

## Walking here between the past and the future: A review essay

COURTING JUSTICE 2008. A FILM CREATED BY [RUTH COWAN](#), DIRECTED BY [JANE THANDI LIPMAN](#), SOUTH AFRICA, 2008, COLOUR, DVD, ENGLISH.

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*Courting Justice* is a documentary film about the role of women in building a human rights based democracy; South Africa is the democracy in question. The judiciary, the film makers argue, have a key role to play in 'living the dream' and of making that democracy happen. The role of women as members of the senior judiciary is the particular concern of this film. *Courting Justice* offers an intimate and revealing portrait of a number of women who at the time the film was made (2007-8)<sup>1</sup> held high judicial office across the range of the superior courts in South Africa, from the Constitutional Court in Johannesburg to various High Courts. Through these lives the film's 70 minutes (and there is also a shorter 54 minute version) present the arguments for judicial gender diversity, explores some of the challenges to and considers the future facing the women who have taken on, and who might in the future participate in, the important political role of being a judge. 1

The polemic that drives this documentary, a gender diverse judiciary, is central to the project of building a democracy grounded upon human rights. Without it the decisions that breathe life into the law will be lacking, partial, a poor reflection of the democracy that the law seeks to establish, respect and preserve. In the South African context it is an argument that is well established and beyond formal legal controversy. Chapter 8, section 174(2) of South Africa's Constitution requires consideration be given to the need for the judiciary to 'reflect broadly the racial and gender composition of South Africa'.<sup>2</sup> But the argument at the heart of this film is that, in practice, in the then 14 years of the new democratic regime, progress on this constitutional requirement has been slow. Only 16% of the judiciary were women and the language of the Constitution provides space for contestation and equivocation. The challenges have been great. More needs to be done and action needs to be taken with more speed. 2

The film is upfront about its pedagogic mission. It is set up in the prologue. The opening shot positions us looking up before the Constitutional Court in Johannesburg, situated next to a notorious former prison 'The Old Fort' (now a museum) that housed many of those involved in the political struggle against apartheid.<sup>3</sup> We are transported, by way of a voice-over by an unidentified male speaker, into the midst of a group of South African schoolchildren. A close up reveals the voice is that of our site tour guide. He explains the South African project of social and political transformation to those assembled both in the image and before it, by reference to the symbolic role of the old prison's bricks. They have been used to build the great African steps that abut the Constitutional Court and lead up to its entrance, and are incorporated as memorials into the very fabric of its walls. As his moral and political tale unfolds his audience clamours to be heard. Their voices take over his story, drowning him out, completing his sentence. In unison they rehearse what appears to be a well known political slogan, '...you can build your future by using the past.' On regaining control, our guide explains, '...when you are walking here between the past and the future, the past is where we are coming from and the future is the Constitutional Court.' Law is the future and so the story of the women judges who are making that future begins. 3

It is a story told from 'backstage'. Each female judge portrayed in the film is introduced in a 'behind the scenes' context; walking down a back corridor in the judges' chambers, in a judicial committee room, or in a judge's office. Another recurring 'back stage' visual motif is images of the final moments just before the public judicial performance by the women begins; the judicial robe is being donned, the white neck bands straightened and adjusted for the last time, the black sash, pulled corset tight, is wrapped about the judicial waist and fastened firm. The first time this particular visual motif occurs, at the end of the prologue, our proximity to the judicial body is such that we are almost caught up in the folds of the judicial robes, almost tied to the judicial body, as it is wrapped, in this instance, in scarlet, black and white. This visual motif of putting on the mantle of judicial authority recurs at regular intervals throughout the film. It provides the visual point of departure for various clusters of auto/biographical reflection by and about the featured women and their 4

experiences of inhabiting judicial authority.

