in order to achieve what they could not achieve by using conventional methods. In *CMC Woodworking Machinery (Pty) Ltd v Odendaal Kitchens*<sup>38</sup> the court allowed substituted service by way of a Facebook posting. It was clear that none of the normal forms of service set out in the rules could be used; there was a real likelihood that the notice would be brought to the attention of the respondent by way of Facebook; there were sufficient guarantees that the respondent’s right to privacy would not be infringed and the court was satisfied that it was indeed the correct person’s Facebook page.

## Social media tips for judges

Most South African judges are not active on social media, except WhatsApp. The South African judiciary has a social media policy. It inter alia states that when using social media in their personal capacity, judges must take every reasonable effort to make it clear that they are contributing to social media sites as private individuals and not as representatives of the judiciary. They may also not disclose information or content that they are not specifically authorised to disclose. Judges are also admonished to be vigilant not to transgress the judicial code of conduct and or their oath of office when engaging in social media activities.

Judges must be very circumspect when engaging in social media activities. Communicating via social media while sitting on the bench is unacceptable conduct. Judges should not Google witnesses who are testifying or have testified in their court while they are still busy with the case. The same applies to the accused or any party who appears before them. Judges must be careful who they “like” or “dislike” and who their virtual friends are.

Do not engage in conduct that may be embarrassing or improper for it to become public knowledge. In other words, do not do anything in the virtual world that you would not do in the real world. If you belong to a WhatsApp group, especially the group consisting of close friends and family members, inform them about a judge’s ethical obligations and how the misuse of social media can undermine those obligations.<sup>39</sup>

<sup>34</sup> (2013) (6) SA 529 (GNP).

<sup>35</sup> *ibid* at [35].

<sup>36</sup> As quoted by Kirby J in *Dow Jones v Gutnick*, above n 14 at [66].

<sup>37</sup> *ibid* at [125].

<sup>38</sup> (2012) (5) SA 604 (KZD).

<sup>39</sup> See UNDOC, “Non-binding guidelines on the use of social media by judges” at [www.unodc.org/res/ji/import/international\\_standards/social\\_media\\_guidelines/social\\_media\\_guidelines\\_final.pdf](http://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/social_media_guidelines_final.pdf), accessed 17 January 2020.

## Conclusion

In order to meet the challenges and benefits posed by social media, judges will have to be trained on how social media platforms operate, how they should use social media platforms and what the potential risks and consequences of such participation are.

The proper training of judges on the impact of social media on the law and behaviour of judges is imperative for transforming the judiciary in order to meet the challenges of the fourth industrial revolution. The internet and social media platforms are developing rapidly. These technological advances should not leave judges behind clinging to methods of yesteryear to solve modern day problems. Lord Hand once observed that:<sup>40</sup>

The respect all men feel in some measure for customary law is deep in their nature; we accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action.

Choose the irksomeness of action. In the age of the fourth industrial revolution, the move from a teacher-focussed approach to a learner-focussed approach will have to happen rapidly. Postponing, suppressing or being sceptical about acquiring basic knowledge of social media platforms will not only retard a judge's ability to engage meaningfully with new technologies, but also the ability to develop our law to meet the realities and challenges of today.

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<sup>40</sup> L Hand, "The contribution of an independent judiciary to civilisation", in G Winters (ed), *Handbook for judges*, American Judicature Society, 1975, p 44.



# Judicial training challenges — over-abusive use of social media

André Gustavo Corrêa de Andrade\*

## Introduction

The technological progress of the last decades, alongside the exponential increase in communication speed, the overwhelming amount of information available online and increasing access to the internet through different devices, has allowed the most unprecedented exchange of messages, ideas and knowledge in the history of humankind. It can be said that freedom of expression has never been so widely exercised.

In this context, social media has come to play a significant role in society and is one of the main channels of communication. An example of its strength and importance in the contemporary world is the fact that the messages exchanged in social media were considered decisive in elections held in several countries, overcoming the influence of the so-called mainstream media or traditional mass media.

Social media has created new problems. Included among these are the broad dissemination of fake news, and the use of bots, to reach a large number of users in a short time. Fake news is a serious threat to democracy due to the influence online media messages have on public opinion. Opinions and beliefs have taken the place of truth, creating the concept of post-truth.

Another critical problem related to the abusive use of social media is that of hate speech, which is widely disseminated. Discriminatory or offensive expressions, previously restricted in space and time, have become global, magnifying the violence of these manifestations. One can say that we are living in a “culture of hate”.

The ability to create false profiles, together with the possibility of anonymity provided by the internet has also created an increase in offensive messages against personality rights, such as honour, image, and privacy.

The legal system should not be seen as the only way to reduce complex problems involving the abuse of social media. However, sanctions can and should be used by the judiciary to address these problems.

In this context, it is the responsibility of the judicial schools to conduct training courses to help judges deal with these problems involving the protection of individual and collective rights, and the civil and criminal liability of internet service providers and users of social networks.

## The course

The “Judicial training challenges — over-abusive use of social media” course educates magistrates to deal with various conflicts arising from the abusive use of the internet. It is both an in-person and online course.

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The course discusses relevant contemporary legal controversies to understand how the internet works, how it is regulated, and how conflicts can be legally resolved. The general objective of the course is to get to know the panorama of internet regulation in Brazil. It seeks to understand how the Brazilian Internet Law Framework (Law no 12.965/2014) was conceived, how it is structured and what topics are regulated by it, including blocking internet content and applications. It analyses different kinds of expressions related to the internet, like humour, cyberbullying, revenge pornography and hate speech. The goal is to create solutions for specific cases related to these themes.

It is a continuous training course taught over 20 hours, with classes divided into four days of five hours each. All activities are designed to evince a proposed theme and includes the study of concrete cases, in addition to the use of other active methodologies.

## **Methodology**

The course methodology pursues the objective of developing the continuing education of judges with a view to deepening their knowledge and understanding of the practical effects and social repercussions of their decisions.

The course is both theoretical and practical, taking jurisdictional practice as a starting point, seeking to understand the effect of judicial decisions within the complexity of society. Thus, student magistrates learn by reflecting on concrete jurisdictional practice, which encourages new ways of acting.

The trainees use their experiences and knowledge — based on a diagnostic evaluation — in theoretical and practical activities to better understand and consolidate their use of new practices. For this, the theoretical analysis is carried out using active methodologies, such as the study of concrete cases, simulations, dialogued classes, dramatisation, the study of processes and other teaching strategies.

Classes are intended to expose an issue, with group discussions, from the debate of specific cases, analysis of articles of law and judicial decisions. Multimedia resources are used — both PowerPoint and videos related to the material covered in class, such as related texts, interpretation of articles of law by the courts, practical situations that may be encountered by the judges, an appreciation of judgments and concrete cases.

Students are divided into groups to carry out the proposed activities in each class.

## **Internet regulation in Brazil**

The first class deals with internet regulation in Brazil, through the so-called “Brazilian Civil Rights Framework for the Internet”, or, in short, “Internet Bill of Rights”. It discusses the principles established by the law:

- the guarantee of freedom of speech, communication, and expression of thought
- protection of privacy
- protection of personal data under the law
- preservation and guarantee of network neutrality
- preservation of stability, security and functionality of the network via technical measures consistent with international standards and by encouraging the use of best practices
- the liability of the agents according their activities under the law

- preservation of the participative nature of the network, and
- the freedom of business models promoted on the internet, provided they do not conflict with the other principles set out in the law.

Also, the class deals with issues related to the providers' civil liability, especially considering Art 19 and 21 of the Internet Bill of Rights. Article 19 establishes the responsibility of internet application providers for the removal of offensive material after receiving a judicial order: "To ensure freedom of expression and to prevent censorship, internet application providers may only be held civilly liable for damage resulting from content generated by third parties if after specific judicial order the provider fails to take action to make the content identified as offensive unavailable on its service by the stipulated deadline, subject to the technical limitations of its service and any legal provisions to the contrary."

Article 21 demonstrates the application of the "notice and takedown" method. Internet application providers that make content created by third parties available without the participants' authorisation will be secondarily liable for violations of privacy resulting from the disclosure of images, videos and other material containing nudity or sexual acts of a private nature, if, after receiving notice from the participant or the participant's legal representative, they fail to take prompt action to remove the content from their servers, subject to technical limitations.

## **Limits on freedom of expression**

The second class deals with the limits on freedom of expression in social networks.

Freedom of expression, like other fundamental rights, has limitations of a different nature. Freedom of speech is contained when it collides or impedes the freedom of expression by another person. As Vieira Andrade observes, "the conflict between the rights of each individual and the rights of others is inevitable and systemic."<sup>1</sup>

The class discusses, in more specific terms, civil liability for third party content in the Internet Bill of Rights, the limits of humour, cyberbullying, protection of children and adolescents and the protection of images on the internet.

It addresses the serious problem of posting intimate photos and other cases of violation of privacy, such as revenge pornography, which primarily (but not exclusively) affects women.

The specific objective of this class is to evaluate the limits of freedom of expression in different scenarios by applying rules of civil liability with regards to online content, primarily related to humour, children and adolescents, and intimate content.

## **Right to be forgotten, fake news and post-truth**

The right to be forgotten has gained strength in recent decades. Currently, information is disseminated on a large scale and at high speed so that the disclosure of a fact can have worldwide repercussions in a few minutes. Also, the capacity for storing, locating and sharing this information in electronic media is immeasurable, enabling it to be retained indefinitely. The class studies the history on this subject and compares the European jurisprudence. In addition, it analyses the judgments of the Superior Court of Justice, as well as proposals to regulate the right to be forgotten in Brazil. Last, it debates the possibility of blocking websites and applications.

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<sup>1</sup> J Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 2016, University Manuals, p 263.

Another critical topic is the problem of fake news. The dissemination of deliberately false or distorted information, or fake news, to use the expression that became popular after the 2016 US Presidential elections, represents one of the most severe abuses of press freedom and freedom of expression in general, constituting a serious threat to democracy itself. It is a phenomenon that is not new, but that has acquired a much more significant and worrying dimension where a false publication in a digital media or social network takes a few minutes to go viral, causing immeasurable damage to reputations, political careers and, in some instances, putting lives in danger.

The phenomenon of fake news is closely related to the “post-truth”, the notion that truth is relative, and objective facts have less importance than emotions and personal beliefs. Post-truth is not related to the philosophical concept of relativism. It is only a radical attachment to beliefs (be they ideological, political, or religious), feelings and emotions, with total and absolute contempt and repudiation of factual evidence.

The problem of fake news tends to worsen with the improvement of the so-called “deep fake”, a technique based on artificial intelligence that allows the creation of fake videos, with the superposition of images and sounds, with a high degree of accuracy.

## **Hate speech**

The fourth and final class deals with the problem of hate speech and how it manifests itself. It compares the North American and European systems in the treatment of hate speech; debates the issue of racism and other forms of discriminatory discourse; establishes its relationship with freedom of expression and its constitutional limits and the treatment given to it by the Brazilian legal system.

Hate speech constitutes a challenge for the law because the limits of freedom of expression are in conflict with the interests or rights of vulnerable groups.

With the advent of the internet and the popularisation of social media, expressions of hatred have become more potent and disseminated in such a way that it is said we live in a “culture of hate” or an “era of hate”. The seriousness of offensive and discriminatory messages has increased, whereas once restricted in time and location, they can now be disseminated at a very high speed and to have a global reach. It does not mean that we hate more, but that it has become much easier to spread hate.

At the same time, the last few decades have seen a growth in claims for rights by various social groups which previously had no voice in public discourse. These conflicting demands are sources of tensions, heightened emotion and collisions between groups seen as opposites or adversaries, creating a society permeated by aggressive speeches and discrimination.

The internet is a platform widely used to convey hate speech. Discriminatory messages abound on social media, forums, chats, blogs, videos and other digital communication channels. As mentioned above, the possibility of anonymity and speed in the dissemination of messages via the internet encourages extreme manifestations of all kinds. There is a feeling of power and impunity that, together with ignorance and prejudice, and other amalgamated feelings, impels the hater to distill anger at digital speed.

Byung-Chul Han, professor of philosophy at the University of Arts in Berlin, identified this phenomenon. He says the anonymity afforded by the internet is, to no small extent, the cause of the lack of respect perceived in digital communication. He observes that respect is tied to names,

which is why anonymous messages facilitated by the digital environment generates a “growing culture of indiscretion and lack of respect”. The so-called “shitstorms” are also anonymous, “and it is the anonymity that makes them so violent”.<sup>2</sup>

Associated with anonymity is the high speed of digital communication, which, unlike the old and analog forms of written communication, has a “different temporality”. It allows the immediate transmission of messages, without the time for reflection that letters formerly sent to a newspaper provided, giving time between composition and delivery for the dissipation and self-containment of extreme feelings.

This distinct temporality, according to Han, makes digital communication a form of communication in which the sender of the message tends to express his feelings thoughtlessly and hurriedly:

In contrast, digital communication enables affective discharge right away. Based on its temporality alone, it conveys impulsive reactions more than analog connection does. In this respect, the digital medium is a medium of affect.<sup>3</sup>

On the internet, hate speech has become more sophisticated, with forms of expression that make use of technology for accessing and disseminating messages. Among these forms, there is the use of “memes”, a form of expression of an idea, through videos, images (static or animated), phrases, words or hashtags, all disseminated through social networks, blogs, e-mails and other services based on the worldwide web. Many of these memes go viral, spreading quickly among users and gaining much popularity, especially amid young people, making them a particularly useful way of spreading discriminatory messages. The use of memes and other forms of spreading hatred and prejudice through the internet have become so frequent that companies that maintain media and virtual social networks, such as Facebook, have been looking for technological measures to identify these types of messages, including the use of artificial intelligence.

To make identification difficult, haters have used symbols and coded communication to spread their hatred and prejudice. For example, Neo-Nazis, anti-Semites and racial supremacists began to use a set of three parentheses around a Jewish surname (eg (((Goldstein))) ) to identify Jews in order to subject them to harassment on social networks like Twitter.

One should not confuse the “hater” — the sender of hate messages — with the figure that was conventionally called a “troll”, who uses the internet to post inflammatory, irrelevant and out of context messages to provoke emotional responses or for the sole purpose of interrupting the ordinary course of a debate or discussion.

Haters, to make it challenging to identify and censor their messages, have used the so-called deep web, part of the worldwide web that is not reached by traditional search engines like Google and Yahoo. For this reason, it constitutes an attractive refuge for many users and groups that propagate hate messages.

The truth is that the amount of data that circulates on the internet every moment is so vast that it is impossible to know its real size, and it increases at breakneck speed. In addition, the web constitutes a virtual environment that crosses the borders of a specific national territory. All of this makes it virtually impossible to control all the information that circulates on the web.

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<sup>2</sup> B Han, *In the swarm: digital prospects*, The MIT press, 2017.

<sup>3</sup> *ibid*, p 2.

## **Conclusion**

Like almost everything in life, the internet is a tool that can be used for good and for bad. Its misuse does not diminish its importance as an instrument of free dissemination of useful information and good ideas.

While, on the one hand, it is true that the internet enables the practice of terrible acts such as cyberbullying, cybercrime and the distribution of child pornography, it is also true that the internet has brought immense benefits for society. It brings people and cultures together, allowing access and exchange of information in almost real-time, with undeniable advances in human knowledge.

Therefore, with all its challenges, the internet must be seen as a tool at the service of individuals and society, that will be so much more useful and valuable the more widespread and free its use.

This freedom, of course, does not mean self-regulation on the part of internet providers is unnecessary. Internet providers can and should make efforts to prevent the use of the web as a platform for extreme hate speech or the practice of crimes and rights violations. Nor does it make redundant the action of governments, through the implementation of rules that seek to combat abuse, exclude harmful content, protect the privacy, and ensure the repair of damage caused to third parties.

The “Judicial training challenges — over-abusive use of social media” course is essential not only to qualify judges to deal with the abusive use of the internet but also to make them aware of the importance of freedom of expression, its limits and the relevance of creating objective standards for applying this principle.

# The communication policy of a judicial training institution

Maxime Antier\*

## Introduction

This article discusses the issues of an institutional communications policy, drawing on the French experience at the French National School for the Judiciary (ENM).

We are living in a globalised, interconnected, digital world made up of exchanges and networks of all kinds. A world ruled by immediacy, that is in constant flux, more complex than ever before and where the circulation of information has become a critical issue. Against this background, communicating today, that is to say, conveying and sharing information with others, seems to be an unavoidable necessity for any organisation or community — and that includes the judicial community — to be identified, to develop, to extend its influence and even to simply exist.

So how should judicial training institutions deal with the issue of communication?

What we do know is that many of them teach the subject to their trainees: talks on justice and the media, sessions on social media, media training workshops, and so on. But shouldn't they also, as entities, draw up and apply a set of communication strategies that would actually amount to a communication policy? And if so, what would the stakes and limits of such a policy be?

To fully play its role in the rule of law, as well as providing basic teaching on communication, a judicial training school must communicate as an institution.

## Why develop a communication policy?

The ENM, which celebrated its 60th anniversary in 2019, has developed a proactive communication policy, which is defined and driven by the school's top management.

