Session 7.3
Training for Judges on Fundamental Rights
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1 Mr Chairman, thank you. Good afternoon ladies and gentlemen, distinguished colleagues, or should I say, learned colleagues. Thank you for your kind words of introduction and for your invitation to me to give this talk.

2 I was reminded when I heard the introduction of my biography of the story that is told of the Archbishop who attended a meeting and was introduced in very complimentary terms. He went home that evening and he rendered two prayers to the Almighty. The first prayer was to forgive the speaker for exaggerating a bit as to his qualities and the second prayer was to the Almighty to forgive him for enjoying so much hearing about them.

3 The apology that I need to make is that I grew up in the generation, as you may have gathered, looking at me, that never heard of PowerPoint, so I am going to have to rely on your listening to what I say. I will introduce the odd slide once or twice if I am able to work the slide projector. I will also perhaps use the whiteboard occasionally.

4 What I am going to be talking about, obviously, is the training of judicial officers, which in the South African context includes not only judges but magistrates, who perform a very important role. I know in other countries, Australia and New Zealand, the magistrate is not quite in the same category as a judge. We certainly do not call a magistrate a judge, but they have very wide jurisdiction in South Africa. We do not have a district court, for example. That kind of work is done by the magistracy so they are very important. Above them you have the Provincial Courts and above that still what we used to call the Appellate Division, where I sat for some years, is now called the Supreme Court of Appeal. We have some competition from another court called the Constitutional Court. We judges in the Supreme Court of Appeal used to call it the Con Court, not only as an abbreviation but as an appellation for what they did, because they deal with very esoteric matters which really do not affect people who get run down in the street, or get defamed, or have their deaths not paid for, the bread and butter that is dealt with either in the magistrates courts, depending on the amount, or in the Supreme Court.

5 Let me tell you a bit about the South African legal system, before I get to the nitty gritty of training for equality court. The South African legal system, unlike in Australia, unlike in Canada, unlike in the United States, is a unitary state. We are not a federal system. We do not have federal courts. We have one set of state courts. Everything happens in the state court. As far as the legislative authority is concerned, that is conferred on the unitary parliament, which sits in Capetown, and there are provincial governments that pass legislation but all of that is subordinate to the legislation of the central authority.

6 There are one or two other differences which you need to note in understanding the legal system. The most important for modern times is an Act that was introduced in 1996. It is Act 108 of 1996, and it is called the Constitution of the Republic of South Africa. You may, of course, realise that we underwent a watershed change in South

Africa in law and in South African society with the change from the bad old days when South Africa was a pariah state and looked down upon by most jurisdictions. The apartheid policy, all that came to an end shortly before 1996, and three characters were very much involved in that process. There is no guessing who the main character was. He has become an icon. He is now just over ninety. The two other people who played also a very important role was a bishop called Tutu, who had a lot to do with the reconciliation of different groups, and I like to think a most important person, the then President De Klerk. Some people say he bluffed the public a bit with a referendum of white people; there were no black people on the voters roll or holding positions of importance in our society. De Klerk held a referendum, by which did not quite say whether he would change things, but as you know he released the most important member of our society at that time, of course, Nelson Mandela.

7 That brought about a sea change. The Con Court I spoke about was created at this time, and it dealt with constitutional matters. Of course it had to prove, in terms of a document hammered out by two judges, CODESSA 1 and CODESSA 2 [Convention for a Democratic South Africa]. They picked two judges, one a very great friend of mine called Ismail Mahomed, a man of colour who became the first Chief Justice of colour of South Africa, and a white judge who was very much rightist in his views. These two came together and they hammered it out with a meeting of different parties, a constitution. The constitution has two very important provisions which I would ask you to bear in mind when you consider South African law today. They are fundamental. I think my Austrian colleague would know the term. The *Grundnorm* is the basic norm of the constitution. These are the two sections, and I quote, "Section 1: the republic of South Africa is one sovereign democratic state founded on the following values … " Value A is of great consequence in what we are talking about today. Value A is "human dignity, the achievement of equality and the advancement of human rights and freedoms". That is A. B: "non-racialism and non-sexism". I am never sure what non-sexism means, but I will come to this in a moment. I do not think it means you do not have sex, but maybe it means something else. C: "supremacy of the constitution and the rule of law". D: "universal adult suffrage, a national common voters roll, regular elections and multi-party system of democratic government to ensure accountability, responsiveness and openness".