'Backstage' works as a framing device that promises to deliver us the stories behind the public performance. These are stories, perspectives and insights that are not (and maybe cannot be) spoken from the public bench. 'Backstage' is a visual and narrative device that exploits film's voyeuristic qualities for the political project in hand. Together with a pervasive use of close up shots the general feel of the film is one of intimacy with a powerful elite institution, the judiciary, and some of its female members, tying us into their stories. 5

Like a quality television drama series the lives of these judicial women are told by fragmenting, interweaving and sequencing their various stories. The serial quality of this documentary is a common style of televisual story telling that works to engage the viewer (Villez, 2010). The repeated suspension of an individual's story, and its later return, works to keep us watching, drawing us in, wanting more. 6

The first cluster of biographical fragments shows the various women in a number of judicial roles: in discussion with fellow judges, poring over a stack of paper with a furrowed brow, sitting on the bench listening intently to legal argument. Another cluster is organised around the depiction of the 'roots' of these judges, their place of birth, their early education: sometimes this is a coloured township or a rural village, and in one case, Deputy Judge President Jeanette Taverso, in an urban home of a member of one of the latter day white Afrikaans apartheid political elite. Their political and professional origins and trajectories is another organising theme. Other thematic clusters explore: the impact of judicial office on family relationships (these women rarely see their spouses and children); the moral and political burdens of occupying such a responsible position (it is a job that threatens to consume all and the responsibility is intimidating); the almost ubiquitous hostility these women face (from fellow male judges on the bench and from various men before the bench); and the pleasures of the judicial role (the respect and admiration shown these women and the inner peace that comes from handing down a rigorously crafted judgment). And this is far from an exhaustive list. Within these thematic clusters the sequence of judicial lives mirrors the hierarchy of the Courts. The women of the Constitutional Court appear first, followed by those in the Supreme Court of Appeal in Bloemfontein and then the women who work in various High Courts. And the sequence also tends to mirror the chronology of appointment: the first woman, the first black woman, comes first. So Justice Yvonne Mokgoro of the Constitutional Court, the first woman we meet, is the first black woman appointed to that court. Judge Mandisa Maya is the first black woman on the bench of the Supreme Court of Appeal in Bloemfontein and the first subject we meet from that court. While this might tend to produce a rather rigid viewing experience that is predictable and boring, the overall effect of this sequencing and fragmentation is to produce an effective and rich visual and aural experience of multiple interweaving, interconnected lives. 7

Biographically these women appear to have much in common. They have a common institutional identity; judge. They all express a strong sense of the threat of social injustice and a devotion to social justice. They are all dedicated to serving the new democracy. They are all hard working. They have all made many sacrifices. They are all passionate. 8

But these things in common don't erase all of their differences. Some are from the townships, some are from rural communities; 'rural is what defines me' explains Judge Mandisa Maya. Another distinction is colour; only one of the 7 stories relates to a white woman. Two other white women, Justice Kate O'R egan in the Constitutional Court and Judge Belinda van Heerden in the Supreme Court make only brief appearances, more as bit parts, both falling out of the frame shortly after the opening sequences. Marital relations (one judge is a single parent with 3 daughters) and social class (only one of the seven appears to be from an established socially privileged and elite background) are other differences. Differences in prior political engagement (often associated with age differences between the women) are also mentioned. So Justice Yvonne Mokgoro's political biography involves long term involvement in the anti apartheid struggle, including being arrested and tried for obstructing the ends of justice. The much younger Judge Patricia Goliath was politicised by way of watching the spectacle of the political trials of others and through her pioneering work, running the first 9

legal practice in her township.

Little is made of how these differences might generate different women's perspectives on the bench, or how they might divide women on the bench. It is perhaps unsurprising that at this particular moment in time, and in the context of this particular political project, gender equality on the bench in post-apartheid South Africa (itself still in its infancy), the solidarity of these women and their 'sisterhood' are the things that are emphasised. But this leaves a key contemporary issue, their differences, unexplored. 10

It was an issue that troubled me as I watched the film unfold. My own research on judicial diversity in South Africa has been on sexual diversity,<sup>4</sup> an aspect of judicial diversity that has no formal constitutional recognition in that country, and has much less visibility than the debate about gender diversity. During the course of my research Judge Satchwell of the High Court in Johannesburg offered the following reflection on things in common with a fellow lesbian on the bench, Judge de Vos, Judge Satchwell explained: 11

...what I am saying is that I have nothing in common with Anna Marie de Vos. She is a white Afrikaner from Pretoria. She was never engaged in the struggle. And I'm not interested in her politics. Do you see? That diversity is not enough to bridge certain things.