It applies that policy with a professionalism that it has striven to reinforce over the last 10 years with the creation of its own communication department, which is made up of experts from different backgrounds: communication professionals, journalists, web and social media specialists and graphic designers.

This policy is divided into three main strands:

1. We communicate to be identified and to assert ourselves as an institution that plays a major role in guaranteeing the rule of law by upholding its values.
2. We communicate to meet a democratic requirement for transparency and access to Justice, by generating confidence in the quality of the recruitment of judges and prosecutors, and in their training and independence.
3. We communicate to recruit and thereby consolidate the judicial institution.

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These are the three points developed throughout this article.

### **Identification and assertion as an institution**

The first point is that the ENM communicates to be identified and to assert itself as an institution that plays a major role in guaranteeing the rule of law by upholding its values.

Before going any further, two important facts should be noted:

- the first is that the institutional landscape in France is very dense and complex,
- second, there is real lack of knowledge of the world of justice in general and the judicial institutions in particular, among both decision-makers — even at a very high level — and the general public.

It is therefore necessary for the ENM to be visible and familiar:

- to as many people as possible: government departments, state and decentralised authorities, parliamentary assemblies, local government bodies, independent administrative authorities, other court systems and of course, ordinary citizens
- as the only school in France that recruits and trains judges and prosecutors, as the school of the judicial authority, the “guardian of individual freedoms” (Article 66 of the Constitution of 4 October 1958).

For the ENM, it is not so much about establishing its own legitimacy, but the legitimacy of the judicial authority, which is an essential ingredient in the democratic system and the relations between the different powers that are exercised within the state.

The main objective of our communication policy is therefore institutional.

We need to relentlessly inform of our existence and constantly assert our competence, explaining the ENM’s monopoly on the training of judges and prosecutors, which is directly linked to the statutory independence of those judges and prosecutors and which is protected by the constitution (Article 64 of the Constitution of 4 October 1958).

Furthermore, Article 2 of the Declaration of Judicial Training Principles adopted by the IOJT on 8 November 2017 aptly states that to “preserve judicial independence, the judiciary and judicial training institutions should be responsible for the design, content and delivery of judicial training”.

Although we have been applying this type of communication policy for many years, the celebration of the ENM’s 60th anniversary has provided us with an opportunity to reassert our message with considerable force through a variety of actions organised as part of what has been an ambitious and highly successful communication plan.

First of all we published, a little while before the celebrations began in 2019, a special issue of the ENM magazine, packed with interesting content, entitled “Judicial training as a guarantee of the rule of law”.

We then carried this key idea forward through a multi-channel strategy, such as the creation of a dedicated website separate to our institutional site, writing and disseminating news articles on our sites and networks and publication of “web teasers”.

Finally, this culminated in a major conference held in Bordeaux in May 2019 titled “Judicial training: a challenge for democracy”. This provided an opportunity for our institute, which, although it can draw on a proud history, is also a resolutely forward-looking institution, to reiterate its fundamental role.

This strategy is all the more important as the question of whether the ENM should be abolished is one that rears its head on a regular basis. It is wrongly accused of a variety of “sins”, such as a lack of openness, a lack of diversity among its trainees and creating a harmful corporatist mindset, among other things.

This was the case most recently in 2018, when a high-profile lawyer publicly called for the abolition of the school and attracted extensive media coverage. How then can we react and deconstruct the arguments of those who make such unjustified attacks without turning in on ourselves and leaving ourselves wide open to criticism, and without becoming involved in political wrangling?

In this particular case, the response was an open letter sent by the Director of the ENM inviting the lawyer to come to the school and debate the issue in front of its students and academic staff, and in the presence of the press (print, radio, television, regional and national). The debate took place at the beginning of May 2018 and served its purpose of giving the school a voice and provided an opportunity to explain and educate the public whilst highlighting the specificities that legitimise its existence.

The debate was co-organised with trainee judges and prosecutors, and the press coverage was largely favourable to the school, thereby giving it the chance to respond to the widely reported statements of this lawyer.

Nevertheless, the fact remains that any incursion into the media arena carries a risk, that is, the risk of not convincing your public or of not conveying a positive image. It is therefore necessary to prepare such “live” interventions with as much professionalism as possible, but without overdoing it. The less often we speak out, the more weight what we say will carry.

In addition, a training institution asserting its institutional role must not lead to its taking up positions on particular subjects in the public debate that would lead to it losing the neutrality that is sometimes of critical importance.

This means that requests from the media to “comment” from the judiciary’s point of view on new laws or white papers should be treated with the greatest of caution.

### **Democratic requirement for transparency**

The second point is that the ENM communicates to meet a democratic requirement for transparency and access to justice, by generating confidence in the quality of the recruitment of its judges and prosecutors, and in their training and independence.

In France, even though there is no lack of criticism, people harbour very high expectations of justice in general and the judicial institutions in particular, especially in a period where politics and politicians’ relations with citizens are in crisis.

To meet this demand for justice, it is essential that a strong bond of trust be formed between the population and its judges. This means making as much information available as possible to the public on the institution that recruits and trains those judges in order to firmly establish their legitimacy.

This is why:

#### ***We communicate on our governance***

We communicate on our internal organisation, our activities, including the school’s finances (it is essential that the public see that the nation is investing in training its judges and what the concrete effects of that investment area) and the decisions of our board of administration.

*We communicate on our recruitment and training activities, seeking to articulate a number of messages that structure our discourse:*

1. **Recruitment based on the values of the French Republic and the notion of excellence:** our entrance exams are public, open to all without discrimination, transparent (we publish everything from the dates of forthcoming exam sessions, lists of candidates admissible and those who pass the exam, to the best answers to the exam questions and the examining board's report).
2. **Diverse recruitment:** if citizens are to put their trust in the justice system and their judges and prosecutors, the judiciary must strive to reflect the society it represents and in which it will operate as closely as possible.

We communicate on the diversity of our students' backgrounds — those who come directly from university or who cross over from other professions, gender diversity and also territorial and social diversity. Concerning this last point, it is 10 years now since we set up "equality of opportunity" preparatory classes, and the results have been very satisfactory.

3. **Practical professional training with a focus on the technical aspects and professional ethics:** lifelong learning for judges and prosecutors of all ranks and lengths of service.
4. **Training that is in touch** with the realities of society.
5. **Inter-professional training.**
6. **Innovative training methods** (the latest issue of the ENM magazine is entirely devoted to this fascinating subject).

Anyone, anywhere in the world can go to our website and find all the data concerning all the aspects I have just listed online.<sup>1</sup>

Of course, transparency also has its limits. Two of those limits are worthy of mention here. Firstly, confidentiality. Sometimes journalists will ask to attend a training session or interview trainees, and it is necessary to keep in mind the need for discretion regarding the exchanges. This aims to preserve the serenity of the training environment and in some cases, means refusing access to the media.

The other issue is anonymity. It is true that since 2016, we have communicated on our training in the area of anti-terrorism, but this communication has been of a general nature, without going into detail on the content or giving the names of the lecturers involved.

### **Recruitment of candidates**

The third point is that the ENM communicates to recruit, attract and to consolidate the judicial institution. If there were no candidates to become judges and prosecutors, the judicial institution would soon come to grief. The stakes are therefore high.

To guarantee this stream of new candidates, each year the ENM runs a proactive, targeted communication campaign to attract candidates for the competitive judiciary exams and the preparatory classes.

It conducts its campaign in universities, institutes of political science and sometimes senior high schools. It also organises visits for students, as it did for example in Bordeaux on

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<sup>1</sup> See further [www.enm.justice.fr](http://www.enm.justice.fr), accessed 22 January 2020.

4 September 2019. “Start U” was part of a scheme initiated by the University of Bordeaux, with the aim of informing students on what is involved in the professions of judge and prosecutor and hopefully fostering some vocations.

We also seek to encourage diversity in our recruitment. This deliberate policy has enabled us to achieve a geographically and socially more diverse mix among our trainees. We are also working on our communication with a view to recruiting people from other walks of life who are looking for a change of profession.

## **Conclusion**

These campaigns may also face certain limits, such as a limit on the resources that can be devoted to communication. The school develops its communication efforts using its own resources, both financial and human, and sometimes has to reorient those efforts due to a budget shortfall or a lack of time.

In conclusion, it appears that communication can offer a judicial training institution tremendous opportunities as well as giving its considerable leverage over its own development.



# **Institutional actors in globalised society: the role of judicial schools, ENAMAT and its training axes**

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Giovanni Olsson\*\*\*

## **About ENAMAT-Brazil**

The National School of Formation and Improvement of Labour Magistrates (ENAMAT) is the first school in Brazil established to regulate official courses for the admission and promotion of judges' careers. It is instituted by a Superior Court and fulfills the purpose of constitutional amendment No 45/2004 (the Reform of the Judiciary) and is established at the Superior Labour Court (TST).

In that same Constitutional amendment, it was also stated that its related national school — National School of Formation and Improvement of Magistrates (ENFAM) — would be set up by the Superior Court of Justice (STJ). Both conduct several joint projects and are active members of IOJT.

As a consequence of the 2004 rule, all professional development of the more than 17,000 magistrates — on the federal branch (federal ordinary judges, federal labour judges, federal military judges) or the state branch (ordinary judges from all 27 states) — is performed by public, national institutions and is strictly regulated by the Constitution.

It is important to highlight that, in the very complex Brazilian judiciary system, all “magistracy schools” are under either the ENAMAT or ENFAM hierarchy, or belong to (or are part of) private entities (such as Associations of Magistrates) and are their educational arms, apart from the official realm. Many people are not aware that there are magistracy schools in Brazil, which are outside the official formation system.

Therefore, Brazilian labour judges' professional education is primarily held by the official magistracy schools, either on a national level (ENAMAT) or on a regional level (24 regional Judicial Schools of Labour Magistracy).

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Since its inception, the constitution of ENAMAT has had the objective of promoting the selection, training and education of labour judges, who require specific professional education and continuous updating due to the public function they perform in the area of social justice. In this regard, the school promotes the following basic activities:

- (a) **Initial Training Courses:** designed for substitute labour judges recently appointed for a probationary period;
- (b) **Continuing Education Courses:** consisting of varied formats, such as seminars, juridical colloquia, lectures, simulations, or distance learning (via Moodle platform or video-conferences) in Brazil or abroad, designed for all labour judges, at any level of the jurisdiction; and
- (c) **Training of Educators Courses:** designed principally for judicial regional schools staff (but also for other teaching professionals including school managers, distance learning designers, tutors), for the professionalisation of the judicial schools on a regional level.

Along with these teaching activities, the national school has a heavy focus on research and publishing. As a consequence, ENAMAT achieves judicial function and the judges' continuing development, contributing to a better quality of social justice throughout country.

The first group of judges to undertake ENAMAT as a magistracy school on a national level completed the course in October 2006. There were 72 substitute labour judges, from seven regional labour courts. Since then, a great deal of work has been done to enhance teaching and learning capabilities. In May 2019, there were 3,400 federal labour magistrates on duty in Brazil, and more than 1,500 of them have engaged with the institutionalised national initial education since ENAMAT's establishment in 2006. Moreover, they are all permanently completing continuing education throughout their careers.

## **Judicial regional schools and integrated training system**

The Judicial Regional Schools of Magistrates, which are located throughout the 24 regional labour courts, were only fully established in all Regional Courts in 2009.

Although performing any private or public duty requires specific professional knowledge, for many years the judiciary in Brazil missed programs and systematic judicial education institutions. For decades, it was wrongly assumed that graduation in law would suffice for legal professional needs and, moreover, that a qualified judge should be a highly productive decision-maker or, eventually, someone holding several academic post-graduate titles.

From an historical perspective, the interest for systematic qualification of judges in Brazil is recent, except for isolated, scattered initiatives in both federal and state branches.<sup>1</sup>

The constitutional amendment No 45/2004, began to effect a change by modifying the recruiting regime and education for judges by introducing important new institutional duties to courts. The main change related to the institutionalisation of a nationwide system for the education of judges. The creation of National Schools in the scope of Superior Labour Court and also the Superior Court of Justice was designed with the express intention of "regulating official courses for the admission and career promotion",<sup>2</sup> and both have taken the role of coordinating the system since then.

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<sup>1</sup> S Teixeira, *O juiz: seleção e formação do magistrado no mundo contemporâneo*, Belo Horizonte, Del Rey, 1999.

<sup>2</sup> Constitution, article 111-A, sect 2, II.

Another core change is nurturing professionalism in the judges' education and development. The professional formation is a requirement for approval during the probationary period (initial training courses), because it is a "[...] mandatory stage in the probationary period the participation in official course or recognised by national school of magistrates' formation and improvement". It is also a requirement for promotion (continuing education courses), establishing "official courses for preparing, improving, and promoting magistrates..."<sup>3</sup>

These changes clearly boosted the establishment of judicial schools in all regional courts and unleashed a phenomenon of intense educational re-qualification, either in terms of judicial policy or consideration of efficient pedagogic techniques within these education institutions. Specifically, they greatly enlarged judicial schools' attributions and responsibilities over the qualification of these professional careers.

In Brazil, only regional courts are entitled to establish official judicial schools. Therefore, they are relatively financially autonomous, due to previous approval of the expenditure by the court they are bound to. Despite this singular limitation in some regional contexts, it is undeniable that schools have broad pedagogical autonomy and total integration with other planning mechanisms and control of the jurisdictional activity in its region. This enables a specific education based on the needs of the local region. Moreover, they are under constant supervision of national schools, which define general education rules and can offer not only support in several academic and administrative issues, but also financial contributions.

As a rule, judicial schools perform only professional educational activities. In many cases, however, they match judges' and public servants' education, either in a broad context (servants of different positions in the institution) or according to relevance and link to the magistrate (positions related to the judicial activity such as the judge's assessors, and clerks).

It is important to say that the two national schools coordinate complex, but integrated education systems with all judicial regional, or state, schools of their branches.

### **Federal labour judges recruiting model**

It is quite clear that professional education procedure should consider the labour court judges' recruiting system, and how it affects judges' profiles and expected qualifications.<sup>4</sup>

The tradition of the Brazilian judicial system (and in labour justice as well) is that the judge's investiture in their career follows approval through a public tender process by means of content tests (several written and oral tests) and academic curriculum analysis, in the scope of each regional court. Although general criteria for this procedure are nationally established, everything occurs regionally and according to vacancies available, and to their own calendar. So, the regionalised recruiting model for labour judges remains with their respective regional courts where prospective judges apply by public tender.

There is only one exception, which is the provision of one-fifth of the regional labour court judges, reserved to public labour attorneys and to the labour lawyers, appointed by the federal government and under legislative approval in a very complex procedure. It is important to stress that similar provisions are due in all regional and superior courts of all branches in Brazil and is a well consolidated regulation.

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<sup>3</sup> Constitution, article 93, II, c; IV.

<sup>4</sup> L Vianna et al, *O perfil do magistrado brasileiro*, JUPERJ, 1996.

When commencing their career, judges start to integrate the administrative and functional staff of a specific regional court. Once a magistrate is bound to only one court, there is less opportunity for mobility, and their education suffers from the influence of the regional peculiarities regarding social and economic aspects of the country region where they are assigned. Therefore, the importance of the regional education is highlighted as the most suitable way to identify and respond to these singularities and concrete matters.

Positions are substitute labour judge, district labour court judge and regional labour court judge. The substitute labour judge, following some requirements (time and/or qualification and/or administrative need) may move from one location to another and, as after some time (usually more than a decade), is able to progress by successive promotions to district labour court judge and, in some cases, also to regional labour court judge (Regional Court).

In recent years, ENAMAT has conducted the first experience of a nationalised recruiting process, simultaneously with the 24 regional labour courts, the results of which are still to be properly analysed and subject to further scrutiny. In any case, it is undisputed that the Brazilian constitutional model defines public tender as the instrument for magistrates' recruitment, and its written and oral tests are grounded on legal knowledge and legal subjects.<sup>5</sup>

Therefore, with a recruitment process based on the juridical science, naturally the most important competencies for professional performance should be delivered by national and/or regional schools. This training must be lifelong, dynamic and extensive.

Moreover, in a contemporary globalised society, it is essential to consider that magistrates want to ensure continuous learning, not only to properly perform their duties,<sup>6</sup> but also to understand the whole society in which they are immersed in a reflexive, dynamic way.<sup>7</sup>

There are several lines of thought to explain professional competencies and their dimensions,<sup>8</sup> but we can summarise them in three areas: knowledge (theory), skills (how to perform) and attitudes (where ethics and acumen are core). These are competencies targeted to address social needs and conflicts challenging the judiciary system.

As is obvious, the role in teaching magistrates fundamental contemporary social needs,<sup>9</sup> is, nevertheless, the biggest challenge of judicial schools as institutional players in contemporary globalised society.

## **Demands for renewed professional training and development**

In the Brazilian judicial system, as in many others, there are increasing challenges regarding magistrates' duties to address contemporary social needs, including claims and experiences of reformist systems.<sup>10</sup> Many things have changed in order to overcome the traditional idea that a judge is entitled only to "judge" or issue decisions. Being a judge encompasses much more than just "judging" in this narrow perspective.