8 The constitutional principles are subject to judicial test. They are 'justiciable', is the word that is used. Section 2 is very brief and very important: "[t]he constitution is the supreme law of the Republic. Law of conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled by it". You can test legislation, any legislation, any common-law principle, by going to court and saying that this is contrary to the Constitution. Americans are great on this: 'it is unconstitutional'; 'it is unenforceable'.

9 I should refer you also, in the context, to the preamble to the Constitution, which really says it all. It says, and I quote, "[w]e the people of South Africa recognise the injustices of the past, honour those who suffered for justice and freedom in our land, respect those who have worked to build and develop our country, and believe that South Africa belongs to all who live in it, united in diversity … " I should just interpose there, that we have eleven official languages. How you work with that is a bit of a mystery to me as well but in real terms, certainly, the court language is basically English today. "We therefore, through our freely elected representatives,

adopt this Constitution as the supreme law of the Republic, so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, lay the foundations for a democratic and open society in which government is based on the will of the people, and every citizen is equally protected by law, improve the quality of life of all citizens and free the potential of each person, and build a united and democratic society able to take its rightful place as a sovereign state in the family of nations. May God protect our people", and then the words in Zulu, part of the national anthem, "Nkosi sikelel' iAfrika; Morena boloka setjhaba sa heso" – that is in Sutu; "God seen suid Afrika" – that is Afrikaans for "God bless South Africa".

10 That is the preamble which, as I say, tells it all but we have not forgotten entirely what our history was all about because South African law basically, so the academics tell me, is Roman/Dutch in basis. When people ask me, are you a civil-law country or a common-law country, the answer is, we are both. We are both civil-law orientated, because of the code of Justinian and the Roman element in the Roman/Dutch law. I speak of the Dutch law, as enunciated in the 17th and 18th centuries by Roman/Dutch writers, particularly people like Grotius and Van Leeuwen and a most famous one called Voot The academics will tell you, if you can quote Voot by the yard then you are a proper lawyer. Most people do not understand it. It is written in High Dutch, or Flemish, but that is the basic law. Basically, when you have a difficult case you try to find an ancient Roman/Dutch authority to support you, but a lot of those principles have been overtaken either by subsequent court decisions or by statute.

11 As far as the court's decisions are concerned, judge-made law is also a very important aspect of the law and of course statutory law is equally of importance. A lot of our statute law is influenced by English law, the English *Companies Act*, *Insurance Act*. A lot of this has changed a bit but in the good old days a lot of it was adapted from the English law. The history of the country some say started in 1652. Others say much earlier when there were nomadic tribes moving down Africa, but the bulk of the black people were not there yet. There was a few what we used to call 'bushmen', nomadic people, but basically a gentleman called Van Riebeeck arrived at the Cape in 1652. He was sent out by the Dutch East India Company, a trading company in Holland, the Netherlands. What was important about this was that the Cape was on the sea route to the East, and navies and ships were most important. The ships needed to be dealt with and the sailors needed to be provided with fresh vegetables because the scourge of sailors was scurvy, not AIDS, believe it or not, scurvy. They needed fresh vegetables and Van Riebeeck's mandate from the company was to establish a vegetable garden – not to establish a colony. That they were not interested in, but things developed differently: sailors jumped ship and settled in the Cape, and the Cape settlement grew until a gentleman called Napoleon arrived in Europe at the end of the nineteenth century.

12 Britain was very worried that Napoleon, the French, would take over the Cape and there was a brief war which lasted, I think, two days, the battle of Muizenberg. The locals surrendered and Britain occupied the Cape in the beginning of 1800 and established, from the point of view of law, a very important thing. They sent out officials from England, particularly judges, who knew nothing about Dutch law. They thought they were applying Dutch law but they were not. They were applying English law. This led to a lot of unfortunate things. The language was supposedly Dutch but

they tried to impose English law. English settlers arrived. They were put on the border, where they had to deal with border conflicts. The Afrikaner population, mainly of Dutch extraction, decided to pack their bags and get into wagons and go north. That was called 'the great trek', in 1836. They travelled into the hinterland and they were lucky in some respects because they finished up in a place called Kimberley, where the diamonds were found. More importantly, those that got to the Transvaal, across the Vaal River, found gold.

