

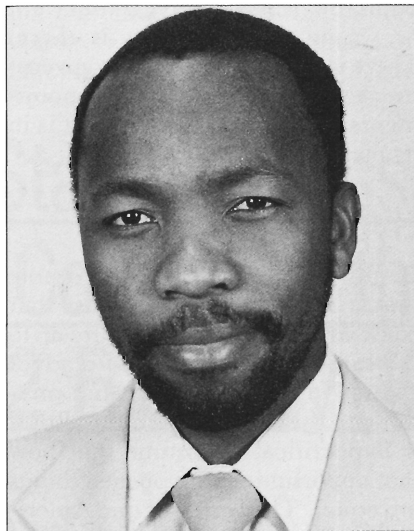
# The Appointment of Blacks as Judicial Officers

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It would appear that today nothing that affects the black community is incontrovertible. Although one would expect that the need for the appointment of blacks as judicial officers is fairly obvious, this is not so. There is a sharp difference of opinion on this within the black community itself. This owes itself to the fact that black lawyers espouse different political views on changing the South African political situation.

## Few black advocates

There is no doubt that one of the factors which influence the number of blacks who study law is the question of job opportunities after qualifying. No person would pursue a course of study which does not offer enough job opportunities. It is a notorious fact that in the not too distant past the highest job that a black person could aspire to in the Department of Justice was that of a senior clerk or court interpreter. It was inconceivable that a black person could become a prosecutor or magistrate. This implies that there was little incentive for blacks to study law unless they wanted to practise as attorneys or advocates. Even practising had its own share of challenges peculiar to black practitioners. This was exacerbated by the fact that in order to practise as an advocate a person had to have a minimum qualification of LLB. Not many blacks could afford to acquire



this degree owing to time and financial resources required. Even today there are extremely few black advocates when compared with the community they have to serve.

## Credibility in black community

It is equally clear that if South African law has to have a degree of credibility especially in the black community a number of blacks have to be involved in the administration of justice. People seem to identify with a legal system which has some members of their race group as functionaries. At the moment few blacks are such functionaries. Only a small number of blacks is employed by the

Department of Justice as prosecutors. There is no black magistrate except those who are employed as judicial officers in the homelands. One is obviously aware that the Department of Justice has started to appoint blacks but it is doubtful whether enough has been done in this regard. It is not clear whether any black has been appointed in the Attorney-General's Division.

## Attitude of whites

The major reason behind this practice has been that it has been and still is unacceptable for many whites to be tried by a black judicial officer, however qualified he may be. The government has equally not been prepared to upset its supporters by doing away with this discriminatory practice. It is actually sad to realise this has been the case. The department which is involved in the administration of justice, where equality of treatment should be the norm, should have taken the lead in removing discriminatory practices. If justice is dispensed equally and impartially in South Africa and if judicial officers are so trained that race or colour does not influence their decisions, then it should be immaterial who presides as judge and who appears as litigant. But a nagging question is: why has the race of the judge or magistrate mattered so much in our country?

## No black judge

It is regrettable that at present there is not even one black judge. And it is still going to take time before one is appointed. The argument that is often advanced in defending this situation is that there are no senior black advocates from which judges can be appointed. This purported reason is to my mind not convincing. There is no doubt that there are few if any senior black advocates. But the question is hardly ever asked why that is so. Is it because of the inability of blacks to become senior advocates or are there other factors which account for this? If they are unable now, will they ever be? If in any case blacks can be appointed as magistrates in the self-governing territories, why are they not appointed in the urban areas? Moreover, if blacks are fit only to be appointed as judicial officers in the self-governing territories, is it deliberate to give these territories an inferior system of justice administration? These questions need to be addressed before any pretext can be raised.

## Government's attitude

As already suggested, a more sensitive reason is that it is still unacceptable to the government to appoint a black judge who would even preside over the cases involving white litigants. This would upset many whites. It would be politically embarrassing to appoint a black judge and then circumscribe his powers and jurisdiction to hearing cases of black people only. Even if that is not done by legislation, if it could be perceived that he only heard cases of blacks, his credibility would be diminished. No self-respecting black person would today accept this condition.

Although it is government policy to appoint prosecutors or magistrates to serve their own communities, and although various race groups prefer their own people to preside over their own trials – a desire which no doubt should be respected – white people should learn to accept that it is inevitable that black judicial officers will have to preside over their cases as well. If blacks have up to now accepted that their cases will be decided by white judicial officers, there is no reason why whites should not accept the same. The dictates of fairness and equality of treatment demand this.

## Precedent

The reason why the absence of senior black advocates from which black judges could be appointed is no real reason, is because there is a precedent in South Africa where people who had not been practising advocates were nevertheless elevated to the bench. One of them even became the longest-reigning chief justice so far. One attributes this step to the government's perception that it was important to appoint such judges contrary to convention. It would appear, therefore, that the appointment of a black judge is not really a major priority to the government. If it ranked high on the government's scale of priorities, it would have appointed one already.

Some might even argue that to deviate from the established convention was wrong and should not be followed. Indeed one is not pleading for following that precedent. But the point that is made here, is that right or wrong the precedent is there. There is no evidence that the government will not repeat such appointments in future if it feels that it is in its own interests to do so.

## Hypocritical

In any case it is interesting to note that it is fashionable to insist that black advocates should measure up to the same standards as white advocates. No one suggested that anything to the contrary be done. But it is hypocritical to assume that now that opportunities are opened things are equal. The words of one American commentator are so apposite here:

Rather, the objection is against a "catch 22" social system which operates as follows:

- (1) It fashions standards which incorporate white reality as the norm;
- (2) it demands unquestioning acceptance of the norm;
- (3) it excludes for over 200 years (one would say 300 for SA), most blacks from experience and training in meeting the norm;
- (4) it suddenly accepts the principle of equal opportunity;
- (5) it then concludes that blacks who do not meet the norm, are unqualified.