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<sup>5</sup> J Nalini, *Recrutamento e preparo de juizes na Constituição do Brasil de 1988*, RT, 1992.

<sup>6</sup> C Houle, *Continuing learning in the professions*, Jossey-Bass, 1980.

<sup>7</sup> D Schon, *Educating the reflective practitioner: toward a new design for teaching and learning in the professions*, Jossey-Bass, 1990.

<sup>8</sup> T Durand, *L'alchimie de la compétence*, Revue Française de Gestion, v 127, pp 84-102, 2000, n 1; P Zarifian, *O objetivo competência: por uma nova lógica*, Atlas, 2001.

<sup>9</sup> K Kolbe, *Conative connection: uncovering the link between who you are and how you perform*, Kolbe Corporation, 1997.

<sup>10</sup> L Armytage, *Reforming justice: a journey to fairness in Asia*, Cambridge University Press, 2012.

Judges are being increasingly called to explain plainly, in a transparent way, their decisions to society and the media and to lead and inspire a working group of public servants and clerks. They are required to organise claims, routines, hearings and calendars. Judges must understand conflicts surrounded by economic, social, psychological or political issues, which are usually caused or aggravated by social inequalities, frustrated personal expectations, labour market exclusion, digital economy, ideological tensions and other deep structural societal changes and reshaping. Judges have to perform duties on electronic procedures systems or virtual platforms provided by courts working in a fully paperless judicial world and deal with high exposure in social medias and networks. All these new challenges judges face increase the judicial schools' responsibilities and enlarge the scope of education far beyond legal capabilities. In a globalised, intertwined world, judges require more than legal knowledge.

In order to build the core principles of the curriculum and professional teaching and learning courses,<sup>11</sup> some steps are indisputable. The most remarkable are the core competencies to be offered to these professionals aligned to their careers. The idea is not really new because, as eminent authors stress, magistrates need a whole and authentic process of continuous "education", which is provided through new models of teaching and learning in judicial schools.<sup>12</sup>

Following this trend of thought, ENAMAT has been working hard since the beginning of 2018 to improve its role as an institutional player in a globalised society and to offer all labour judges qualified training and development. The largest, but most difficult move in this direction was the recent reform of its education programs to emphasise ethical and alterity dimensions.

Since 2006, ENAMAT has built its National Formation Programs on a model of "general" and "specific" competencies, applying generally to all magistrates or only to labour magistrates.

General competencies are common to legal practice in general, and in this case, are divided into the following fields:

- "argumentative and discursive" (reasoning elaboration, discourse and language building)
- "juridical and dichelological" (legal aspects related to fundamental structure system and justice being accomplished in real life)
- "juridical and deontological" (ethically guided judicial theory)
- "political and institutional" (introducing the professional to the group of institutions and to public agents), and
- socio-interactive (interpersonal relationship, as well as with the society, media and public and private entities).

The specific skills are related to the performance of the labour magistrate themselves. They complement and adapt the knowledge common to other judicial areas, or the ones which have different legal and social groundings, administrative criteria or functional workflow, and are categorised as: "administrative and functional", "labour jurisdictional", "legal and labour" and "socio-psychological".

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<sup>11</sup> R Tyler, *Basic principles of curriculum and instruction*, University of Chicago Press, 2013.

<sup>12</sup> L Armytage, *Educating judges: towards a new model of judicial learning*, Kluwer Law Int, 1996.

However, after long debates and thorough studies by magistracy schools and experts in the field of judicial education, it became clear that the former model, in spite of its structural sophistication and comprehensiveness, was not enough to educate and train labour magistrates facing complex social conflict.

Therefore, since early 2019, a new approach has been taken. Formation or education guidelines are now set directly by axes, based on their role: applied ethics, alterity (relation to others), conflict resolution and law and society, and how it relates to the role of the magistrate. It is important to say that all the professional competencies (knowledge, abilities, attitudes) are retained, improved and further detailed, but their meaning is now enhanced from the position of the magistrate regarding their role.

There are many approaches to qualifying magistrates and to improving recruitment systems, but it is quite clear that an ethical dimension is fundamental to any attempt.<sup>13</sup> This turning point in ENAMAT core competencies is to emphasise the role of ethics in magistrates working experience.

Each of the new curriculum axes has major relevance for the professional life of the judge.<sup>14</sup>

Applied ethics involves reflection on the ethics and morals applied in professional practice. More than just studying the laws and rules of the professional conduct codes in the Brazilian system, the study of ethics introduces the application of international rules, such as the Bangalore Principles and the Inter-American Code of Judicial Ethics. Furthermore, everything is always addressed in the perspective of conflicts and dilemmas in its concrete application in the interfaces between public and private life.

Alterity emphasises the inter-subjectivity and understanding of “otherness” on the part of the magistrate. The magistrate must bear in mind, throughout their formative itinerary, that interpersonal relationships, inter-subjectivity and empathy are present, because the judge is required to solve the problems of others.

Conflict resolution offers a broader study than just the techniques and tools for judging and reconciling conflicts. This subject introduces the reflection on conflict models, patterns of litigation, mass violation of social rights and citizenship rights in a globalised society. More than that, it proposes that a fair solution to conflicts requires the understanding of numerous variables other than mere legal technicality.

The last guideline, law and society, presents the debate on the interface between law as a social regulation instrument and society itself, as a legitimate source and recipient of these rules. The subject proposes a reflection on the relationship between law and democracy, based on the principles of transparency, multidimensional sustainability and accountability.

As stated, these various guidelines articulate the main concrete challenges of the professional life of the Brazilian magistrates today and, with education based on the application of all competencies, the goal is to provide a public service of justice in a highly complex and globalised society. In summary, the new educational aims intend to distinguish ENAMAT as a qualified institutional player in this new and challenging reality.

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<sup>13</sup> B Santos, *O recrutamento e a formação de magistrados: uma proposta de renovação*, Coimbra: OPJT-CES, 2001.

<sup>14</sup> ENAMAT, 2019.

## **Conclusion**

This article provides a brief presentation of the theme, with the purpose of stimulating future reflections and deeper investigation.

Its starting point was the implementation of the new model of professional formation of magistrates in Brazil in 2004, and the context of the creation of ENAMAT as one of the two national schools that co-ordinate the entire official and institutional system of this formation.

In addition, there is an intention to demonstrate that, in the Brazilian case, the education co-ordinated by official national schools is carried out with the indispensable participation of regional judicial schools, installed in each of the regional or State courts. In each school, different but interconnected stages of the formative process are carried out.

It is important to emphasise that the Brazilian education model is based upon its recruitment model, with a great emphasis on theoretical and legal knowledge. Therefore, the role of the judicial schools is of greater relevance for the development of knowledge in areas other than law, encompassing skills and attitudes that integrate the magistrate's core professional competencies.

Finally, in the context of a globalised and highly complex contemporary society, with growing conflicts and great interdependence of transnational social, economic, political and legal matters, schools must act as authentic institutional players. In order to face this challenge, ENAMAT has been promoting changes in the focus of its professional development, emphasising in particular the dimensions of ethics and alterity as necessary guidelines of professional training for the Brazilian magistrate.

It is too early to say if all the expected results will be realised, but it is true that this change is necessary as the role of magistrate is much more than just "judging", and the schools should develop professional education of magistrates for the new social challenges of the 21st century.



# Evaluating the impact of training on judicial practice in the Netherlands

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## Introduction and problem statement

In a rapidly changing society, it is important that organisations and their workforce keep up with the latest developments in knowledge, practices and technologies.<sup>1</sup> To do so, organisations often invest heavily in systematic training for employees.<sup>2</sup> Transfer of training, employees' application of acquired knowledge and skills and insights in the working practice is vital for employee training to be of value for organisations.<sup>3</sup> However, transfer of training often leaves a lot to be desired.<sup>4</sup> As such, the transfer of training is regarded the “Achilles heel of the training process”.<sup>5</sup>

The same could be the case for judicial training; every year large amounts of money and time are spent on training activities to improve the quality of the judiciary.<sup>6</sup> However, the evaluation of training practices rarely includes an evaluation of the impact of the training on work practice.<sup>7</sup> The return on investment of training in the judiciary is therefore unclear, while gaining insight in returns has become increasingly important. Courts and public prosecutor offices are being put under increasing pressure by politicians, media and the public regarding the way they function and perform,<sup>8</sup> while at the same time the courts' budgets are shrinking.<sup>9</sup> This is the case in multiple countries, like Switzerland,<sup>10</sup> China<sup>11</sup> and the Netherlands.<sup>12</sup> These developments have

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<sup>1</sup> R Grossman and E Salas, “The transfer of training: what really matters” (2011) 15(2) *International Journal of Training and Development* 103.

<sup>2</sup> *ibid.*

<sup>3</sup> K Jiang et al, “Clarifying the construct of human resource systems: relating human resource management to employee performance” (2012) 22(2) *Human Resource Management Review* 73.

<sup>4</sup> Grossman and Salas, above n 1.

<sup>5</sup> J Botke et al, “Work factors influencing the transfer stages of soft skills training: a literature review” (2018) 24 *Educational Research Review* 130.

<sup>6</sup> S Daffron, D Cowdrey and J Doran, “Transfer of learning for state court judges: maximising the context” (2007) 26(6) *International Journal of Lifelong Education* 689.

<sup>7</sup> L Hammergren, *Judicial training and justice reform*, Center for Democracy and Governance, USAID, 1998.

<sup>8</sup> L Noyon, “Waarom publieke opinie er (juist nu) toe doet voor het strafrecht” 81 *Strafblad*, 2017, at [https://openaccess.leidenuniv.nl/bitstream/handle/1887/60994/Strafblad\\_2017.pdf?sequence=1](https://openaccess.leidenuniv.nl/bitstream/handle/1887/60994/Strafblad_2017.pdf?sequence=1), accessed 18 February 2020; S Taal, “Working separately together: a quantitative study into the knowledge sharing behaviour of judges”, 2016, Doctoral dissertation, summary available at [http://www.justizforschung.ch/pdf/Taal\\_Working\\_separately\\_together.pdf](http://www.justizforschung.ch/pdf/Taal_Working_separately_together.pdf), accessed 18 February 2020.

<sup>9</sup> Taal, above n 8, p 50.

<sup>10</sup> D Kettiger, “Swiss courts move toward an outcome-orientation”, EGPA conference, 2005, Bern.

forced courts to raise their productivity, leading to a higher workload and less time to spend on training activities for judicial employees.<sup>13</sup> Guaranteeing that remaining judicial training results in a sufficient transfer is therefore vital.

Research has identified characteristics of employees, their work contexts and training designs that influence the transfer of training. Of these factors, especially motivation to transfer (ie, the individuals' desire to transfer the acquired knowledge during the training towards their working practice)<sup>14</sup> has been found to matter.<sup>15</sup> When employees are more motivated to transfer, there is also a higher probability that they will put the learned content into practice.<sup>16</sup>

Recently, motivational scientists De Brabander and Martens<sup>17</sup> developed a model that integrates several theories of motivation and accommodates personal and contextual factors that influence the transfer of training. This Unified Model of Task-specific Motivation (UMTM) aims to describe factors that influence the motivation of individuals at a given point in time to put task-specific behavior into action. As such, the UMTM can also be used to predict transfer of training in the judiciary. In work contexts other than the judiciary, studies have started to show the merits of the UMTM for predicting task-specific motivation.<sup>18</sup> However, the model has not yet been tested within the judicial context. To aid the evaluation of the impact of judicial training on work practice, this study aims to explore if the UMTM works in the judicial training context and whether it predicts transfer of judicial training to practice.

## The unified model of task-specific motivation

The UMTM<sup>19</sup> describes motivational factors that precede task-specific action, of which transfer of training is an example (see Figure 1, below, for an overview of the model). The UMTM is based on an integration of six motivational theories that each provide different nuances on the origin of motivation.<sup>20</sup> In short, the UMTM identifies personal and contextual factors that predict cognitive and affective forces which put individuals into action.<sup>21</sup> Each UMTM component will be discussed in turn.

<sup>11</sup> B Liebman, "China's courts: restricted reform" (2007) 27 *Columbia Journal of Asian Law* 1.

<sup>12</sup> D Broeders et al, *Speelruimte voor transparantere rechtspraak*, Amsterdam University Press, 2013.

<sup>13</sup> Taal, above n 8.

<sup>14</sup> R Noe and N Schmitt, "The influence of trainee attitudes on training effectiveness: test of a model", (1986) 39(3) *Personnel Psychology* 497.

<sup>15</sup> R Grossman and E Salas, "The transfer of training: what really matters" (2011) 15(2) *International Journal of Training and Development* 103.

<sup>16</sup> A Gegenfurtner et al, "Integrative literature review: motivation to transfer training: an integrative literature review", (2009) 8(3) *Human Resource Development Review* 403.

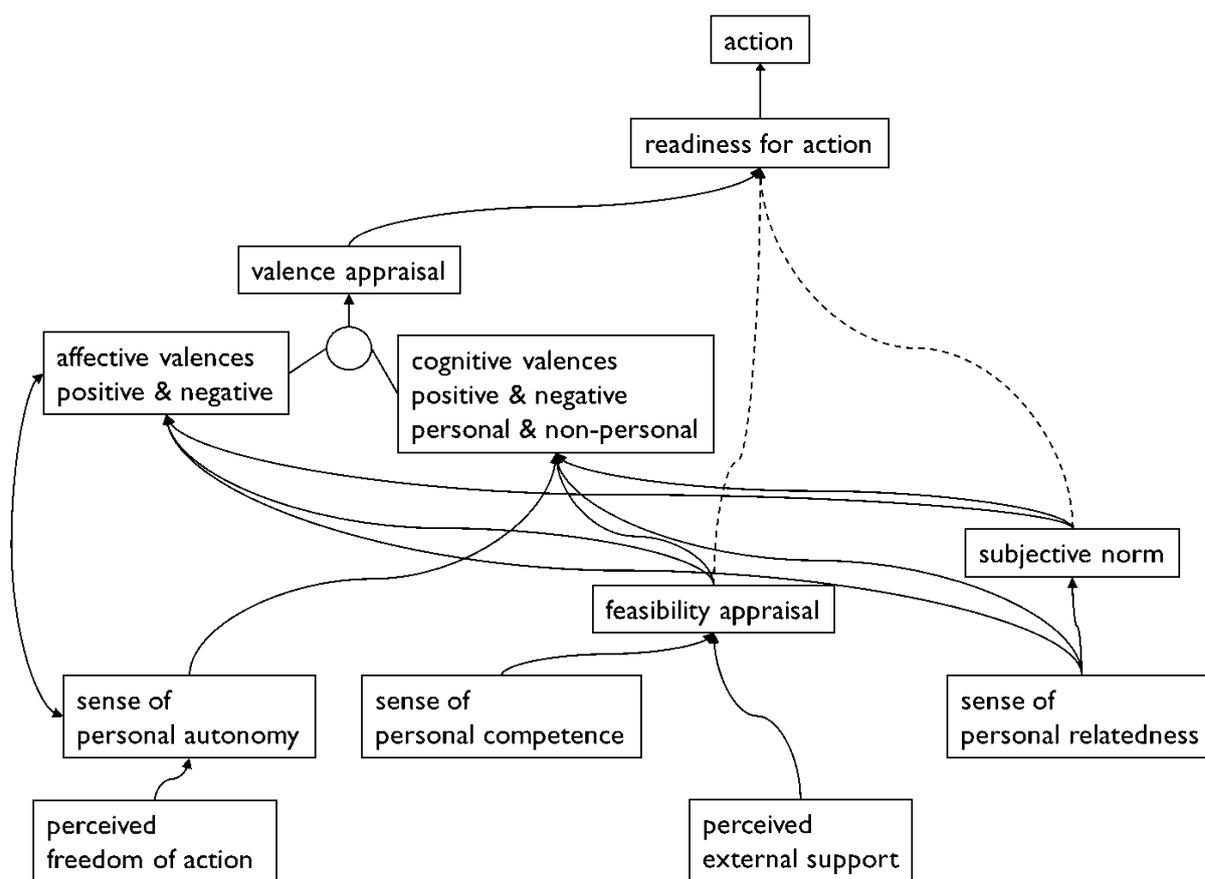
<sup>17</sup> C De Brabander and R Martens, "Towards a unified theory of task-specific motivation" (2014) 11 *Educational Research Review* 27.

<sup>18</sup> C De Brabander and F Glastra, "Testing a unified model of task-specific motivation: how teachers appraise three professional development activities", International Conference on Motivation, 2016, Thessaloniki; C De Brabander and F Glastra, "Testing a unified model of task-specific motivation: how teachers appraise three professional development activities" (2018) 6(1) *Frontline Learning Research* 54; De Brabander and Martens, *ibid.*

<sup>19</sup> De Brabander and Martens, above n 17.

<sup>20</sup> see De Brabander and Martens, above n 17, for a more in-depth explanation of the UMTM.

<sup>21</sup> *ibid.*

**Figure 1: The Unified Model of Task-specific Motivation<sup>22</sup>**

Within the UMTM, task-specific behaviour of individuals, which in this study refers to transfer of training, is represented by *action* (eg, writing a legal verdict). The main component predicting action is *readiness for action*. This component can be interpreted as the overall motivational force that drives task-specific behaviour (eg, the motivation to write a legal verdict)<sup>23</sup> and is equivalent to motivation to transfer. This overall motivational force is predicted by *valence appraisal*, which consists of affective and cognitive valences.