13 A gentleman called Kruger was in charge there, President Paul Kruger. He is the origin of the Krugerrand. He was very much aligned with Germany, the Kaiser, and at the end of that century a war broke out with England, the Anglo-Boer War, and it led to a lot of unpleasantness. The war was supposed to last a few months. It lasted a few years. There was great bitterness amongst the English and Afrikaans populations, the white populations. Eventually, Britain ceded in the war. There was then a peace. In 1910 a major event occurred, the Act of Union. It was a statute of Westminster, passed by the English parliament. The Queen was in charge so the British sovereign and Governor General were sent to South Africa, much like Australia, to administer the country on behalf of the Queen. The reality was that the local parliament was important.

14 Four elements came together in this union. Firstly, what was called the 'mother settlement' of the Cape. In the Cape the parliament was set up, because we believed in the separation of powers, legislative, executive and judicial. The legislative capital was Capetown. The executive capital was about a thousand miles away in a place called Pretoria, which is about to undergo a change in name. It is going to be called Tshwane. That is where the civil servants live, and every six months they travel to Capetown for parliament. The third element I got to know quite well, the judicial capital of South Africa is in Bloemfontein, in the free state almost in the middle of the country. That is where the top court – and I like to say 'the top court' – presided, much like the High Court of Australia. The court was then called the Appellate Division. It was the top court. Every appeal finished up there. You might ask, what was the fourth element? The fourth element was Natal. Natal is where Durban is. What did Durban get? When I used to teach this course to students I would say, well Durban got the bananas. They got the residence of the Governor General. He has a magnificent residence in Pietermaritzburg, which is about thirteen miles from Durban.

15 So much the potted history. I have already mentioned about how we became a Pariah state. I move on to the era of the 'new deal', the constitution, the release of Mandela that was the watershed event.

16 There are a few other points of difference with other countries. What is important is that we do not have a jury system. We used to have a jury system. It was abolished about sixty years ago. It was abolished for a very important reason – and this was even in the bad old days, in the apartheid era – and that was that is was grossly unfair. The jury consisted of white voters only. There were no blacks on the voters roll so you got a white jury dealing with a black accused and the probabilities were that they would convict him, especially if it was a farmer who got murdered in a remote area. When it came to a white man who was charged with murdering a black man the chances were that he would be acquitted. It did not work. It was grossly unfair, and it was abolished. When Americans tell me that the jury system is so marvellous I ask them about OJ Simpson. When he was tried by a jury consisting of a majority of

people of colour he was found not guilty. When he was tried in a civil case by a majority of people who are white he was found guilty. True, the test was different – balance of probabilities as opposed to beyond reasonable doubt – but I am a great critic of the jury system. My friend Judge Heath from New Zealand tells me it works well in New Zealand but things are different in different countries and I think you need a relatively homogeneous population for it to be successful and I am not sure that it would ever work in South Africa. We do have a system of a judge sitting with assessors. We try to have a representative body deal with cases.

17 One of the biggest problems facing a fledgling democracy such as South Africa is building a country that is fair to all citizens in the country. I have read to you from the preamble, which seeks to emphasise that in which individuals have a value and have a meaningful right in the country. One may summarise six components of this element. First of all, the most important one is the respect for human dignity. That is a core value, when you talk about human rights. Secondly, the promotion of human development, fostering human equality and advancing human freedom.

18 Unlike the Austrian system and a lot of the continental systems, we do not have a system of judges being trained to become judges. They usually start off as barristers and if they gain a certain eminence and experience they get promoted to the High Court. In the old days and even today there is a lot of political interference, sometimes, in certain situations. There is a Judicial Services Commission, that deals with the appointment of judges. The magistrates are employees. They get employed. They usually start off as prosecutors. We have that in common with the Austrian and German systems. Prosecutors do get training to become prosecutors. They then go on the bench. Stereotyping, particularly racial stereotyping, certainly goes through the mind of some judicial officers. They see a person of a particular colour or a particular reason, religion, they in the back of their minds think, 'well, all these kinds of people are liars or crooks or cheats'. They never say that or articulate that, but this is a big problem for a judicial officer, and I am coming closer now to the Act that I am going to talk about.

19 The Promotion of Equality and the Prevention of Unfair Discrimination Act is the topic of this talk. It was promulgated in 2000. It is Act four of 2000. Let me show you a bit of the audio-visual presentation of this Act. What I have put on the screen there is the preamble to the Act. It says that the Act is to give effect to Section 9 read with Section 23.1 of the Constitution. This is the important wording: 'so as to prevent and prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination, to prevent and prohibit hate speech and to provide for matters connected therewith'. That says it all. There is also a preamble and a consolidation of various principles. I should mention to you that that Act was a great advance in giving practical effect to the high ideals set out in the Constitution.

