

Transformation of the legal profession: some thoughts

Patric Mzolisi Mtshaulana
Johannesburg Bar

“Why is it that in this courtroom I am facing a white magistrate, confronted by a white prosecutor, escorted by a white orderly? Can anybody honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced. Why is it that no African in the history of this country has ever had the honour of being tried by his own kith and kin, by his own flesh and blood”

These were the words of Nelson Rolihlahla Mandela when he appeared on 7 November 1962 on a charge of leaving the country without a permit. In this court address Mandela was expressing not only his but the black people's perception that the legal profession and the judiciary in particular was an instrument of the system. Mandela argued then that the domination of the courts by whites tended to lower the standards of fairness and justice applied with respect to black litigants; it made Africans not to regard the courts as impartial tribunals dispensing justice without fear or favour.

Transformation, as the term is used in legal circles, means transforming the legal profession and the judiciary so that they represent in broad terms the people to whom they are dispensing justice. It means legitimising the judiciary in the eyes of the black people and making them identify with it, no longer seeing themselves as “blackman in a whiteman's court”. Transformation means and must mean that the legal profession and the judiciary must be a mirror of the entire rainbow nation.

It is against this background that section 174(2) of the Constitution should be seen and understood. It provides that “the need for the judiciary to reflect broadly the racial composition of South Africa must be considered when judicial officers are appointed.”

However it is important to stress that section 174(2) is not a transitional provision but one that should forever remain in

our statute book. It must forever remain a principle that the people, be they black or white, rich or poor, shall be judged by their own kith and kin, by their flesh and blood, by their peers. This principle inspires confidence in the impartiality of the courts.

It is important to distinguish between section 174(2) and section 9(2) of the Constitution. Section 9(2) is a transitional provision that will be removed from the statute books as soon as the abnormal situation existing in the country has been corrected. It provides that “...to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”. This section embodies what many call affirmative action, positive discrimination or “regstellende aksie”.

There are two main streams of thought on which affirmative action could be justified, namely: corrective justice and substantive equality. Corrective justice is mostly associated with Aristotle. Aristotle tries to answer the question, what is justice?, by distinguishing between distributive justice and corrective justice. Affirmative action is more akin to corrective justice in that it seeks to correct damage caused. In corrective justice the law seeks to examine whether a person caused any damage to another person. The aim is to restore the status quo by depriving the perpetrator of the damage, some of the benefits of his wrongful act.



Patric Mtshaulana practises at the Johannesburg Bar. He has also clerked to the President of the Constitutional Court. He holds inter alia an LLM from the University of Leyden, and was a senior serving officer in Umkonto we Sizwe.

If corrective justice were to be compared with the law of damages, it would be said that its elements are:

- Is there a wrongful act?
- Is there a victim who suffered the consequences of the act?
- Is there an actor who perpetrated the act?
- If so, the victim is entitled to compensation by the perpetrator.
- The compensation should be proportionate to the damage caused.

Corrective justice is retrospective in its operation and has a punitive character. If this analysis were used to justify affirmative action appointments to the bench in order to promote or advance black people, then one would say that apartheid was indeed a wrongful act and that it was committed upon the black people who were the victims. They were denied good education and opportunities that would have prepared them to serve as judges. The whites on the other hand would be the perpetrators of the wrong and for that reason would be precluded from benefiting from their wrong.

Approaches

The problem, however, is that although

the whites were undoubtedly the beneficiaries in that they obtained the good education and had all the opportunities, it can never be said that every individual white person participated in the commission of apartheid wrongs. Some sections of the white community were equally denied the honour of being appointed to the Bench, or were refused appointments because of their rejection of apartheid.

On the other hand, although black people were the victims of the system in the sense described above, it is also true that among black people themselves there were those who benefited from the system enormously. An example is the middle class in the Bantustans.

In my view a victim-based approach to affirmative judicial appointments is difficult to implement. It demands a more focussed definition of victims. It would lead to preferring some blacks over others. It probably would result in promoting those blacks with talent in the rural areas and the townships but would be less effective in identifying the best black candidates for the Bench.