*Affective valences* refer to the feelings individuals expect to experience when performing a certain activity.<sup>24</sup> These feelings are activated automatically when individuals anticipate performing an activity.<sup>25</sup> *Cognitive valences*, on the other hand, describe the contemplated value of potential consequences of performing an activity. The value of consequences of an activity is determined actively and explicitly by individuals. Moreover, this value is not only determined for individuals themselves, but also for other stakeholders such as colleagues, litigants or courts or public prosecutor offices in general. Cognitive valences can therefore be both personal and non-personal.<sup>26</sup>

Both cognitive and affective valences can be positive or negative. When they are positive, individuals anticipate pleasant feelings and they expect positive consequences for themselves

<sup>22</sup> De Brabander and Martens, above n 17, adapted by De Brabander and Glastra, 2018, above n 18.

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

or others when an activity is being performed. When they are negative, individuals expect unpleasant feelings and adverse consequences when the activity is performed. Consequently, when valences are positive, readiness for action increases which eventually leads to action, whereas the opposite occurs when valences are negative.

Within the judicial transfer of training context, enthusiasm about using newly gained knowledge about a law during a legal case would be an example of positive affective valence. Expecting higher efficiency in handling legal cases, leading to a lower workload for colleagues within the court or public prosecutor office would be examples of positive personal and non-personal cognitive valences, respectively. Negative valences would occur when individuals feel insecure about performing a recently acquired skill on how to interrogate a witness (affective valence) and when it seems to lead to a higher workload for individuals themselves or colleagues within the court or public prosecutor office (cognitive valences).

Both types of valences are affected by contextual and personal antecedents that the UMTM puts into three categories. The first category revolves around individuals' estimations of the feasibility of performing an activity. This feasibility appraisal is determined by individuals' sense of personal competence for performing a task successfully (eg, am I personally capable of writing the verdict more to the point?) and the perceived external support they experience to do so.<sup>27</sup> For transfer of training, there can be stumbling blocks that decrease perceived external support (eg, lack of suitable work equipment) or beneficial factors that increase it (eg, sufficient expertise among legal assistants).<sup>28</sup> It is expected that feasibility appraisal predicts readiness for action via valence appraisal.<sup>29</sup> However, a direct effect on readiness for action is also possible.<sup>30</sup>

The second category of antecedents concerns individuals' autonomy and includes a personal sense of autonomy and perceived freedom of action. Perceived freedom of action is defined as the amount of freedom individuals experience to make their own decisions about performing an activity (eg, having the freedom to make choices on how to structure written verdicts).<sup>31</sup> It is expected that perceived freedom of action predicts a personal sense of autonomy, which refers to the extent individuals perceive themselves as the origin of choosing and performing a certain activity (eg, the extent that individuals feel free to decide on if and how to write a verdict).<sup>32</sup> According to the UMTM, personal sense of autonomy is a predictor for cognitive valence, whereas it has a reciprocal association with affective valence.<sup>33</sup>

The third category of antecedents concern social factors, of which subjective norm is of particular interest. Subjective norm can be defined as an individuals' tendency to abide by the approval or disapproval of important others regarding particular behavior (eg, the approval of colleagues when individuals use a new interrogation technique on a witness).<sup>34</sup> Subjective norm

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<sup>27</sup> *ibid.*

<sup>28</sup> Grossman and Salas, above n 1.

<sup>29</sup> E Deci and R Ryan, "The 'what' and 'why' of goal pursuits: human needs and the self-determination of behavior" (2000) 11(4) *Psychological Inquiry* 227.

<sup>30</sup> I Ajzen, "Behavioral interventions based on the theory of planned behavior", 2006, at <https://people.umass.edu/aizen/pdf/tpb.intervention.pdf>, accessed 18 February 2020.

<sup>31</sup> De Brabander and Martens, above n 17.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> Ajzen, above n 30.

is expected to influence readiness for action via valence appraisal,<sup>35</sup> although a direct effect is also possible.<sup>36</sup> The second social factor is sense of personal relatedness. However, since work within the judicial context is relatively solitary,<sup>37</sup> this component is not included in this study.

## **Combining the UMTM and transfer of training literature**

The UMTM seems to be a suitable model to predict and explain transfer of training. As mentioned previously, one of the central factors that predicts transfer of training — motivation to transfer — is directly comparable to readiness for action in the UMTM.<sup>38</sup> Other factors that influence transfer of training are also incorporated in the UMTM. Individual characteristics like self-efficacy and perceived utility of the training are retraceable to personal sense of competence and cognitive valence in the UMTM.<sup>39</sup> Moreover, freedom to transfer the acquired knowledge to practice and availability of resources<sup>40</sup> are compatible with perceived freedom of action and perceived external support, respectively. Other transfer of training models, however, only identify influential factors for (motivation to) transfer without describing how they relate to each other. The added value of the UMTM is the incorporation of the connections between the factors influencing the (motivation to) transfer and explaining how environmental factors affect (motivation to) transfer.

However, the UMTM can also be informed by other transfer of training models, especially since it does not consider training designs. The extent that course content matches the requirements and circumstances on the job (ie, content validity) has been shown to influence (motivation to) transfer. The same holds for providing employees with aids for applying the learned content into practice, and practice doing so in an authentic environment (ie, transfer design).<sup>41</sup> These aspects will be included in this study to complement the UMTM. Ultimately, it is expected that training design is an indicator of feasibility appraisal, since the training design affects the extent that individuals possess the required competencies to transfer the content to practice.

## **The present study**

As yet, research about transfer of training has been scarce in the judicial context, and more research is required to gain a better insight in the transfer of training and which factors can explain its occurrence. The UMTM seems to be a suitable model to gain insight in the transfer

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<sup>35</sup> C De Brabander and R Martens, above n 17.

<sup>36</sup> I Ajzen, “The theory of planned behavior” (1991) 50(2) *Organizational Behavior and Human Decision Processes* 179.

<sup>37</sup> Taal, above n 8.

<sup>38</sup> Grossman and Salas, above n 1.

<sup>39</sup> A Gegenfurtner, “Dimensions of motivation to transfer: a longitudinal analysis of their influence on retention, transfer, and attitude change” (2013) 6(2) *Vocations and Learning* 187; Grossman and Salas, *ibid*.

<sup>40</sup> Gegenfurtner, *ibid*; Grossman and Salas, above n 1; C Tonhäuser and L Büker, “Determinants of transfer of training: a comprehensive literature review” (2016) 3(2) *International journal for research in vocational education and training* 127.

<sup>41</sup> Grossman and Salas, above n 1; D Lim and M Morris, “Influence of trainee characteristics, instructional satisfaction, and organizational climate on perceived learning and training transfer” (2006) 17(1) *Human Resource Development Quarterly* 85.

of training, but this model has not yet been tested within the judicial context. However, if the model works within the judicial context, this could give insight in the impact of judicial training. This leads to the following two research questions:

1. To what extent does the UMTM hold within the judicial context?
2. Which factors of the UMTM predict the transfer of training of judicial trainings?

## ***Method***

### **Procedure**

This study was conducted in the context of the Dutch judicial training institute SSR. Data was collected from participants between September and December 2018 who attended one of 100 selected courses. These courses could focus on acquiring knowledge (ie, knowledge about a new law) and/or learning new skills (ie, writing a well-formulated verdict). Courses were selected if there was a substantial probability that participants would put the learned content into practice within three weeks after completing the course, and if there was room for filling in the digital questionnaire directly after the course. Data was first collected directly after attending the course (T1) and again three weeks after (T2). The three-week time gap was chosen to ensure that participants had the chance to put the learned content into practice, but also still remembered the content of the course they attended. Participation was voluntary and no incentives were offered.

### **Participants**

At T1, data was collected among 514 participants from 100 courses (response rate = 36.5%). The number of participants ranged between 1 and 33 ( $M = 5.14$ ,  $SD = 4.17$ ). The mean age was 39.73 ( $SD = 11.55$ ) and 72% were women. Different job positions were represented in the sample, including judges (25.8%), public prosecutors (12.4%), legal assistants (45.2%) and managers (2.9%). At T2, 325 participants distributed over 86 courses participated in the study (response rate = 23%). The number of participants per course ranged between 1 and 18 ( $M = 3.78$ ,  $SD = 2.74$ ).

### **Measures**

To measure the different constructs included in the UMTM, the questionnaire of De Brabander and Glastra<sup>42</sup> was adapted to fit the purpose of the current study. The questionnaire contains one question per UMTM construct with a bipolar seven-point Likert scale (see Table 1, below, for details). In addition to the UMTM questionnaire, participants completed two questions about the training design of the course based on the learning transfer system inventory.<sup>43</sup> Answers were given on a five-point Likert scale. The questionnaire was similar at T1 and T2. However, at T2, participants also responded as to whether they had had opportunities to transfer training content, and if so, whether they had done so. In addition, the questions about the perceived quality of the course were removed at T2.

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<sup>42</sup> De Brabander and Glastra, above n 18.

<sup>43</sup> E Holton, R Bates and W Ruona, "Development of a generalized learning transfer system inventory" (2000) 11(4) *Human Resource Development Quarterly* 333.

Table 1: Items and answering scales for constructs included in this study

Constructs	Item	Answering scale
1. Sense of personal autonomy	When applying this courses' content to my job, I would feel I did so [...]	completely out of my own volition — completely out of experienced pressure
2. Perceived freedom of choice	When putting the things that were offered in this course into practice, I will have [...] opportunities for free choice	very much — very little
3. Sense of personal competence	I personally feel [...] to successfully apply the knowledge, skills and insights that I acquired in this course	very able — not able at all
4. Perceived external support	I find the facilities in our court to apply what I have learned successfully [...]	very obstructive — very conducive
5. Subjective norm	I think that colleagues who are important to me would assess me applying what I have learned during the course as	not positive at all — very positive
6. Positive affective valence	When applying the knowledge, skills and insights that I acquired in this course, I would [...] have a positive feeling	very often — rarely or never
7. Negative affective valence	When applying the knowledge, skills and insights that I acquired in this course, I would [...] have a negative feeling	rarely or never — very often
8. Positive cognitive valence	Considering the positive consequences, applying the course content in my job would be [...]	not or hardly rewarding — very rewarding
9. Negative cognitive valence	The costs and unwanted consequences of applying the course content in my job would be [...]	very heavy — negligible
10. Readiness for action	I am going to apply the things that I have learned during the course in my job	completely disagree — completely agree
11. Content validity	The methods that were used during the course are very similar to the way we do things at work	completely disagree — completely agree
12. Transfer design	The trainer(s) used many examples to show me how I could apply the course content	completely disagree — completely agree
13. Opportunity to perform*	Did you have opportunities after the course to put the learned knowledge, skills and insights into practice?	yes — no
14. Action*	To what extent did you put the learned knowledge, skills and insights into practice?	almost never — very often

\* questions were only asked at T2

## Data analysis

To analyse the data, Structural Equation Modelling (SEM) was conducted with a separate model for T1 and T2 using Mplus.<sup>44</sup> Prior to that, it was first checked whether the assumptions for applying SEM were met.<sup>45</sup> In doing so, we found an overrepresentation for the middle and lowest answering option (negligible) for the questions measuring negative cognitive valence, leading to a non-normal distribution at both time points. Negative cognitive valence was therefore dropped from the study. The assumptions were met for all other variables at both timepoints.

As a next step, it was explored for both time points separately if the UMTM represents the data adequately. This was done through a Confirmatory Factor Analysis (CFA) for positive cognitive valence items and feasibility appraisal separately, followed by a path model to test model-fit for the whole model. To evaluate model-fit, multiple goodness-of fit indices were used. For the RMSEA and SRMR a value below .08 indicated a sufficient fit and a value below .05 a good fit. For the TLI and CFI a value above .90 indicated a sufficient fit, and above .95 a good fit.<sup>46</sup>

If model-fit was insufficient, modifications were made to improve model-fit. When model-fit was sufficient, it was assessed with the path model whether the UMTM gave insight in the main factors that influenced readiness for action. That is, which factors significantly (indirectly) predicted readiness for action. Finally, it was also investigated at T2 whether readiness for action predicted action.

## Results

### Descriptive statistics

Descriptive statistics of T1 and T2 are presented in Table 2. The mean scores indicate that the participants scored more towards the positive side of the answering scale regarding readiness for action and the factors predicting readiness for action at T1. The same holds for T2, albeit the means were slightly more to the middle of the Likert-scale. Moreover, within three weeks, 66% of the participants had already had opportunities to put the learned content into practice. Finally, the mean for action lay around the middle point of the Likert-scale.

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<sup>44</sup> L Muthén and B Muthén, Mplus Statistical modeling software: Release 7.0, 2012, Los Angeles.

<sup>45</sup> R Kline, *Principles and practice of structural equation modeling*, 3rd edn, The Guilford Press, 2011.

<sup>46</sup> *ibid.*

**Table 2: Means and Standard Deviations at T1 and T2**

	T1		T2	
	<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
Perceived freedom of choice	5.20	1.23	5.13	1.19
Personal sense of autonomy	5.94	1.22	5.78	1.21
Perceived external support	4.81	1.25	4.75	1.19
Personal sense of competence	5.63	1.03	5.40	1.12
Subjective norm	5.23	1.29	5.23	1.29
Positive affective valence	5.50	0.94	5.39	0.99
Negative affective valence	1.22	1.27	2.11	1.23
Positive cognitive valence (pers)	5.65	1.09	5.39	1.28
Positive cognitive valence (team)	5.37	1.13	5.13	1.26
Positive cognitive valence (court)	5.26	1.16	5.14	1.26
Positive cognitive valence (judicature)	5.35	1.19	5.22	1.30
Positive cognitive valence (litigant)	5.28	1.25	5.23	1.31
Content validity*	3.45	0.82		
Transfer design*	4.03	0.85		
Readiness for action	5.52	1.67	5.29	1.67
Opportunities to transfer**			0.66	0.47
Action***			3.95	0.98

\* answered on a 5-point scale

\*\* answered on a dichotomous scale

\*\*\* answered on a 6-point scale

### Functionality of the UMTM in the judicial context

Firstly, it was assessed at T1 with a CFA whether the questions for positive cognitive valence could be represented by one factor. The same was done to see if personal sense of competence, perceived external support, content validity and transfer design could be represented by a feasibility appraisal factor. For positive cognitive valence, the best model-fit was found when a distinction was made between personal and non-personal positive cognitive valence, which then loaded on the general factor positive cognitive valence.<sup>47</sup> Model-fit for feasibility appraisal was good according to all “goodness of fit” indicators.<sup>48</sup>

Next, the factor structures acquired for positive cognitive valence and feasibility appraisal were used in the path model (see Figure 1 for the recreated model). This model had a sufficient to good model fit when the task-specific antecedents co-varied with each other.<sup>49</sup> Model-fit at T2 too was sufficient to good.<sup>50</sup> This model was an equivalent of the final path model that was used at T1, although content validity and transfer design were removed from the T2 model, whereas *action* was added.

