

# A matter of race?

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*For Arthur Wellesley, Duke of Wellington, history was “just one damned thing after another”. It feels like that for the Bar at the moment: projected legislation intended to change legal education, professional training and practice itself; a White Paper on the judiciary; legal aid in deep crisis; the Road Accident Fund on the block; controversy about judicial appointments and the functioning of the JSC.*

**E**ven our highest courts are not immune: here too the air is thick with talk of fusion. (Or to paraphrase Yeats: “*What rough beast, its hour come round at last / Slouches towards Midrand to be born?*”).

This issue of *Consultus* is focussed on a most pressing issue for the Bar: us. Do we serve a useful function, as an independent referral profession? As Malcolm Wallis reminds us, neither the question nor the sense of crisis is new. Justice Johann Kriegler takes his unerring scalpel to the holy cows – and the young bulls. Other contributors have vital things to say on the same topic. Where matters stand in relation to the other “damned things” appears in the summary of the October executive meeting (page 5) – and will be explored in future issues.

Under all these developments however lies a single unresolved debate. It centres on just two words: legitimacy and transformation.

Time and again they are invoked. Institutions (like the Bar or the Bench) are said to lack the former and to need the latter.

But what do these words *mean*? In an earlier time South Africans were castigated (and worse) for being “anti-South African”, “fellow travellers” and even part of the “total onslaught”. To debate what these flaccid slogans meant was itself “unpatriotic”.

The danger in any age is that the bumper sticker becomes a substitute for exactness. I would like to suggest a defi-

inition for the Bar of both current buzzwords.

## Legitimacy

Legitimacy, some argue, really means popular acceptance. Unless an institution enjoys wide public support, it lacks legitimacy. That in turn means that it must be representative, which in *its* turn means an accurate reflection of demographics. It comes down to race, says Ken Owen (and two Cape colleagues writing recently in *The Cape Times*). And that of course means Black leadership – which, Ken Owen helpfully observes, is better than bullets.

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All this makes sense in a democracy, where a winner may take all – but is it true of a *constitutional* democracy? Is it not a view as bleak as it is without principle?

What makes something legitimate in South Africa now, I suggest, is its acceptance because it is institutionally respected, not because it is immediately popular. The Constitutional Court’s decisions on the death penalty, and in relation to gay rights, are respected (it is evident from the response to them), but they are probably not popular. They are nonetheless not



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considered to be illegitimate, simply because they do not reflect the view of most people. The essence of constitutionalism is indeed that we are ruled by law, not in terms of numbers. The decisions are legitimate because they are respected for their fealty to constitutionalism, not because of a weekly Markinor poll.

What about the legitimacy of the institution itself? Does the Constitutional Court lack public regard because it is headed by Arthur Chaskalson (because he is a white male)? Or is that a consequence of the fact that the majority (just) of its members are white persons? Would it gain stature if racially its membership was composed in as exact a compliance as possible with the last census? And would consistency not then equally demand that composition reflect gender demographics?

Why is race axiomatically more important than gender? Should the exercise moreover stop there: what about religion and sexual orientation? By “Blacks” do we moreover mean “Africans” – and is either a dermatological description or (as for Robert Sobukwe) a matter of personal allegiance?

Similar questions arise in relation to other institutions. Was our first democratic Cabinet lacking in legitimacy because of its insufficiently representative racial mix (if this is to be measured by

the iron laws of the pocket calculator)? When President Mandela asked Chief Justice Corbett to continue in that office (twice) was it at the cost of legitimacy – or did this in fact give stature to the Appellate Division?

The legitimacy of public institutions is a complex thing. It has everything to do with a moral authority derived from fidelity to the Constitution. Obviously that is weakened if the composition of a body, its decisions and the way it functions are seriously out of kilter with the society it serves (like the old Appellate Division in the emergency years). But it is not all about race, because the Constitution is not all about race. The Constitution is, in fact, undermined when demographics – and these with broad, selective and inexact brushstrokes – are used to overpaint the core values of the Constitution. One such value is explicitly “non-racialism” (section 1(b)). It is reinforced by section 7 and of course the equality clause (section 9). Indeed, in authorising racial redress, the Constitution stresses that this is “to promote equality” (section 9(2)). These provisions are the antithesis of a mere numbers game.

As Mamphela Ramphele has remarked: it is not for this that we worked.

When a brilliant South African, known for his commitment to constitutionalism, his scholarship and his dedication, is passed over by the President for appointment to the Constitutional Court in the circumstances which recently applied,

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legitimacy is not advanced. The institution is not enhanced; only a racial ratio is.

### Transformation

If that is right about legitimacy, what does transformation then mean? Cheryl Loots, in her discussion paper on the proposed single legal profession, says it means change. We have said in our response that it does not: in context, it means changing *for the better*. How do we measure that? Certainly we start with the fact that it is not right that still too few judicial officers and legal practitioners are not male and not black. We must be committed to

changing that – and with all deliberate speed. But we must not lose sight of the fact that change must make things better, not worse. If the result is less, not greater, access to justice, there will not have been transformation, only transmutation. What applies to health and education applies to justice: we need to recruit, train and advance in a way which redresses current imbalances in race and gender. But we must not lose sight of the fact that the ultimate requirement is the capacity to *improve* the justice system. Nothing less will meet the injunction in the last words of the President’s inaugural address to “*get South Africa working*”.

This is not a call for quiescence: far from it. The GCB has frankly acknowledged that it has been too complacent and reactive in the past. As Arthur Chaskalson has said, there is none of us who in the past has done all that he or she could do.

But in tackling the issues with which I began, we have to start in the right place. Unexamined slogans should not be left unchallenged – particularly when put to destructive use.

We need to say, as Edith Cavell said of patriotism, that race is not enough. 📖

## Letters to the editor

### Strategy of reform

Alan Dunlop  
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I cannot allow the September 1999 issue of *Consultus* to pass without paying compliments to the refreshing and encouraging impression conveyed from the very first pages of this issue. The courage and clarity of thought evidenced in the Bar’s new strategy for reform and in the speech of the new Chair of the GCB to the Commonwealth Law Conference are a source of hope and encouragement to all in South Africa that our extraordinarily diverse heritages which now make up the new South Africa will indeed achieve the creation of legal

structures in our country which take the best from all our influences.

It is interesting that the GCB has now issued a general policy statement which defines an encompassing strategy in three dimensions and these are discussed in the Chair’s contribution. I am happy to say that for a few years now the South African Institute of Intellectual Property Law has restructured its organisation and practises into two main areas, (a) public services and (b) professional services. The former is outward looking, dealing with training and student affairs, advice to Government and public affairs in general and the latter to various services to its membership. The Institute has for many years been responsible for the lectures and examinations conducted under the auspices of the Patent Board of which

the Registrar of Patents is Chairman, the examination for qualification as a Patent Attorney. It has also created its own special qualification of a trade mark practitioner with similar very high standards to that required of the Patent attorney. These lectures are being offered to a wide audience, and particularly through the stimulus of its lectures given to the BLA membership the Institute has been wrestling with the twin problems of preserving high professional standards and of opening the profession to the previously disadvantages. A recent special general meeting of Institute was devoted to finding solutions and I believe we are well on the way, including the intractable problem of pupillage being made available to those outside the traditional centres of excellence in this profession. 📖