Judge Satchwell suggests that being lesbians did not create the singularity of experience and the deep bond with another Judge, also a lesbian, which the use of the term 'lesbian' might connote. They are separated by ethnic background, Judge de Vos is Afrikaner in contrast to Judge Satchwell's background, which is English South African. Politics also separates them. During the course of the interview Judge Satchwell identified her privileged left liberal background and engagement in the anti-apartheid 'struggle' as central to her politics, her position on the Bench and her sense of community, which she defined as a community made up of 'struggle people', and to her more general sense of 'self'. This she suggested is very different from the social cultural and political background of Judge de Vos. The being in common that 'lesbian' suggests is in part serendipitous, being something that arises out of coincidence, in part externally imposed by the media, fellow judges and in part it is a conscious choice of individuals deciding to act in common with a certain commonality of experience. Sexual commonality is not brought into being fully realised by a name, uniformly applicable, taken for granted or enduring. And it may also be experienced as an alien and alienating, qualified, partial and fleeting experience. As I watched *Courting Justice* I was left wondering about the contingency of the term 'women' and thereby upon the diversity of the ways these women occupy the political role of judge. 12

The documentary contains a range of rationales explaining the virtue of more women on the bench. One is that women make a substantive difference. They bring an otherwise missing compassion to the bench. They also bring different experiences and different perspectives to the bench that are otherwise missing. Another relates more to what might be described as generating confidence in the courts of the new nation. Women on the bench is a sign for all women in South Africa that the wrongs done against them will be heard by a bench of judges that includes someone, another woman, that they may identify with, that may identify with their problem. This creates the possibility of a previously impossible 'shared reality' between the woman before the court and the court itself. 13

But we learn little from this film about the difference that women on the bench have made. One reason for this may be that with such a small percentage of women on the bench this difference is still more a hope than a concrete reality. Such a conclusion is probably too simplistic. However, I still hungered for more about the way these women were changing the judicial institution and justice more generally. And there is only one reference to some of the challenges women face when they are before the courts. Justice Mokogora is shown speaking in a lecture theatre full of law students about the epidemic of sexual violence in South Africa. The message is that lawyers need to change their ways to assist the victims of sexual violence. This sequence points to another silence in the film; there are but a few brief moments when we see these women judges talking to the men who still dominate the judicial institution. These men who dominate the institution are largely missing from the film. Going 14

back to Justice Mokogora's lecture, I wonder if she has ever given a similar lecture to male judges of South Africa about how they need to change the way the Court assists victims of sexual violence?

Pius Langa, then Chief Justice of the Supreme Court, is one male judge shown engaging with and supporting present and future female judicial colleagues. He appears towards the end of the film speaking at an event organised to encourage and support women who aspire to a judicial career. He explains that more needs to be done than merely abolishing the old regime. There is a need to act positively to rectify the injustice and concludes, 'We know this transformation is not going to be easy as it requires not only a change in numbers but a change of attitudes and perceptions.'

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In the final instance, and probably for good strategic reasons, *Courting Justice* is more concerned with the project of increasing the number of women on the bench. Less attention is paid to the matter identified by Pius Langa, of the need to change judicial attitudes and perceptions. This is probably an even bigger and more daunting project than that associated with growing the number of women on the bench, but it is an important part of the project of transformation. It is likely that men are going to dominate the South African bench for the foreseeable, if not the long term, future. What changes are taking place in the appointments of men to the bench to change the attitudes of the men appointed, to improve their performance of judicial authority and their delivery of social justice to women as promised in the Constitution? Perhaps these are questions to be explored in a sequel.