Another approach to affirmative action is one based on equality. President Johnson in introducing the Civil Rights Act in 1964 said that you do not tie a sportsman in chains while his colleagues are preparing themselves for the competition and then release him to compete with them. That sportsman is not being treated equally. Similarly, in appointing judges one cannot just look at experience despite the fact that one knows that the black people were deprived under apartheid. In principle, each person must have an equal right to the most extensive total system of equal basic liberties comparable with a similar system of liberties for all. Those basic liberties are denied to black people if their previous deprivation of experience is to be used against them today. Social and economic inequalities should benefit the least advantaged taking into account that those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system and

irrespective of the class into which they are born.

Applying this approach to the appointment of judges one would argue that regard should be had to talent, ability and willingness to develop on the job. This approach and its emphasis on nurturing talent and ability and disregard of initial place in the social system makes it more attractive as a method for recommending people for judicial appointments.

There are two extreme view points that are difficult to reconcile. On one extreme are people who believe that the appointment of blacks as judges is per se wrong and will bring down the standards because 'black is inferior.' Another extreme is a politically correct group that seeks to equate competence to excellence, which denies that there is a world of difference between a competent judge and an excellent judge.

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In a multi-racial country such as South Africa it is important to uproot any lingering forms of racism. It is important to stamp out the attitude in some people that black is inferior. On the other hand it is equally important to emphasise that the wrong way of correcting racism is to appoint incompetent blacks to positions they cannot manage.

Judicial Service Commission

Appointment as a judge is something very special. Once a judge always a judge. You cannot be dismissed for under-performance. For this reason it would have been expected that the Judicial Services Commission would have developed some guidelines, in line with section 9(2) of the Constitution, as to how it goes about its business of recommending black candidates for judicial appointments in the transition period; how inequality affects the achievement of the principle of a representative bench and

the role of affirmative action to overcome the problems of the transitional period. It is this failure to develop and publish measures designed to advance black people or to promote the achievement of equality within the bench that is the cause of the uncertainty, reckless criticism and in some cases confusion.

The Judicial Services Commission has in the past been criticised when it recommended black candidates who were highly competent and experienced but had not been appointed as judges previously because of the colour of their skin. These appointments are criticised with the same vigour as appointments of people who under normal conditions would have been regarded as able and competent but not ready for judicial appointment.

In my view the application of affirmative action in cases where candidates have the competence, experience and expertise


poses no problem whatsoever. In fact, the very description of such appointments as affirmative action appointments is imprecise. However, it would be foolish to deny that the pool of black candidates for judicial appointment is small, that that is a product of our recent past; and that the implementation of section 9(2) of the Constitution is very difficult. Again it should be emphasized that once a judge always a judge. An appointment for judicial office cannot be compared with the appointment of a director general of a department or chief executive officer of a company. It is difficult to identify the qualities of a good judge.

What makes the problem even more complex is that gradually the pool of black candidates with experience, competence and expertise is getting exhausted. This demands clearer guidelines from the Judicial Services Commission as to how the promotion or advancement of black people is to be achieved. In my view new guidelines should be developed which will focus more attention on: increasing the pool from which appointments are made; ensuring that there is proper transfer of skills from whites to blacks; guiding or placing under guidance those that have been appointed or aspire for ap-

pointment. Capacity-building is the only viable long term strategy for ensuring that in the long run we will move from appointing competent black candidates to appointing black men and women who will excel as judges. Capacity-building in the legal profession demands programmes designed to transfer skills from

those who have them to black people.

The need to transform the Bench cannot be postponed. This is important for political stability and political stability in turn is a precondition to achieving other things such as fostering experience and excellence. There is a need to strike a balance between long and short-term goals.

Striving for excellence and high levels of competence in the bench cannot and should not be abandoned. We should acknowledge the limitations of the transitional measures we are taking. We should not turn affirmative action from a mere means to achieve equality into a goal in itself. 