<sup>47</sup> Model-fit for positive cognitive valence: ( $\chi^2 = 9.51$ ;  $df = 2$ ;  $p < .01$ ; CFI = 1.00; TLI = .98; RMSEA = .09; SRMR = .02)

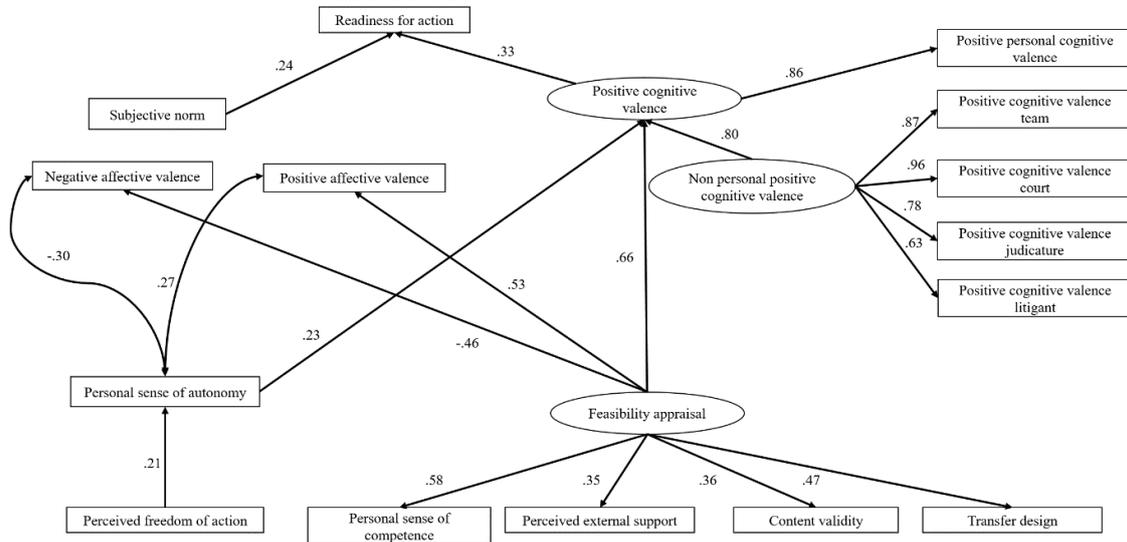
<sup>48</sup> Model-fit for feasibility appraisal: ( $\chi^2 = 1.82$ ;  $df = 2$ ;  $p = .40$ ; CFI = 1.00; TLI = 1.01; RMSEA < .00; SRMR = .02)

<sup>49</sup> Model-fit for UMTM at T1 ( $\chi^2 = 231.70$ ;  $df = 62$ ;  $p < .01$ ; CFI = .95; TLI = .91; RMSEA = .07; SRMR = .05)

<sup>50</sup> Model-fit for UMTM at T2 ( $\chi^2 = 159.97$ ;  $df = 55$ ;  $p < .01$ ; CFI = .96; TLI = .93; RMSEA = .08; SRMR = .06)

## Relationships between the UMTM components and readiness for action at T1

**Figure 2: Standardised significant ( $p < .05$ ) relationships between UMTM indicators and motivation to transfer at T1. Non-significant relationships were not included.**

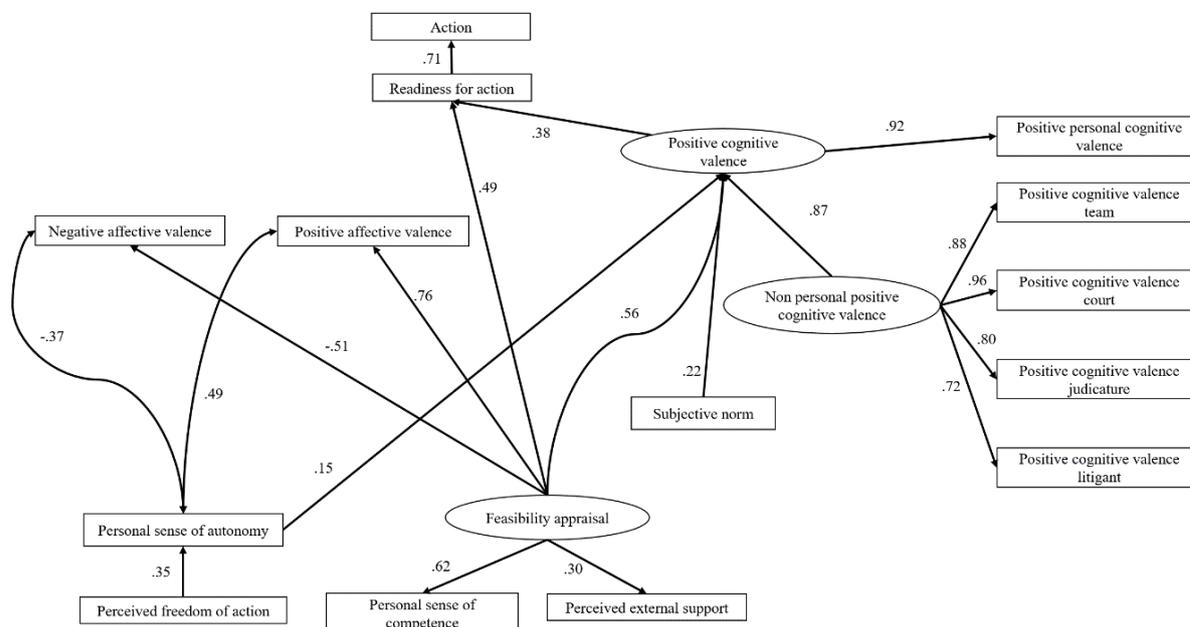


Based on the final path model at T1, factors that predicted readiness for action were inspected. The relationship between the different factors is displayed in Figure 2, above, and will be discussed from bottom to top. Perceived freedom of action positively predicted personal sense of autonomy, which in turn was negatively correlated with negative affective valence and positively correlated with positive affective valence. Moreover, personal sense of autonomy positively predicted positive cognitive valence. Also, feasibility appraisal positively predicted positive affective valence and positive cognitive valence whereas it negatively predicted negative affective valence.

Regarding the different types of valence, only positive cognitive valence positively predicted readiness for action. This indicates that personal sense of autonomy and feasibility appraisal indirectly predict readiness for action via positive cognitive valence. Thus, if participants experienced more autonomy or anticipated to be better able to perform an action, they expected more positive consequences for themselves or others which, in turn, led to a higher readiness for action. Interestingly, subjective norm only had a direct positive effect on readiness for action. This implies that the more participants anticipated appreciation by their colleagues for putting the learned content into practice, the higher their motivation to transfer.

## The relationship between the UMTM components and transfer at T2

**Figure 3: Standardised significant ( $p < .05$ ) relationships between UMTM indicators and transfer of training at T2. Non-significant relationships were not included.**



The outcomes for T2 are displayed in Figure 3. Again, personal sense of autonomy and feasibility appraisal positively predicted positive cognitive valence. In contrast to T1, subjective norm only indirectly positively predicted readiness for action via positive cognitive valence. Thus, if the sense of autonomy, feasibility appraisal and subjective norm were higher, the positive thoughts about putting the learned content into practice also increased. Positive cognitive valence and feasibility appraisal were direct positive predictors for readiness for action. Ultimately, readiness for action was a positive predictor of action. In other words, if the motivation to transfer was higher, the actual transfer of the learned content to practice also increased. This implies that autonomy, feasibility appraisal and subjective norm indirectly influenced the actual transfer of the learned content into practice via positive cognitive valence and readiness for action.

## Conclusion and discussion

The aim of this study was to investigate whether the UMTM works in the judicial training context and if so, whether the components of the UMTM can predict transfer of training. Outcomes underline that the UMTM can be used to examine the transfer of training in the judicial context; factors underlying the UMTM predicted motivation to transfer, which is in line with previous studies<sup>51</sup> and even predicted actual transfer of training over time.

More specifically, the outcomes directly after the training showed that personal sense of autonomy and feasibility appraisal positively predicted positive cognitive valence, which in turn positively predicted readiness for action. Subjective norm, on the other hand, had a direct positive effect on readiness for action. After three weeks, the outcomes are similar. However,

<sup>51</sup> De Brabander and Glastra, 2016 and 2018, above n 18; De Brabander and Martens, above n 17.

subjective norm now indirectly predicted readiness for action via positive cognitive valence instead of directly predicting readiness for action. Feasibility appraisal now had an indirect and direct effect on readiness for action. Most importantly, readiness for action was able to predict action. The outcomes indicate that the underlying factors indirectly predicted motivation to transfer, which in turn predicted transfer of training. Furthermore, the fact that only positive cognitive valence was a predictor of readiness for action indicates that the motivation to transfer of the participants was mostly influenced by positive thoughts about the consequences of the action, whereas feelings did not seem to play a role in this.

### **Implications for the judicial context**

The outcomes imply that the UMTM does seem suitable for predicting transfer of training in the judicial context. This means that the UMTM can be used by judicial training institutions, courts and public prosecutor offices to investigate the effects of training on a larger scale. These investigations can be done relatively easy, since the UMTM questionnaire is a relatively short questionnaire. The UMTM can be used to monitor the transfer of learning to investigate to what extent training has its intended impact on work practice. In addition, the information provided by the UMTM can be used by judicial training institutions to engage in a dialogue with courts and public prosecutor offices on how the conditions in the working place can be altered to promote transfer of training. Additionally, factors influencing the quality of the training can be taken into account in the training design to increase the likelihood of transfer of the training content. Thus, the UMTM can inform courts and public prosecutor offices on how they can improve work practice and provide insight into what judicial training institutes can do to promote transfer of training.

Judicial training institutes can take multiple measures to improve the transfer of training. For example, feasibility appraisal can be enhanced by boosting personal feelings of competence among trainees. This can be done by ensuring that the training content is clear, by providing adequate support when needed and by providing informative feedback.<sup>52</sup> Also, training institutions could try to ensure that the content of the training is sufficiently relevant for the work practice and adjusted to the work practice.<sup>53</sup> This can be done, for example, by using simulation exercises in the training about the content that are similar to and relevant for what could happen at the workplace.<sup>54</sup>

Courts and public prosecutor offices could try to alter the context in which the trainees work to enhance the transfer of training. They could, for example, enhance feelings of autonomy among trainees by providing them with choices, ensuring that it is also clear to trainees why it is important to put the learned content into practice and by devoting sufficient time to trainees to do so.<sup>55</sup> Subjective norm can be promoted by changing beliefs of colleagues about the perceived usefulness of the training content that is being put into practice by those trainees. If these colleagues develop a more positive stance about when trainees use the newly gained knowledge,

<sup>52</sup> K Stroet, M Opendakker and A Minnaert, "Effects of need supportive teaching on early adolescents' motivation and engagement: a review of the literature" (2013) 9 *Educational Research Review* 65.

<sup>53</sup> E Holton, R Bates and W Ruona, "Development of a generalized learning transfer system inventory" (2000) 11(4) *Human Resource Development Quarterly* 333.

<sup>54</sup> Grossman and Salas, above n 1.

<sup>55</sup> Grossman and Salas, above n 1; Stroet, Opendakker and Minnaert, above n 52.

the probability that trainees actually transfer the acquired knowledge to practice may also increase.<sup>56</sup> Finally, perceived external support can be raised by, for example, offering sufficient equipment, such as computers, to enable trainees to use the acquired content into practice.<sup>57</sup>

### **Limitations and future research**

Despite the aforementioned contributions of this study, some limitations should be considered. First, the measure that was employed to assess transfer of training was based on self-reports of trainees. It is unclear to what extent these self-reports accurately represent actual transfer of training. Some research has shown that self-ratings of transfer of training can be too positive.<sup>58</sup> A future study should therefore investigate the extent to which these self-reports are a valid source for investigating the transfer of training by comparing them with judgements of external sources, such as supervisors. That is, if trainees say that they put the learned content into practice, to what extent do they actually do so?

Secondly, participation in this research was voluntary, which could have led to a selection bias in the sample for this study. This may limit the extent to which results can be generalised. To overcome these issues, future studies could make participation less voluntary by making it part of training requirements and also offering a reward. This would ensure the participation of less motivated trainees and increase participation rates.

Thirdly, this study's measures for negative cognitive valences could not be used in analyses. Perhaps trainees were not able to envision "costs or unwanted consequences" for themselves or others through the transfer of the training content. Consequently, they may have misunderstood this question. Future research should therefore incorporate examples in the questionnaire of the kind of costs and unwanted consequences.

### **Conclusion**

Despite the limitations, the outcomes of this study give insight in the merits of using UMTM in the judicial context. The outcomes showed that the transfer of training not only depends on the quality of training delivered by the training institutions, but also that courts and public prosecutor offices play a major role in this. Furthermore, the outcomes provide an overview of factors that may promote or hinder this transfer. Based on the UMTM, judicial training institutions, courts and public prosecutor offices can take the influential factors into account, engage in a dialogue with each other on how to improve the transfer of training and systematically alter these factors to improve the transfer of training. Ultimately, this can strengthen the quality of judicial training and thereby eventually the judiciary.

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<sup>56</sup> Ajzen, above n 30.

<sup>57</sup> Grossman and Salas, above n 1.

<sup>58</sup> B Blume, et al, "Transfer of training: a meta-analytic review" (2010) 36(4) *Journal of Management* 1065.



# Interprofessionalism in judicial training

Oliver Leurent\*

## Introduction

This article addresses one of the strong trends among the changes taking place in the training of the judiciary in France: the development of interprofessionalism in training courses. This, along with the issues surrounding recruitment, is one of the most marked changes the French National School for the Judiciary (ENM) has seen in the last few years.

Interprofessionalism is not an entirely new thing. The ENM, like other schools in countries with the continental legal system, is interprofessional in essence, since we have always provided both initial and in-service training to judges and prosecutors, who in France are part of the same professional body, itself a part of the civil service.

The ENM has striven over the past few years to go beyond these two professions, opening up the training we provide to new audiences and creating more joint courses with other regular or occasional actors in the justice system: lawyers, clerks, investigators, and perhaps in the future, court experts; as well as partners of the justice system: doctors, journalists, social workers, conciliators and mediators, and so on.

In addition, there is also a working group currently looking, at the request of the French President, at how to create bridges between the training of senior civil servants and that of judges and prosecutors, in order to forge stronger interprofessional ties. The possibility cannot be excluded that in the near future, judges and prosecutors will spend some of their initial and in-service training time alongside senior civil servants.

## What is meant by interprofessionalism?

As interprofessionalism in judicial training is a recent phenomenon, at least in France, it is important to define what is meant by the term before moving on to the specifics of the subject.

Interprofessionalism or “interprofessionnalité” in French, refers to the idea of having several professions work together, but surprisingly this word is not in the French dictionary. Turning to the English dictionary, again revealed no results.

Having failed to find an answer in the dictionary and still on a quest to find an “official” definition, the next step was Google, both in French and in English.

On the English site, all results concerned the medical world.

On the French Google site, the responses referred to only three fields: agriculture, medicine and justice. So what conclusion can we draw? What specific features do medicine and justice share?

One theory concerning the answer to this question centres on the following two statements.

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### **Medical sector**

As in all other sectors, law and medical professionals operate as part of a chain, with each profession constituting a link in the chain that helps it to achieve a common final goal (recovery for medicine, justice for us).

Take the example of a road accident. A succession of professions will be involved in dealing with the victims:

- paramedics in the ambulance
- the surgical team (with several different professions: surgeons/ anaesthetist/ nurses etc), but also resuscitation (another speciality)
- rehabilitation professionals, including physiotherapists and so on.

Each of the people involved is an indispensable link in the chain leading to the victim's recovery.

### **Justice sector**

In the justice system, the situation is the same: in French we sometimes talk of the “chaîne pénale” — the “criminal chain” — when referring to the whole justice system. By this we mean the police investigators, the prosecutor, the judge's decisions, their application by the prosecutor and the sentence enforcement judge, probation officers, etc. Each of the people involved is indispensable and has to interact with the others.

But unlike some other sectors, the actors in the justice system and in medicine are all autonomous:

1. There are no contractual ties to clarify the links between them and force them to adapt (market forces). Take agriculture for example: the farmer buys his fertiliser from a wholesaler (contract), sells his produce to a central purchasing body (contract), which sells it to retailers (contract), which then sell it to consumers (contract). This does not exist in medicine and even less so in the justice system. There are no contracts to clarify the relationship between the links in the chain.
2. No hierarchical relationships — for example between judge and prosecutor or prosecutor and lawyer
3. Sometimes there are intermediate objectives specific to each role. For instance, the key statistic for the police a few years ago was the ratio between the number of arrests and the number of prison sentences. The police would therefore press for prison sentences, while the prison service was struggling with prison overcrowding and trying to keep the prison population down, which left judges, whose sole focus is the judicial truth and a fair sentence, stuck in the middle.

We therefore have the links in a chain, in linear formation but independent of each other, or a constellation of actors who have to live with each other.

So what can we do to ensure these different independent professionals interact with each other as smoothly and effectively as possible?

To take a sporting image, it is like trying to get a team made up of football, basketball and rugby players to all play together with each of them playing to their own rules, while at the same time having the same aim — winning the game. The footballer cannot expect to receive

a forward pass from the rugby player any more than they would kick the ball to the basketball player. And if the rugby player tries a rugby tackle on the footballer, they are likely to get a red card.

The situation in our field is very much like this. Our common aim in terms of justice is of course to provide a legal response that is just and adapted to the situations that are submitted to us. To achieve that common aim, we have to overcome the specificities and professional cultures of each of the actors involved (investigators, prosecutors, judges, lawyers, notaries, social workers, probation officers, bailiffs, members of the armed forces in some cases, etc).

So how can we do that? In sport, it would involve long periods of training together after the separate training that allows each player to acquire their own specific professional skills. In the justice system, the same applies: separate training of each profession is necessary, but insufficient. Interprofessional training therefore has a role to play in making it easier for the different actors to work together. In any case, this is the conviction held by the ENM.

### **An empirical approach to training: the ENM example**

The ENM has been organising training courses and sessions that aim to bridge the culture gap between the different professions in the justice system for a long time. These courses were developed on an ad hoc basis in response to specific difficulties in comprehension or communication observed between different professions, but more recently they have become one of the priorities of our training programmes.

Until now, we have mainly focused on providing “immersion” placements with different partners for practising and future judges and prosecutors and on receiving other justice professionals in our courts in return.

In the last few years, we have also endeavoured to bring these different actors together in joint training sessions, initiatives that are being developed more frequently.

#### **Organising two-way immersion placements**

*During initial training:*

During their 31 months of initial training, our future judges and prosecutors have the opportunity to spend periods embedded with the main partners of the justice system.

They all have to spend:

- 3 months with a law firm
- 2 weeks with a law enforcement investigations department
- 2 weeks in a prison (including some time working as a prison officer)
- a few days in the court clerks’ office, and
- a week with a social work department working with at-risk children, as well as a few days with the probation service.