20 The Act is divided, you will see, into some seven distinct chapters. The first chapter is *Chapter One, Definitions, Objects, Interpretation and Guiding Principles of the Act*. *One*, *Two* and *Three* are fairly simple sections. They give you the guiding principles to the Act. Chapter Two deals with the prevention and prohibition and elimination of unfair discrimination. Chapter Three deals with the burden of proof. We set up a system of equality courts, which you will find dealt with in Chapter Four. I am coming to that, because that is the role that I was principally involved in. There are various sections dealing with that. Section Five deals with the actual promotion of

equality. Section Six contains general provisions and implementation of the Act. Section Seven is a review of the Act, the short title and the commencement. As you heard from John, I was seconded from the Supreme Court of Appeal in Bloemfontein, then called the Appellate Division, to set up a syllabus and to supervise the training of judicial officers, both magistrates and judges, in the implementation of this Act.

21 What is very important, and I need hardly tell you this, is to change the minds and hearts and souls of people. It is all very well to have a piece of black-letter legislation but unless people are attuned to getting the spirit of the matter it does not work. What we did was to set up seminars, much like they did in Austria, lasting two to three days and we gathered in different parts of the country. We dealt with the judges. In some places – if you can believe the arrogance of this – we had a lot of trouble with the judges. They refused to sit with the magistrates, so we had to have separate training for judges and separate training for magistrates, but eventually they got the message and we managed in later seminars to get them together.

22 One of the problems, and I heard it in an early session that I attended this afternoon, was judicial reluctance to participate. Judges, particularly the older judges, reckon they know everything, they do not need any training, it is all common sense, let the advocates or barristers tell them what the law is, they know it all, the principle being, 'now that I have got the foreman's job the working class can do what they like. I am not interested in them anymore'. They were in a relative minority. Once you get some of their colleagues participating they feel they do not want to be left out of anything. We try to hold these seminars in attractive venues so that they really have a holiday in addition to going back to school. It is not so easy because you need funding and the government was very reticent to provide the funding, and you need time because judges have got work to do and magistrates do not want to leave their court and go to some remote place and hear talks and lectures.

23 What we did is, I travelled around the country with them. I should have told you that the magistracy deals with both civil and criminal cases. The more serious criminal cases are dealt with in a regional court that has much bigger jurisdiction. I recruited a then senior magistrate, now a judge, Joe Rulinger, Chief Regional Magistrate in Bloemfontein. He was very helpful and very keen on this job. They tell the old story of the elderly practitioner who was not wearing his dentures. He appeared in the ordinary magistrates court. The magistrate said to him – Mr Joseph was his name; he is now deceased – 'Mr Joseph, I would hear you a lot better if you put your dentures in'. He said, 'no your worship, I only wear those for the regional court magistrate'. There is a hierarchy and a distinction between different judicial officers. We travelled around the country giving these seminars. It was divided into four parts. First of all, I or Joe would give a general introduction as to what the Act was about. We engaged academics in various centres who would tell them what some of the problems of the Act were. We would have an academic who would explain the Act.

24 To get it working properly, particularly among judges, you need to have talks by their peer groups, the people who they respect. If you could get a senior judge to come and talk to them and tell them the difficulties, so much the better. We experienced, as I said, a bit of reluctance in the beginning but eventually we managed to get the message through to most of the judges. Some of them did not get involved. It was not obligatory. You could come if you wanted to. Thirdly, we also had people talking about social context, which is very important. Dealing with this we have a body much

like they have in Australia. The Australian equivalent, I think, is HREOC. We have a similar sort of body called the Human Rights Council. People on that body would tell us about these sorts of things.

25 Finally, two other matters. We had a video made. We had it made by practitioners. I got some of my pals who are barristers to argue a moot, much like the students, to be presided over by another academic as the judge, on a human rights issue. That could then be used for educational purposes. It went down very well. A picture tells a thousand words. People would watch this video and see what it is all about. Then we had various movies on human rights issues, from overseas and locally made, about how people had been discriminated against and how they were dealt with. We showed old movies, like *To Kill a Mockingbird*, that kind of movie, and movies about how jury systems, or non-jury systems, work. By and large, after two or three days we managed to convert a lot of people to change their hearts and souls and minds, encouraging them to adapt to this Act in practical terms.