(*'Equality in Fact v Equality of Opportunity'* 1976-77 *Wayne Law Review* cited by KJ Kemp *'Race and Access to Justice'* 1985 *HSRC* unpublished).

## Alan Paton's message

The only problem that I foresee is that by the time the government comes round to accepting that blacks should be appointed as judges, there will no longer be any blacks willing to accept the appointment. This is generally what is happening in the political sphere. The government has been having a hard time trying to persuade blacks to agree to serve on the national statutory council. It would seem that the prophetic utterances of years ago by Reverend Msimangu in Alan Paton's *Cry, the Beloved Country*, are being confirmed today when he said that he had one fear in his heart, namely that one day when whites turned to loving they would find that blacks had turned to hating. And indeed signs of this trend are appearing.

## Attitude of black lawyers

Some black lawyers feel that the appointment of black judges is not really a major priority. They argue that no black person should be appointed as judge in this illegitimate legal and political dispensation. What they see as a real priority is the dismantling of apartheid. While I concede that apartheid should be dismantled, I believe the appointment of blacks as judges is part of that process. No one knows when exactly apartheid will be completely dismantled and a new non-racial South Africa established. Should we wait for the unknown? Moreover, when apartheid is gone, will we sack all the judges who were appointed by the apartheid regime and appoint new ones? Shall we be having enough blacks ready then? (Compare the experience in other African countries.) To adopt a holier-than-thou attitude is equally not appealing to me. If a person is prepared to appear in the South African courts as an attorney or advocate – courts which are part and parcel of the apartheid system – or to teach South African law at a South African university, then he cannot properly adopt such a stance. The kettle cannot call the pot black.

## Blacks on bench – the advantages

It is sometimes argued that black legal practitioners who appear in

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court do so merely in order to protect the interests of their clients – some of whom being victims of apartheid – and not to legitimise the system. This is no doubt a laudable practice. If the emphasis, therefore, is on coming to the aid of the helpless victim, I believe having blacks as judges is even more imperative. A legal practitioner only makes submissions on behalf of his client, but the person who takes the ultimate decision is the judge. If that is so, then there is all the more reason for calling for the appointment of black judges and more black magistrates.

A rejoinder to this argument is that if you appoint a black judge in the present legal dispensation you would be placing him in an untenable situation because he would have to apply unjust laws. That is not denied, but the question is whether refraining from having blacks as judges at the moment does improve the situation. In my humble opinion it does not. If we had a few black judges, they might express their views on certain unjust

laws. Moreover, they might influence their colleagues. One of the problems in South Africa is that the judiciary is all white and they have never associated with blacks on a level of equality as colleagues. Most of them have related to blacks on a master-servant relationship.

## Problems for black judges

When blacks are appointed as judges before the system has changed they may well experience a number of problems. No doubt they would still have to apply some unjust laws. No one has suggested that the present judiciary should refuse to apply the laws of the land. It is their duty to do so. But the major complaint has been that some judges when confronted with a choice, do not give that interpretation which favours the liberty of the individual, but rather the one that supports the State. Moreover, so it has been contended, if they have no choice but to apply the

unjust law, then by all means they should do so. But then, as they have done in other less sensitive areas, they should make it clear that the law is unjust and discriminatory. They should not close their eyes to injustice particularly in race and security legislation. By failing to express their views on unjust laws, they are guilty of complicity in the whole episode. This also contradicts one of the tenets of a democratic society that judges must be the protectors of the rights of the individual.

## Conclusion

Be that as it may, there is no sound and convincing argument against the need for appointing blacks as judges. Many of them are already magistrates who are applying some of the unfair laws of the country. Appointing blacks on the upper bench therefore is in my opinion no extraordinary step. The sooner that is realised the better. ■

**Note:** See also the Editorial 'Confidence in the legal system' (1988) 1(2) *Consultus* – Editor.

# Press Statement Issued by the General Council of the Bar of SA on 2 February 1990

**T**he General Council of the Bar of South Africa ('GCB'), welcomes the State-President's announcement that the law relating to the death penalty is to be drastically revised and that measures taken under the state of emergency, including detention without trial, are to be ameliorated.

The GCB recently called for an exhaustive inquiry into the death penalty by the SA Law Commission and has long urged that there should be an automatic right of appeal to the

Appellate Division against the imposition of the death sentence. The GCB has also consistently advocated the principle of discretionary rather than mandatory sentencing in criminal cases. It is therefore gratifying to note the Government's proposals to provide for the discretionary imposition of the death sentence only in extreme cases and for an automatic right of appeal in such cases.

The GCB has persistently opposed the detention of persons without trial as an infringement of the Rule of

Law, but welcomes the extension to detainees of the right of legal representation and a doctor of their own choosing, as well as the abolition of the principle of repeated periods of detention.

The GCB further welcomes, as essential for public confidence in the proper administration of justice, the appointment of a judicial commission to enquire into the alleged existence of a death squad responsible for the politically motivated murders of lawyers, amongst others. ■

## ERRATUM

Op bladsy 76 van Vol 2 is berig dat die ABR (tydens sy 44ste Algemene Jaarvergadering) 'n besluit soos uiteengesit onder die opskrif 'Klagtes teen regters' geneem het. So 'n besluit is nie geneem nie. Die berig moes geles het dat 'n voorstel met daardie strekking

voor die ABR gedien het maar dat dit uitgestel is na 'n dagbestuursvergadering van die ABR wat later sou plaasvind. Enige ongerief wat deur die foutiewe berig veroorsaak is, word betreur.

– Redakteur