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Connected to the argument about the need to change attitudes and perceptions is another interesting silence in *Courting Justice*; the absence of the 'f' word. Feminism is not mentioned by any of the judicial women in this film. This does not necessarily mean that they are not feminists or would not identify with that term if called upon to give a response. Maybe the 'f' word isn't very visual or politically 'now'. But, as Rosemary Hunter has argued (Hunter, 2008, p7), and in line with the sentiments contained in the comments of the then Chief Justice Pius Langa, women on the bench may not be enough, what is needed is political change; feminists on the bench. It is not enough for women to occupy elite and politically powerful positions. Those women must also be committed to the political project of changing the gender attitudes and perceptions and maybe the very nature of that elite political institution.

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This is not to suggest that the women who are depicted in this film are not engaging in and giving direction to a project of substantive and institutional change. Their participation in this documentary is, I want to suggest, in part, an instance of a project of a reimagining of the judicial institution as an elite political institution within the setting of a human rights based democracy. As a candid portrayal of the working and family lives of these senior female judges there is an openness within this group of senior judges that is difficult to image in other contexts in which democracy is said to be more 'advanced'. This is a judiciary that has an openness that is hard to imagine elsewhere. So, for example, it is difficult to imagine, and even more difficult if not impossible to make, a documentary such as this about the lives of women on the bench in the context of a more 'advanced' democracy such as the UK. Judges in the UK rarely step out from behind the mask of legitimate judicial authority that tends to demand their segregation from the public they serve and makes taboo the depiction of their 'private lives' in public. And they rarely engage with image makers that might have an overtly political project such as the one that shaped *Courting Justice*. The candid nature of this documentary, its 'behind the scenes' motif, is perhaps indicative of a more open approach adopted by the judicial elite emerging out of the shadow of apartheid.

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There is certainly some evidence of the South African judiciary trying to be different. Not all judiciaries under democracy at the service of the rule of law are the same. A comparison between the biographical notes of the Justices of the UK's Supreme Court and those of the Justices of the Constitutional Court of South Africa published on their respective websites is not only interesting but revealing of a different and more open approach in South Africa. The website of the South African Constitutional Court contains more expansive information about the professional, political and family backgrounds and credentials of these important political figures. Most biographical pages also contain the transcripts of the interview that resulted in

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their appointment. The UK equivalent is a very different. Biographical data is kept to a minimum, confined to professional careers. Commitment to human rights and social justice is largely absent, at best assumed. Nothing is revealed about the still mysterious process of their selection. All this suggests that the judiciary in that democracy occupy a rather different, more remote and obscure position and perform their role with a different sense of the need to engage the public. While the film's creator and director are not South African, they have perhaps been able to tap into something that is distinctly South African, its more open, public and accountable judiciary, to bring us the lives of these judicial women. But it is unclear how the objective of a more gender diverse judiciary interfaces with the wider issue of different styles of judicial authority and judicial institution that may be possible under the banner of a human rights democracy.

And how deep is the commitment in South Africa to the formation of a different judicial institution? It would, for example, be interesting to know more about the reaction to this film by the judiciary in South Africa. In 2004 a TV documentary film, *Two Moms: a family portrait*,<sup>5</sup> was made about another female South African judge; Judge Anna-Marie de Vos. Perhaps in contrast to *Courting Justice* it was not a film formally about her work as a judge. The film is a portrait of the family of Judge de Vos; her relations with her female partner, Suzanne Du Toitt and their two children, their daughter Nuschka and Reid, their son. It is also a story about their human rights battle for recognition of their family. In 1995 both moms applied to the Children's Court in Pretoria to adopt the two children jointly. The court refused the joint adoption giving an interpretation of the relevant legislation<sup>6</sup> that did not allow unmarried partners and in particular same sex partners to adopt. The matter was finally resolved in their favour by the Constitutional Court of South Africa in 2002.<sup>7</sup> If *Two Moms* is more a study of a family and their human rights struggle than a study of the judiciary, it is, I have argued elsewhere,<sup>8</sup> a film about a judge. References to Anna-Marie's judicial role occur throughout the film. 20

I mention this other documentary here because of the response it generated from Anna-Marie's judicial colleagues on the Pretoria Bench. Their reaction was singularly hostile. When I met her she explained that the screening of the documentary was something of a turning point in her relations with her fellow judges. If in part this might have been because of judicial prejudices against her sexuality it was also something more: 21

...since then I haven't been a friend of the Judicial Services Commission or the powerful structures within the judiciary. And it's not just a perception that comes from nowhere. It was clear to me that I...definitely overstepped a boundary, an unwritten rule that you can't be public in that way, because you are a judge. It comes back to the British traditional idea that everything is secrecy. Can you image a TV programme about a judge's life?