Practical issues

“Let us look at the practical issues. A mass of work is brought into solicitors’ offices by clients every day of the week. Many of the matters arising can be and are dealt with by the skill of the solicitor himself, but no solicitor is competent to deal with every matter brought before him. For example, large sums of money and property may be involved which require the advice of specialists in property and in taxation. Complex legal issues emerge which demand experience in a particular branch of the law. Advocacy of a high order may be needed to avoid a custodial sentence which imperils a client’s freedom. The solicitor may be too close as a friend or adviser of long standing, or be so involved with the detail as to prevent him from taking a detached view. In these many situations the solicitor and the client are not content unless they can obtain the independent services of a specialist with the necessary skills at his command. It would be foolish, if not negligent, to do otherwise.

For these purposes the whole range of services offered by the bar is open to the client. He may employ any of the skills it provides and obtain an impartial opinion from a barrister, either to advise him in chambers on a particular point of law, or to represent him in court or in a tribunal, sometimes for weeks on end. Regular users of legal services, regular by reason of their involvement in business and commercial affairs, told us in evidence that they attached the utmost importance to the independent specialist advice of counsel, and that they received more efficient and quicker service in Britain than in foreign countries in which unified professions operate. They would resent the abolition of a facility which has been available to the great advantage of the public since the seventeenth century.

There is a close parallel between the legal and medical professions in relation to specialists. A patient sees his doctor for the run-of-

the-mill complaints, but when certain symptoms appear both the general practitioner and the patient are anxious for the opinion and services of a specialist surgeon or physician. It would make a mockery of the public interest to propose that medical specialists should be abolished and be required to practise as, or in partnership with, general practitioners. It is equally unrealistic to suggest that barristers should be required to practise as lawyers, alone or in partnership with solicitors.”

America

“The divided profession has earned respect and approbation from abroad. In America the profession is fused, and I quote the views of the Honourable Warren Burger, who gave oral evidence to the Commission when he was Chief Justice of America. I also spent an hour and a half talking over this subject with him in Washington. He said:

‘My observation from sitting in trial of cases in the nisi prius court [court of first instance] was that something less than half the lawyers who appeared there were minimally qualified to perform their function...Over a long period of time I undertook to take soundings in state courts and in federal courts throughout the country, and the most pessimistic view was that only 25 per cent of the lawyers appearing in our courts were really qualified to represent their clients properly, and to move the case along adequately. Some judges [he said] placed it as high as 75 per cent...’

The Chief Justice told us that cases were dealt with in British courts more quickly than in America, and he went on in his evidence to say this:

‘...It is not easy to account for it, but an oversimplification perhaps is that in your courts generally you have three experts who have all been trained in the same tradition and in the same pattern. The judge, almost by definition,

has been one of the leading members of the bar, and the two advocates appearing before him are trained in the same way the judge was trained. This is not so on our side... The trial of the case resembles in a way a three-legged stool. If any one of the legs is very much shorter than the other you have not got a very good stool....In our system, unfortunately, too often all three of the legs of the stool are not as competent as they should be... Even if you have a very experienced judge and he has two mediocre, badly trained or untrained advocates before him, he has difficulty’.

These are strong words from the Chief Justice, and his views were echoed in Britain by Lord Roskill, a lord of appeal, who said this to us:

‘No one without judicial experience can perhaps fully appreciate how much a judge relies upon the advocates before him in arriving at what he believes to be the correct decision. Bad advocacy may lead to the right points being missed, the right questions not being asked and therefore the right answer not being given by the judge.’

In 1970 Lord Gardiner, a former Lord Chancellor, made a study of this subject. In his paper he dwelt on the experience of American lawyers. The conclusions were the same as those of Chief Justice Burger. He also gave his own opinions and those of other distinguished jurists of long experience in Britain who had knowledge of the procedures abroad. All of them expressed the view that fusion would not be in the public interest. In his paper he made the additional point that the system observed in Britain results in a much smaller number of judges than would be the case in other jurisdictions.”

Lord Benson, FCA “The Future of the Legal Profession in South Africa: Is Fusion the Answer?” (1988) 105 *SALJ* 421 at 423-425.