The idea is to enable future judges and prosecutors to gain the most comprehensive vision possible of the daily work of these partners in order to give them a better understanding of their role and goals, the pressures and restrictions they face and above all to do away with the preconceived and false ideas that they may have about these other professions.

Furthermore, in order to give them a better appreciation of the importance of being aware of and understanding the context in which they will be rendering their decisions, a seven-week

“external” placement is also organised. Based on their own interests, this can be in a company, with a voluntary organisation, in a different branch of the civil service, or with an international court or institution, for example.

*During in-service training:*

Here the goal of broadening judges and prosecutors’ horizons is a major concern.

We therefore offer immersion placements, mostly lasting a week, in:

- the civil service (eg at the Ministry for Justice, with the General Secretariat for European Affairs)
- large corporations or news organisations
- specialist departments
- international bodies.

*Immersion in the justice world*

Mirroring these initiatives, the French courts and the ENM are constantly being asked to take trainees and interns from all kinds of backgrounds — trainee lawyers or probation officers, for example — who come to see how we work and what our logic and expectations are.

However, in the last few years, these exchanges have proven to be insufficient to allow a convergence towards a common culture: exchanges provide an opportunity to observe and gain some insights, but they have very little impact in terms of changing our professional practices. Comprehension is facilitated, but that does not take us far enough along the road. We are still dealing with individuals, not a team.

The decision was therefore taken to organise joint training sessions to provide forums for concrete exchanges, where good practice that can be applied interprofessionally can be identified.

### **Interprofessional training**

The ENM has organised many interprofessional training sessions and courses, with diverse themes ranging from forensic medicine (judges and prosecutors/doctors) to interprofessional ethics (judges and prosecutors/journalists/lawyers) or reflection on the digital dimension of the law with lawyers and business law specialists. This article will focus on one particular theme and one organisation.

***Theme: counter terrorism***

The fight against terrorism is necessarily an interprofessional matter. It involves co-action between the intelligence services, the criminal investigation services, prosecutors, investigating and trial judges, the prison system, the voluntary sector (prevention of radicalisation, victim support, etc), the media and the armed forces (especially when the risk is on foreign soil), to name but a few.

It is vital, more than in any other domain, that the different participants understand each other's respective expectations. Numerous exchanges take place with the army (and its special forces in particular), which is often involved on the front line with terrorist groups based outside France. If the army does not make detailed observations during its interventions on the ground and simply contents itself with handing over terrorism suspects to the justice system without

any procedural basis, it is particularly difficult to establish the responsibilities of these suspects and prosecution may be impossible. Likewise, the “judicialisation” of intelligence is the subject of close and regular dialogue between the intelligence services and prosecutor’s offices.

We have therefore organised two major training initiatives in the last few months:

1. **At national level:** an initiative known as PACT, which stands for “advanced counter terrorism programme”. This was a year-long cycle of training sessions attended by judges and prosecutors, investigators and members of the armed forces, all driven by a spirit of progress and the desire to facilitate dialogue and future contacts.
2. **At international level:** the International Counter Terrorism Academy (AILCT) project. The ENM is actively involved in the creation of an academy designed to bring together the law enforcement sectors (including intelligence services), defence bodies (including special forces) and judicial institutions of the countries of West Africa and the Maghreb. We organised an international conference on the project in Abidjan in November 2018, which was attended by 360 participants from 22 African countries. The idea behind this project was to bring together, within a single institution, the different contributors to the fight against terrorism, as well as their counterparts in the countries with which they will need to cooperate. There is therefore both an international and an interprofessional dimension to this initiative.

The outcomes of these two projects have been positive. We were quickly able to see that a closeness was established between the participants, that their exchanges were rich and covered all the topics of interest to all the parties now in contact.

### ***Organisation***

For several years, interprofessional training in France has been overseen by one umbrella organisation, the RESP (Réseau des Ecoles de Service Public (Civil Service Schools network)), which was set up in 1995. This network includes 38 schools that train senior civil servants, from hospital managers to senior local government officers to prison governors and high-level central government civil servants.

The ENM is a member of this network, whose main activities are:

1. Organisation of week-long “inter-school sessions” for trainees during their initial training (eg trainee gendarmerie officers or police superintendents, trainee judges and prosecutors attending the fire service training school)
2. Joint workshops involving several schools: 37 workshops open to trainees from these schools covering a wide variety of themes. Among these workshops, a large number are offered to our French trainee judges and prosecutors.

Ultimately, this network plays the useful role of encouraging active interprofessional contacts between different public servants in France. The very fact that such an organisation exists, with regularly scheduled events, points of contact and predefined shared values, facilitates the construction of a system of exchanges over the long term.

### **Issues raised by interprofessionalism**

After a few years of experimenting, it is now possible to look back and consider some of the issues raised by interprofessional training. Two particular issues are discussed — effectiveness and independence.

### **The question of effectiveness**

The notion of interprofessionalism raises an obvious pedagogical question: how can different target audiences with different professional cultures be trained together without impinging on the quality of the training or seeing a part of the participants drop out along the way? It can indeed be difficult to address a given subject in a way that speaks to court clerks, judges, prosecutors and investigators, all of whom will see the same thing through a different lens.

Nevertheless, it has to be said that such interprofessional exchanges are much appreciated by French judges and prosecutors, and interprofessional training courses and sessions are better and better attended by our audiences year on year.

There are probably two reasons that this is the case:

1. In France, judges and prosecutors choose the training courses that they take. This means that interprofessional training courses are only attended by those of our colleagues who are most open to the notion, along with those who are interested in hearing and confronting different points of view. We are therefore helping the already convinced to take an extra step towards their partners.
2. The training sessions proposed cover only topics that are of common interest, subjects where there is already a strong interprofessional element in the work, which therefore lend themselves to interprofessional training.

Counterterrorism is one of these areas where judges and prosecutors do not act alone. The protection of at-risk minors is another, along with most of the issues around imprisonment and domestic violence.

### **The question of independence**

As you will have understood by now, at the ENM we have chosen to promote interprofessional and joint training with the professions with which judges and prosecutors work or should work.

However, training judges alongside other professionals can sometimes raise issues relating to independence. The question arises as to whether this contact with other professions on a training course is of a nature to influence judges' appreciation of a given subject or to diminish their neutrality. Is there not a risk of collusion or a loss of objectivity if judges or prosecutors subsequently find themselves face to face in the course of their professional duties with a professional they met on a training course? I know that some countries, especially common law countries, refuse to train judges and prosecutors together for this very reason.

In France we see this differently. We do not deny that training with other professions will change a judge's practices and influence them. But that applies to any type of training. It is even the primary objective of interprofessional training. By encouraging the professions to move towards a common culture, the idea is precisely to change professional practices that can sometimes be too isolated, too compartmentalised — a charge that also applies to judges.

In fact, we consider that dialogue and exchanges do not threaten independence. We believe that better knowledge of the judge's partners will have a positive influence on practice, by increasing understanding of the other factors involved in the cases dealt with. In the end, a judge will gain more distance and objectivity by perceiving these factors with more accuracy and subtlety. At any rate that is the view of the ENM.

However, there are some limits to this openness. There are of course some situations where excessively close contacts between the actors in the justice system, as people and not as

professions or institutions, can be harmful. This is why, for example, we avoid sending our future judges and prosecutors on placements in law firms located within the jurisdiction of the court where they will do their training placement. Similarly, practising judges are not totally “immersed” in police stations that they work with.

## **Conclusion**

There is some debate on the extent of interprofessional training within the overall training of judges and prosecutors. Discussions are currently underway on whether or not it would be useful to create a common core for the initial training of all French senior civil servants and judges and prosecutors, prior to specialisation.

For the moment neither the duration nor the content of this common core have been defined, but there is a committee that is studying and consulting on the matter in depth. As you can imagine, this question has given rise to some fierce debate.

On the other hand, a consensus is forming on the issue of joint training sessions with senior civil servants once each professional has acquired their professional identity and built up enough experience to be able to share it without risk in terms of potential impairment of the independence of the judiciary.

These courses are also considered to provide opportunities for senior civil servants to familiarise themselves with the workings and specificities of the judicial institution.



# Public confidence in the judiciary: a South African perspective

Chris Oxtoby\* and Matthias Krönke\*\*

## Introduction

Despite the importance of public confidence in the judiciary, legal scholars have done relatively little research to explore what levels of public confidence in African judiciaries actually are, and what might inform these views. This article aims to offer some thoughts on this issue by analysing data from Afrobarometer public opinion surveys relating to public confidence in the judiciary in South Africa.<sup>1</sup> The very concept of public confidence in the judiciary is an elusive one that could be a topic of discussion on its own.<sup>2</sup> This article will not seek to delve into this debate. Rather, the Afrobarometer survey data will be taken as a starting point for an attempt to explain some of the most striking results of this public opinion survey, insofar as it relates to the judiciary and the courts.

The focus of this article is primarily on results relating to South Africa, although this will be placed in some comparative context by identifying where key results fall in relation to other African judiciaries. It begins by analysing the legal framework to highlight the importance of public confidence in the courts, then provides details on the Afrobarometer project, including a brief overview of the methodology employed. Key findings of Afrobarometer's survey will be presented and analysed. The article concludes by offering some thoughts about what the results mean for the judiciary generally as well as for judicial training initiatives specifically. Limitations of the data and implications for further study of this issue will also be discussed.

## Public confidence in the courts: why does it matter?

The South African Constitution<sup>3</sup> vests significant powers in the courts. The courts are required to declare “any law or conduct that is inconsistent with the Constitution ... invalid to the extent of its inconsistency”,<sup>4</sup> and are themselves “independent and subject only to the Constitution and the law”.<sup>5</sup> The Constitution itself is the supreme law of the land, and any “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”<sup>6</sup>

Structuring the legal system this way brings into stark focus the well-known “counter-majoritarian dilemma”. Briefly put, this concept raises the question of how, in a

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<sup>1</sup> This article forms part of a broader research initiative called the “Judiciaries in Africa” project, which aims to further understanding of judiciaries in Africa by collecting systematic comparative information focusing on judicial independence, legitimacy, and access to justice. The authors are two of the co-principal investigators of the project. Further information is available at: [www.idcippa.uct.ac.za/jia](http://www.idcippa.uct.ac.za/jia), accessed 17 April 2020.

<sup>2</sup> A Miller, “Public confidence in the judiciary: some notes and reflections” (1970) 35(1) *Law and Contemporary Problems* 69.

<sup>3</sup> *The Constitution of the Republic of South Africa*, 1996 (Constitution).

<sup>4</sup> Constitution, s 172(1)(a).

<sup>5</sup> Constitution, s 165(2).

<sup>6</sup> Constitution, s 2.

democracy, “a group of unelected, unrepresentative judges are free to overrule the will of the people and/or their elected representatives.”<sup>7</sup> Again, it is beyond the scope of this paper to enter into a detailed discussion of this issue. But the question is significant, as the absence of democratic checks over the powers of the judiciary make it important for the long-term survival of South Africa’s constitutional democracy that the judiciary maintains a reasonable degree of public confidence. This does not mean that a significant majority have to agree with all of the courts’ decisions all of the time. Nevertheless, the above suggests that the judiciary should be regarded as an institution that acts with credibility and integrity, if this system is to endure in the long term.

Former Chief Justice Sandile Ngcobo has described public confidence in the judiciary as “vital to the preservation of the rule of law, and, ultimately, to the preservation of our constitutional democracy.”<sup>8</sup> Ngcobo endorses Barak’s famous observation that the judiciary has “neither sword nor purse”, but only the confidence of the public, meaning that “the public recognises the legitimacy of judicial decisions, even if it disagrees with their content.”<sup>9</sup> Absent such public confidence, Ngcobo suggests, people may abandon the courts and resort to self-help.<sup>10</sup> Put another way, “the courts cannot act with effective authority (as opposed to brute force) if those with whom they deal do not take them seriously.”<sup>11</sup> Other writers have made the link between public confidence and the legitimacy of the judiciary. Le Roux and Davis argue that:

The more the public respects and heeds the importance of court decisions, recognising that their content broadly reflects the moral convictions of the community, the more legitimate the courts become as an institution.<sup>12</sup>

The need for the judiciary to enjoy public confidence is captured repeatedly in the Bangalore Principles of Judicial Conduct. The Principles identify one of the indicators of judicial independence as the need for a judge not only to be free from inappropriate connections with and influence by other branches of government, but to “also appear to a reasonable observer to be free therefrom.”<sup>13</sup> They identify the need for a judge to show and promote high standards of judicial conduct “to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.”<sup>14</sup> Regarding judicial impartiality, the Principles emphasise the need for judicial conduct to “enhance ... the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.”<sup>15</sup> As to judicial integrity, the Principles require that:

The behaviour and conduct of a judge must reaffirm people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.<sup>16</sup>

<sup>7</sup> K Morgan and W Young, “What counter-majoritarian dilemma? Experimentally evaluating citizens’ views of the democratic nature of the Supreme Court” (2019) 5 *Constitutional Studies*, 1 at 2.

<sup>8</sup> S Ngcobo, “Sustaining public confidence in the judiciary: an essential condition for realising the judicial role” (2011) 128(1) *South African Law Journal* 5 at 6.

<sup>9</sup> *ibid* at 6.

<sup>10</sup> *ibid* at 10.

<sup>11</sup> S Kenny, “Maintaining public confidence in the judiciary: a precarious equilibrium” (1999) 25 (2) *Monash University Law Review* 209 at 210.

<sup>12</sup> M Le Roux and D Davis, *Lawfare: judging politics in South Africa*, Jonathan Ball Publishers, 2019 at p 33.

<sup>13</sup> *The Bangalore Principles of Judicial Conduct* (2002), Art 1.3.

<sup>14</sup> *ibid*, Art 1.6.

<sup>15</sup> *ibid*, Art 2.2.

<sup>16</sup> *ibid*, Art 3.2.

Under South African domestic law, an acknowledgement of the importance of public confidence in the judiciary is evident in the legal tests for judicial independence and recusal. In articulating the test for assessing the independence of the courts from other branches of government, the Constitutional Court of South Africa has held, drawing on Canadian jurisprudence, that “the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted.”<sup>17</sup> And in defining the test for the circumstances under which a judge would be required to recuse themselves on the grounds of a reasonable apprehension of bias, the court has held that:

[f]undamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.<sup>18</sup>

The court held further that one of the factors to be balanced in taking into account whether a judge should recuse themselves is “the pre-eminent value of public confidence in the impartial adjudication of disputes.”<sup>19</sup>

This discussion shows that public confidence and trust in the judiciary is an extremely important matter, both at a theoretical level and at a practical level in giving effect to key legal tests and standards.

Prior to examining what can be said about the actual levels of public confidence in the courts, it will be necessary to introduce the Afrobarometer project, from which this information is obtained.

## **The Afrobarometer project**

Afrobarometer is a pan-African, non-partisan survey research project that measures citizen attitudes on democracy and governance, the economy, civil society and other topics.<sup>20</sup> It began by conducting surveys in 12 African countries in 1999.<sup>21</sup> By the time of round 6 of surveys in 2014–2015, Afrobarometer had expanded to 36 African countries. Round 7 surveys were conducted in 2016–2018. This paper will focus on the most recent data, while drawing on comparisons from the time period from 2000 onwards.

Surveys are conducted through face-to-face interviews with a randomly selected sample of 1,200 or 2,400 people in each country.<sup>22</sup> Surveys are conducted in collaboration with a national partner in each country. National partners are responsible for training interviewers prior to the collection of data and ensuring that interviewers have the necessary skills and qualifications to implement the survey.<sup>23</sup>

## **The survey results**

This section sets out key results from the Afrobarometer surveys insofar as they relate to perceptions of the judiciary in South Africa. To contextualise these results, some remarks about what one might expect to find given the country’s history will be given first.

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<sup>17</sup> *Van Rooyen v The State (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC) at [32].

<sup>18</sup> *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at [28].

<sup>19</sup> *ibid* at [37].

<sup>20</sup> Afrobarometer, *About Afrobarometer*, available at [www.afrobarometer.org/about](http://www.afrobarometer.org/about), accessed 7 April 2020.

<sup>21</sup> *ibid*, *Our History*, available at [www.afrobarometer.org/about/our-history](http://www.afrobarometer.org/about/our-history), accessed 7 April 2020.

<sup>22</sup> *ibid*, *Surveys and Methods*, available at [www.afrobarometer.org/surveys-and-methods](http://www.afrobarometer.org/surveys-and-methods), accessed 7 April 2020.

<sup>23</sup> *ibid*.