The depiction of her life in a documentary shown on television violated an unspoken rule about the nature of the public life of the judge, and thereby challenged the nature of the institution of judicial authority. Maybe that was 2004 and *Courting Justice* is 2008. Maybe the institutional culture of the South African judiciary has changed, just a little. It is difficult to say. There is certainly anecdotal evidence in *Courting Justice* that women (because they represent change) face often bruising criticism from judicial colleagues. At the time *Two Moms* was made and shown Anna Marie de Vos was the only woman on the Pretoria bench and by the time another woman was appointed she had resigned; some evidence perhaps that numbers per se are important. 22

Last, a word about two other women that appear in this documentary. They appear only briefly, they remain anonymous, they are silent. They are two female cleaners who are shown sweeping the corridors of power. These are two women who represent the army of women who have walked the corridors of power long before women occupied the roles of the elite who work there. What stories they could tell of those elites, both men and now women. Sadly, yet again they remain anonymous, without a voice; silently, endlessly cleaning up the mess. What do they think of the women and men on the bench in South Africa? Maybe that is for another documentary. 23

*Courting Justice* is an exceptional film. It puts judges at the centre of the story. This goes against the grain of depictions of law and courts in film and television. The dominant characters in both legal fictions and documentaries are still the lawyers (Black, 2005, p677). Judges, when they do appear tend to be flat characters, one dimensional (Papke, 2007, p127). *Courting Justice* is a dramatic break with that tradition producing a rich and complex representation of those who hold the important elite political role of judge. It offers some interesting insights into the challenges facing women in that role in South Africa. It also offers another challenge. This is a challenge to the judiciaries in more developed democracies in which these important political figures are less public, less open about who they are and what they do. It's time to come out of the shadows and the folds of the mantle of legitimate judicial authority that works to obscure them, makes them secret, less subject to public scrutiny.

[Courting Justice](#) is available through [Women Make Movies](#), a non-profit media arts organization that facilitates media produced by and about women.

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### ENDNOTES

[1](#) Two of the judges, both members of the Constitutional Court, Justices Mokgoro and O'Regan, have subsequently retired. See their 'farewell videos on the website of the Constitutional Court, <http://www.constitutionalcourt.org.za/site/home.htm> (last accessed 30/4/10)

[2](#) <http://www.info.gov.za/documents/constitution/1996/96cons8.htm#174> (last accessed 29/4/10)

[3](#) You can take a virtual tour of the Court and its environs via the Court's website. See <http://www.constitutionalcourt.org.za/site/takeatour/courtbuilding.htm#> (last accessed 29/4/10)

[4](#) The South African study was part of a wider study of sexual diversity in the judiciary. The preliminary findings were published in Leslie J Moran 'Judicial diversity and the challenge of sexuality: Some preliminary findings', (2006) 28 *Sydney Law Review*, 565.

[5](#) *Two Moms: a family portrait* 2004, Directed by Luiz Debarros and Andile Genge.

[6](#) Section 17 Child Care Act 1983 and s 1(2) Guardianship Act 1993

[7](#) All documents relating to the proceedings in the South African Constitutional Court can be accessed via , <  
<http://www.constitutionalcourt.org.za/uhtbin/cgiirsi/IEI6ycyO4H/215860011/9#top>>

[8](#) Leslie J Moran, 'Projecting the judge: a case study in the cultural lives of the judiciary' (2008) 46, *Studies in Law, Politics and Society* 1.

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