Chapter 12
Procedural Justice and the Power of the Judge in the Courtroom:
A Comparison Between Africa and the West

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ABSTRACT

In this chapter, the author conducts a critical analysis and comparison of laws and practices that legitimise discretionary power in the courtroom from a selection of global north and south jurisdictions. The specific offence of contempt of court in facie curiae is the central focus, where the use of full judicial autonomy, summary, and arbitrary hearings have survived now well into the 21st century. The research conducted shows that there is a global problem with significant overreach of power by members of the judiciary in nearly all jurisdictions investigated. In some cases, this could be viewed as being extreme enough in its overreach to justify being described as abuse of power. Further evidence is presented showing little by way of accountability being held against those judges who misuse their discretionary powers in the courtroom. Recommendations are that there should be reform or development of practice through both judicial training and proportionate disciplinary action where overreach is proven to have occurred in order to minimise future overreaches of power.

INTRODUCTION

Article four of the Code of Judicial Conduct for South African Judges (1994) on judicial independence shows best the complex and competing functions of the judge in the courtroom, exemplifying why some judges might find maintaining the correct balance of upholding neutrality whilst simultaneously using powers a difficult task. Section (a) sets out that a judge must "uphold the independence and integrity of the judiciary and the authority of the courts", followed by (b) that he or she must "maintain an indepen-

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dence of mind in the performance of judicial duties". Initially these might seem to be quite straightforward and standard expectations, however the potential conflicts begin to emerge when examining note (i) which requires that "A judge acts fearlessly and according to his or her conscience because a judge is only accountable to the law" and later in note (iv) that judicial independence "…does not justify judicial misbehaviour and does not provide an excuse for failing to perform judicial functions with due diligence or for otherwise acting contrary to this Code."

So, on one hand there is the requirement to remain neutral and independent, and with diligence and care, whilst on the other there is the fact that the judge is tasked with being the custodian of the law and given significant powers to act 'fearlessly' and using their own subjective good conscience, all under the threat of being potentially accused of judicial misconduct should they get things wrong in this regard. Given the discussed provisions then, and the fact that there are similar expectations and consequences in jurisdictions around the world, key questions emerge that are the central focus of this chapter:

1. What are the discretionary powers that a judge has in acting 'according to his or her conscience' when in the courtroom?
2. When using the powers in question, does it appear that judges are always remaining neutral and independent as professional expectation and obligation would demand?
3. Are judges always using their powers legitimately or are there examples where there is significant overreach of power to the point that judges might be acting outside of the law?
4. What are the consequences for judges and other affected people if there is such an overreach of power in the courtroom?

In addition to these questions, another main aim of this chapter is to compare both in law and in practice the same issues in jurisdictions in the westernised / global north context on one hand, and in jurisdictions in Africa, the largest continent in the global south, on the other. There have been several past academic studies conducted examining the power of the judge from different perspectives, focusing on different individual jurisdictions. For example, it may be possible to draw conclusions from an examination of the actions of judges related to different individual offences or sentencing practices which can be reframed as evidence of how judges have used their discretionary powers, or in some cases may be argued to have overreached beyond what their powers legally permit. Several sources have made claims that judges are less susceptible to external influence than the general public, however past research has shown this not to be the case. In one such study, Hausegger and Haynie made the explicit assertion that "Judges are affected by their policy preferences, and decisions are made that benefit those preferences." (2003, p. 635) on their evaluation of the comparison of two jurisdictions, one in the North (Canada) and one in the South (South Africa). They further asserted that "Judging is a political behavior that exhibits similar actions affected by similar influences" (2003, p. 654), interpreted to mean that the authors' belief is that judges are not individually making neutral law-based decisions, rather their decisions are influenced by their own internalised beliefs and ideologies.

In backing up the assertion, the authors conducted rigorous quantitative research techniques, eventually concluding that:

Using comparable measures of dependent and independent variables, we find that chief justices in both Canada and South Africa do not assign their colleagues randomly. In both countries, policy preferences