During the apartheid era which preceded the introduction of the Constitution, it would be fair to anticipate that many South Africans would have had low levels of trust in the courts. In light of the role of the courts in enforcing apartheid laws, the judiciary has been described as follows:

[T]he courts were an important part of the apartheid project. Many litigants inevitably left the courts without justice and with their dignity impaired. It is undeniable that the courts were often engines of injustice.<sup>24</sup>

However, in the constitutional era, it might be anticipated that the courts have enjoyed a resurgence in their public image. The Constitutional Court in particular has been the recipient of much academic praise for its jurisprudence — Theunis Roux describes the Constitutional Court in its early years as having “built an unrivalled reputation in the comparative constitutional law community for technically accomplished and morally enlightened decision-making.”<sup>25</sup> And, perhaps most pertinently for the time period under consideration, the South African judiciary has been seen as being at the forefront of pushback against the phenomenon of “state capture” which is seen by many as defining the administration of former President Jacob Zuma.<sup>26</sup> The judiciary has been said to have been the only governance institution to have “lived up to its constitutional mandate” during this time,<sup>27</sup> with the courts having “held firm” in spite of being:

[d]eluged with cases challenging the state capture project, seeking to hold the executive accountable, demanding that office-bearers perform their functions rather than maintain their loyalty to Zuma and the endemic spread of corruption under his term of office.<sup>28</sup>

This view of the role of the courts in responding to the phenomenon of state capture is one that appears to be shared by many, particularly by academics and political commentators. To be sure, there is a very real risk of the courts being drawn into contested issues where the political stakes are so high. The issues raised by the counter-majoritarian concerns discussed earlier are squarely raised when the courts have to step in to resolve issues that would normally be expected to be resolved in the political or other realms. Former Deputy Chief Justice Dikgang Moseneke has argued that:

This excessive use of the courts speaks to the concern that democratic arrangements in our land are virtually devoid of non-litigious sites for mediation of conflict. Why would party faithful rush off to court to resolve an internecine dispute? Why is the state the chief of all litigators? How does it happen that labour federations should seek solace in court processes? It is not unusual to hear activists or senior politicians vowing to go to the Constitutional Court ... The more this trend continues, the more the courts are drawn into the political arena.

But courts are not and should not be a substitute for the obligation to move our society to spaces envisioned in the Constitution.<sup>29</sup>

There may therefore be a current of opinion which is concerned about judicial overreach due to the extent to which the courts had been drawn into the resolution of some highly political

<sup>24</sup> C Forsyth, “The judiciary under apartheid”, in C Hoexter and M Olivier (eds), *The judiciary in South Africa*, Juta & Co Ltd, 2014, p 26.

<sup>25</sup> T Roux, *The politics of principle: the first South African Constitutional Court, 1995–2005*, Cambridge University Press, 2013, p 2.

<sup>26</sup> See M Le Roux and D Davis, above n 12, pp 267–273.

<sup>27</sup> *ibid*, p 273.

<sup>28</sup> *ibid*. For an overview of judgments where the courts were called on to engage with these issues, see pp 273–296.

<sup>29</sup> D Moseneke, “Reflections on South Africa’s constitutional democracy — transition and transformation”, Keynote Address at the MISTRA–TMALI – UNISA Conference, *20 years of South African democracy: so where to now?*, 12 November 2014, p 21, available at <https://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/>, accessed 7 April 2020.

disputes. However, it might also be expected that the view that the courts have been a “force for good” in resisting the highly publicised phenomenon of state capture would have a significant positive impact on South African’s view of the judiciary. It is to that data that we now turn. First, a descriptive overview of the survey questions will be given, followed by a more detailed analysis of specific findings.

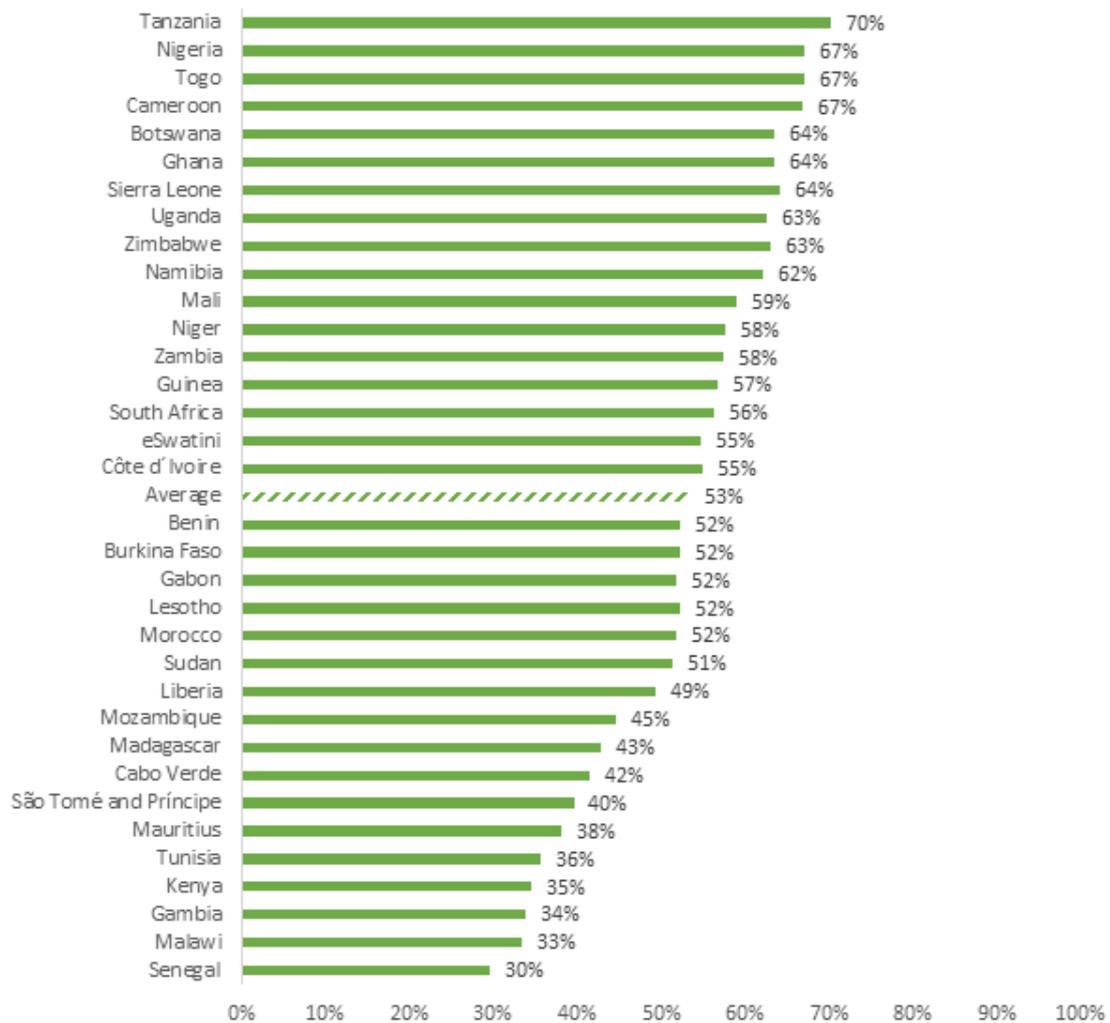
Notable findings in relation to the judiciary include:

- When asked how much they trust the courts, how many judges and magistrates are corrupt, and whether they accept that the courts make binding decisions for everyone, South Africans often reflect the continental average.
  - More than half (56%) of South Africans trust their courts of law “somewhat” or “a lot”, close to the 34-country average.
  - One in three (32%) South Africans say that “most” or “all” judges and magistrates are involved in corruption, close to the 34-country average.
  - A significant majority (68%) of South Africans accept that courts have the right to make decisions that are binding for everyone. This is less than the 34-country average of 74%.
- Since the year 2000, the judiciary has remained the most trusted among the three branches of government in South Africa. However, citizens have lost faith in various actors within the justice sector since 2011.
- According to citizen perceptions, presidential compliance with the rule of law has suffered markedly between 2012 and 2015.

**Graph 1** shows the results on trust in the rule of law across 34 surveyed African countries between 2016 and 2018. Respondents were asked how much they trusted courts of law. The percentage reflects the number of respondents who said they trusted the courts “somewhat” or “a lot”.<sup>30</sup>

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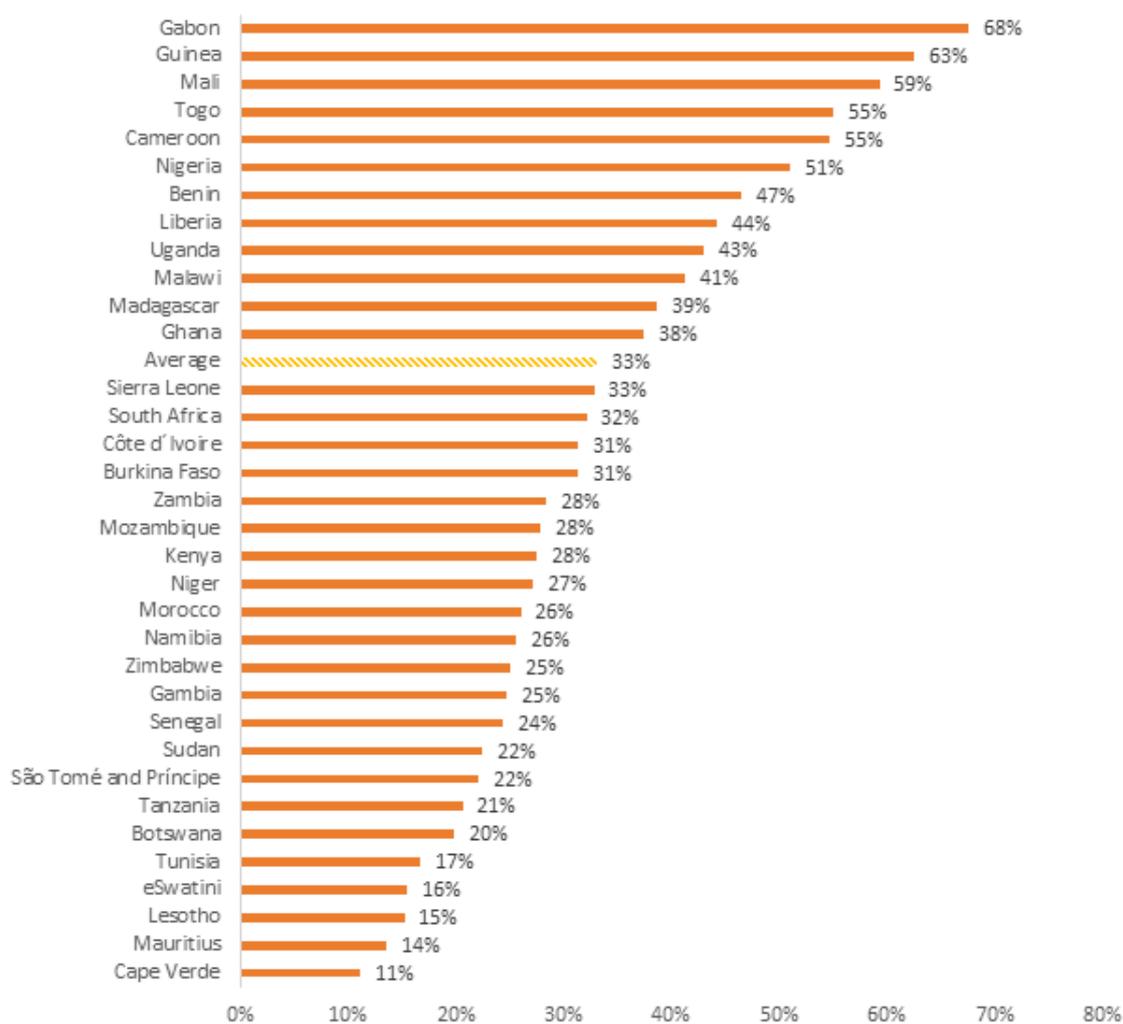
<sup>30</sup> Other answer options were “not at all” and “just a little.”

**Graph 1: Trust in courts of law | 34 countries | 2016/2018**

Note: Respondents were asked "How much do you trust each of the following, or haven't you heard enough about them to say: Courts of law?" (% who say they trust them "somewhat" or "a lot")

As the graph shows, South Africa finds itself in the middle, slightly above the continental average. This is a somewhat surprising outcome in light of the praise the judiciary has received from commentators and analysts, described above. It suggests that ordinary South Africans have a less sanguine view of their judiciary than expert analysts do.

Subsequent graphs offer some clues as to what factors may be contributing to this greater than expected level of scepticism. The next graph reflects respondents' answers to the question: "How many judges and magistrates are corrupt?" The percentage reflects the number of respondents who said that "most of them" or "all of them" were corrupt.

**Graph 2: Corruption among judges and magistrates | 34 countries | 2016/2018**

Note: Respondents were asked “How many of the following people do you think are involved in corruption, or haven’t you heard enough about them to say: Judges and magistrates?” (% who say “most of them” or “all of them” are corrupt)

These results are alarming for anyone who cares about the South African judiciary. Whilst few formal complaints of corruption have been levelled against South African judges, the results show that almost 1 in 3 respondents (32%) say that “most or all” judges or magistrates are corrupt. This level of perceived corruption does not bode well for public confidence in the judiciary.

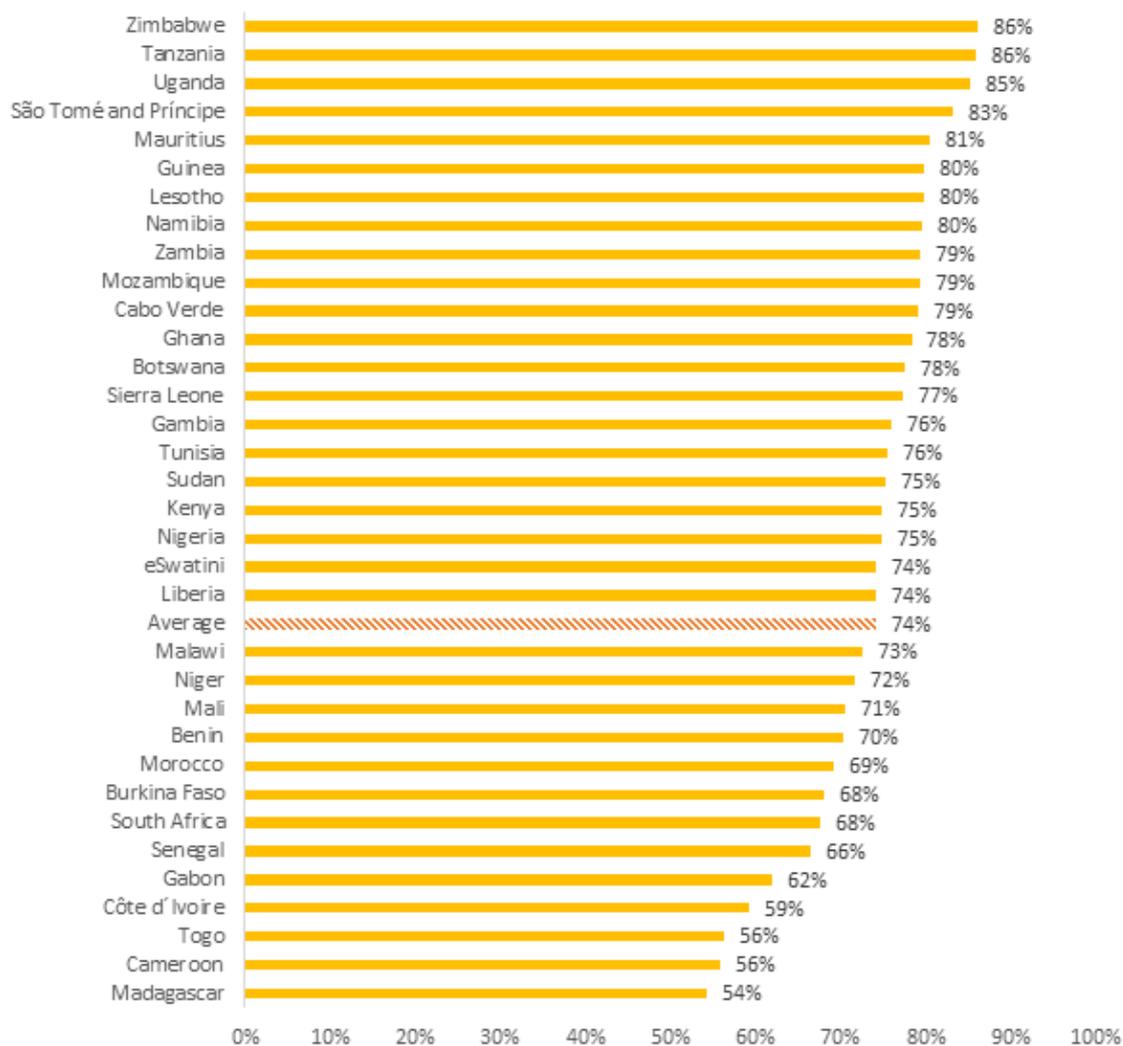
How is this data to be interpreted in light of the absence of any proven cases of corruption against individual judges in the course of South Africa’s constitutional democracy? One possible explanation is that, where allegations of judicial misconduct have been made, the system of dealing with those complaints has proved to be lengthy and indecisive. To give one example, a complaint against Western Cape Judge President John Hlophe by the judges of the Constitutional Court made in 2008 remains unresolved at the time of writing.<sup>31</sup> Commentators have suggested that the failure to resolve this and other complaints quickly and transparently have “done considerable damage to the legitimacy earned by the post-apartheid judiciary as

<sup>31</sup> For a full discussion of the complaint, see H Corder, “Judicial accountability”, in C Hoexter and M Olivier (eds), above n 24, pp 200 – 244, 215 – 219.

a secure and independent protector of the Constitution.”<sup>32</sup> It is also possible that corruption is serving as a proxy for general mistrust of the courts. As has been discussed, allegations of state capture featured prominently in South African political discourse over the past decade. It could be that this has caused people to attribute perceived ills with institutions of governance as being due to corruption, whether or not there are concrete examples of individual wrongdoing.