26 I found it a most rewarding task because I think people then started to appreciate, particularly judicial officers, that they had an important role to play in the new society, not only to enunciate principles of law, the black letter law, but also to treat people with dignity, to treat ordinary people as people of substance, because in the old days – and I do not know if that applies in other commonwealth countries – to talk about the accused as Accused Number One, or Prisoner Number Thirty-seven, or whatever, if you have a number of prisoners, is demeaning, degrading, to talk down to people is not the type of situation which prevails today. I know in the old days it was a different situation. I am always reminded of the old story of the English judge who sentenced a man of seventy-five to thirty-five years imprisonment. The poor individual said, 'but my Lord, I won't live long enough to serve the sentence', to which the judge allegedly retorted, 'my man, just do the best you can'.

27 That type of lack of feeling and empathy for cases which come before the courts is, I think, fast disappearing. Some of the jurisprudence when I started these courses was derived from the Constitutional Court. Because there were no cases in the Equality Courts that were set up. There probably are some now, but some of them are not reported. It is regarded as being a very informal sort of procedure. You can appear in person. It is not very costly and the Equality Courts, as they are called, try, as far as they can, to get the parties to mediate and resolve problems.

28 Let me give you two practical examples. A gentleman went into a barber shop in Pretoria, wanting a haircut. He was a black. The barber refused to give him a haircut. He came up with some ridiculous excuse – that he doesn't cut curly hair. It was obviously racial discrimination. It went to the Equality Court and the Equality Judicial Officer got them together and the long and short was that they shook hands and the barber cut the man's hair, and he learned something good from this.

29 You have it in another field, which is quite important because the Act is not only vertical. I heard what was said about Austria. The Act is also horizontal in approach. It applies not only in that the state is bound, and cannot discriminate against people, for example in the army, nor can individuals, across the board. The best example of individuals is the golf-club example. Some golf clubs in some parts of the country would refuse to allow Jews to become members. You cannot do that anymore. You cannot say that it is a private club, and that you will admit only who you wish to

admit. In the educational field you cannot say that this high school, or institution, is only for white people, or only theoretically for black people. If they can afford to pay the price, so be it.

30 We tried to discriminate in the Act between what is unfair discrimination and what is fair discrimination because you can have fair discrimination, for example the insurance industry. If you want to insure a small motor vehicle, a Volkswagen or whatever, the premium is X. If you want to insure a Rolls Royce the premium is 10 x X. There is a good reason for that discrimination. The value of one car is higher. It is not based on any racial consideration. The Act tries to deal with discrimination against women employees. They talk about gender discrimination. The Act deals also with discrimination against people like myself, aged people, people of a certain age who are discriminated against. The Equality Court deals with that. There have been cases involving religious discrimination, Moslem women who want to wear the Burka, people who want to wear turbans, in a public place or institution. Banks, believe it or not, in the old days had a separate counter for black people. Black people had to sit at the back of the bus. All of that would be regarded as discrimination, and does not exist anymore.

31 Equality has been expressed in a very interesting case which came before the Constitutional Court, a case called *Hugo*. What was Mr Hugo's complaint? The State President issued a proclamation remitting sentences of women prisoners who had children of a certain age. There was a remission of sentence. Mr Hugo was a male but he was the sole supporter of a young child when he was imprisoned. He said that this was unfair discrimination: 'why doesn't the statute apply to me?' In a minority judgment the learned judge, a gentleman called Judge Krischler, who is now involved in some litigation concerning the appointment of a judge, gave a judgment, and he said that this is unfair discrimination. The matter was complicated. There was a lot of argument about it and his was the minority judgment. The late Chief Justice, who I mentioned earlier, gave a judgment in a very celebrated case, the first case that came before the Constitutional Court. It was a case where the Constitutional Court held that the death sentence was unconstitutional. All eleven judges who sat in that court gave separate judgments saying that the death penalty was unconstitutional. There is no longer a death penalty in South Africa. It is a matter of great controversy.

32 I am going to finish off with this one quotation because I think it is important. The late Chief Justice Mahomed said this about the Constitution, and it applies equally to the Equality Act: 'all constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation, the values that bind its people and which discipline its government and its national institutions, the basic premises upon which judicial, legislative and executive power is wielded, the constitutional limits and the conditions upon which that power is to be exercised, the national ethos which defines and regulates that exercise, and the moral and ethical direction which the nation has identified for its future. In some countries the constitution only formalises in a legal instrument a stable and unbroken past to accommodate the needs of the future', and here is the operative part, 'the South African constitution is different. It retains from the past only what is defensible and represents a decisive part from and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly

articulated in the constitution', and all of that is incorporated, in my view, in the Equality Act.