In light of the data considered so far, which painted a less rosy picture of public perceptions of the South African judiciary than might have been expected, it is worth asking a broader question about the country’s judiciary. Would South Africans agree that courts are entitled to make binding decisions? **Graph 3** reflects responses to the question of whether the courts have the right to make decisions that people always have to abide by. The percentage reflects those respondents who answered “agree” or “strongly agree”.

**Graph 3: Court decisions are binding | 34 countries | 2016/2018**



Note: Respondents were asked “For each of the following statements, please tell me whether you disagree or agree: The courts have the right to make decisions that people always have to abide by.” (% who “agree” or “strongly agree”)

Again, the results are remarkable for how much lower the judiciary scores than most legal scholars and commentators might expect. The positive responses of 68% may constitute a

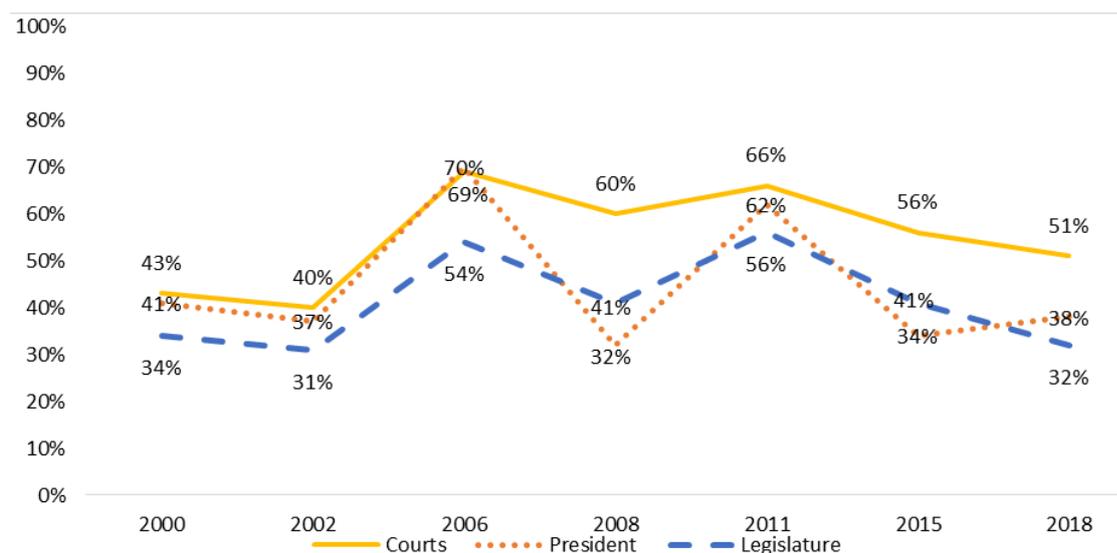
<sup>32</sup> *ibid*, p 221.

majority, but puts South Africa below the continental average of 74%. South Africa also falls a long way below countries such as Zimbabwe, which is arguably surprising given the numerous governance challenges that country has experienced over the same time period. The results are also alarming considering the central role given to the judiciary under South Africa's constitutional democracy, as described above. This role is far-reaching, ranging from holding the executive and other government actors accountable to enforcing the realisation of expansive socio-economic rights.

While the cross-country comparisons provide important reference points for this analysis, the Afrobarometer data also allows for a longitudinal comparison of South African courts covering almost the entire post-Apartheid period.

First, though courts might garner less support than some might expect, do they still receive more public support than other branches of government? We examine this question by comparing citizens' trust in different branches of government. **Graph 4** below shows responses to the question of how much respondents trust the courts of law, the president and the legislature, with the percentages including those who trust each institution "somewhat" or "a lot."

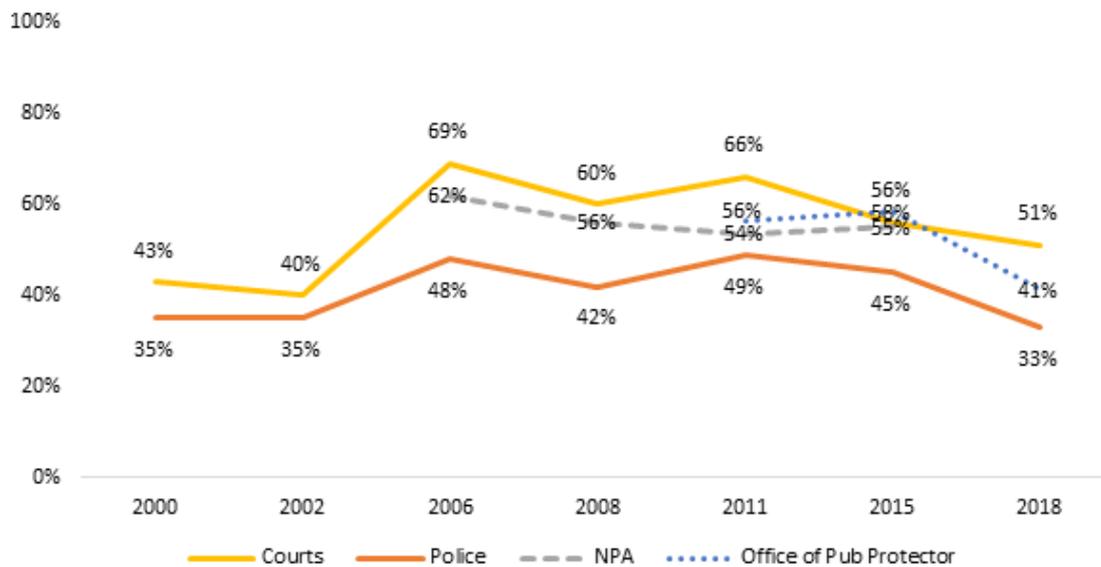
**Graph 4: Trust in branches of government| South Africa |2000-2018**



Note: Respondents were asked "How much do you trust each of the following, or haven't you heard enough about them to say: Courts of law? President? Legislature?" (% who say they trust them "somewhat" or "a lot".)

It will be apparent that the courts have consistently, and often dramatically, outperformed other branches of government over this time period. Thus, while experts might over-estimate absolute levels of public support for the judiciary, they seem to be better at gauging South African's views of the judiciary compared to other key institutions.

Second, it is instructive to look at the levels of trust in the courts relative to other institutions in the justice sector. **Graph 5** depicts responses to the question of how much respondents trusted each of the listed institutions, with the percentage again reflecting those respondents who answered "somewhat" or "a lot".

**Graph 5: Trust in institutions within the justice system | South Africa | 2000-2018**

Note: Respondents were asked “How much do you trust each of the following, or haven’t you heard enough about them to say: Courts of law? Police? National Prosecuting Authority? Office of the Public Protector? (% who say they trust them “somewhat” or “a lot”)

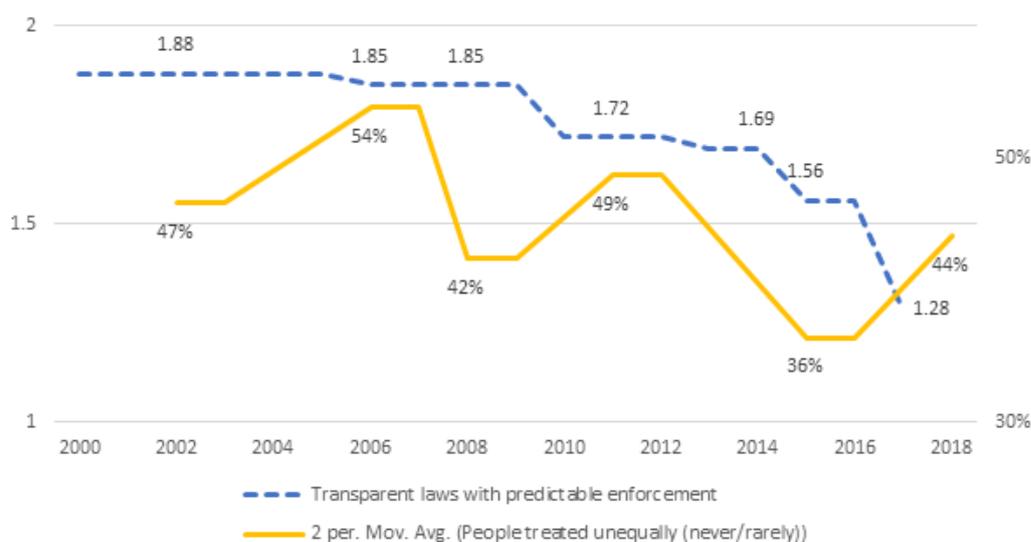
Even allowing for the fact that not all institutions are covered across the full time period, the judiciary is the most trusted of all the justice sector institutions. However, since 2011 South Africans have lost trust in all actors in the justice sector to varying degrees. It may therefore be that the unexpectedly low levels of public confidence in the judiciary are part of a general loss of confidence in governance institutions and particularly justice sector institutions. In other words, the lower levels of public confidence in the judiciary may not be due to meta-narratives about jurisprudence, but more to do with systemic general problems with the justice system being imputed to the judiciary.<sup>33</sup> Public frustration with the failure of prosecuting authorities to act promptly against those implicated in state capture may also contribute to a decrease in public confidence.<sup>34</sup>

Further, a significant factor may also be found in the following graph. **Graph 6** depicts responses to the question of how often people are treated unequally under the law, with percentages reflecting respondents who said people “were never” or “rarely” treated unequally. The bottom graph reflects respondents, the top reflects experts’ opinion from Varieties of Democracy (V-Dem) of how transparent and predictably enforced the country’s laws are.<sup>35</sup>

<sup>33</sup> For a discussion of issues afflicting institutions in the criminal justice sector during the state capture period, see Le Roux and Davis, above n 25, pp 269–273.

<sup>34</sup> See Professor Balthazar, “Time is not on the side of the NPA to prosecute state capture culprits”, *Daily Maverick*, 12 March 2020, at [www.dailymaverick.co.za/opinionista/2020-03-12-time-is-not-on-the-side-of-the-mpa-to-prosecute-state-capture-culprits/](http://www.dailymaverick.co.za/opinionista/2020-03-12-time-is-not-on-the-side-of-the-mpa-to-prosecute-state-capture-culprits/), accessed 17 April 2020.

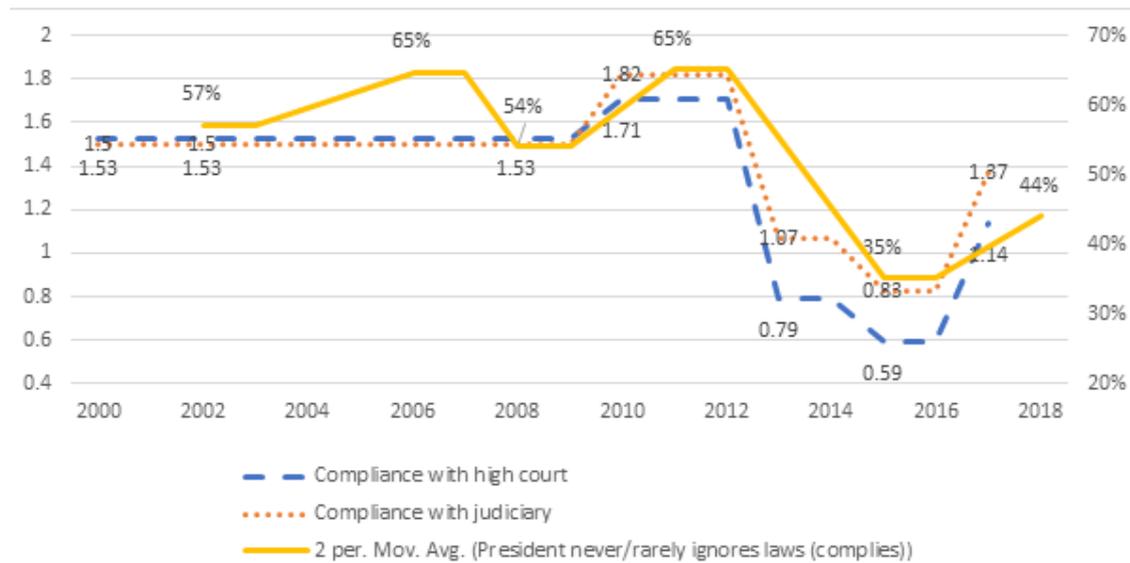
<sup>35</sup> The data is drawn from the Varieties of Democracy data set. The exact question that was posed to country specialists is: “Are the laws of the land clear, well publicized, coherent (consistent with each other), relatively stable from year to year, and enforced in a predictable manner?” Higher scores indicate that transparency and predictability are very strong. The laws of the land are created and enforced in a non-arbitrary fashion. Lower scores connote reduced levels of transparency and predictability.

**Graph 6: Equal treatment under the law| South Africa |2000-2018**

Note: Respondents were asked “In your opinion, how often, in this country: Are people treated unequally under the law?” (% who say “never” or “rarely”).  
Additional source: Varieties of Democracy (transparent laws with predictable enforcement)

Since 2006, a group of country experts surveyed by V-Dem observed the worrisome trend that the predictable enforcement of laws in South Africa has progressively decreased (from 1,85 in 2009 to 1,28 in 2018 on a 4-point scale). It is therefore perhaps not surprising that this erosion coincides with citizens’ views about how equal ordinary South Africans are treated under the law. While in 2006 more than half of South Africans said that people are treated equally under the law, in 2015 only 36% of citizens were of the same opinion. These developments might go some way towards explaining the concurrent decrease in public confidence in the courts.

Finally, it is worth taking into account how South Africans view the relations between the country’s judiciary and the executive. In many jurisdictions, this is a locus of high-stakes conflict over accountability for the exercise of power. We have seen how the South African Constitution has given the courts extensive powers to hold the executive (and other branches of government) to account. We have also seen how the courts have been increasingly called on to exercise that power in highly politically contentious situations, in a context where former President Zuma himself was frequently implicated in allegations of state capture. The impact of these developments is reflected in **Graph 7** below, which shows responses to the question of whether the President ignores the courts and laws of the country. Percentages reflect those respondents who answered “never” or “rarely.”

**Graph 7: Executive compliance with judiciary| South Africa |2000-2018**

Note: Respondents were asked “In your opinion, how often, in this country does the President ignore the courts and laws of this country?” (% who say “never” or “rarely”). Additional source: Varieties of Democracy (Compliance with high court [in this case Constitutional Court] and compliance with judiciary as a whole)

According to citizen perceptions, therefore, presidential compliance with the rule of law has suffered markedly between 2012 and 2015. This suggests that there is merit in the argument that it is harmful for courts to be drawn into the political arena as frequently as South African courts have been over this time. Even if the courts’ decisions may be legally unassailable, the mere fact of them having to decide such issues, in an often drawn out manner with technical points being taken and all avenues of appeal being utilized, may have a harmful impact on levels of public confidence.

## Conclusion

One must be cautious of drawing overly far-reaching conclusions from this data. While the picture that the survey results paint is fascinating and in several respects unanticipated, some dynamics may not be fully captured by the survey. For example, respondents may not always be able to distinguish between different levels of the court system in their responses, and there may be some conflation of problems with other actors in the justice system. It is also not clear to what extent opinions are driven by the influence of media reporting of high-profile cases as opposed to first-hand experience with the courts. However, if public opinion ought to be taken seriously — as the discussion above would suggest — these findings should not be ignored. Rather, the findings ought to encourage all stakeholders to reduce the dissonance between the work of the judiciary, and how it is perceived by South Africans.

Overall, the levels of public confidence in the South African judiciary are not as high as was anticipated. This suggests that it is not grand narratives about the importance and intellectual purity of the courts’ decisions that are influencing public confidence. The courts do, however, fare well compared to other governance institutions, and may be suffering some reflected negativity towards these institutions. Yet that is surely not the whole story. How judges conduct themselves both on and off the bench surely also plays a significant role in how the judiciary is perceived. This, it is argued, makes it vitally important for judges and others in the judiciary

to be mindful of the need for judges to explain their findings clearly in their judgments, and for the judiciary as an institution to use public education and other outreach methods to explain clearly its role and mandate.

Considering the importance of carefully explaining judicial decisions (especially on politically contested issues), there is surely great value in incorporating sessions on public perception into judicial training programs. The Judicial Institute for Africa (JIFA) has incorporated presentations on Afrobarometer data into its training sessions for African judges since 2018. For judges, simply to be aware of the state of play has value. Judicial decision making can obviously never pander to the vagaries of public opinion. But there is value in being aware of the context in which the courts are operating, in terms of public perceptions of the courts. If nothing else, such awareness may alert judges and judicial administrators to shortcomings in communication and public awareness, which can form the basis for interventions which respond to actual problems. All steps to increase public confidence in the judiciary, without compromising the decision-making independence of judges, are to be welcomed and encouraged.

