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NOTES

TRANSFORMING THE JUDICIARY: THE POLITICS OF THE JUDICIARY IN A DEMOCRATIC SOUTH AFRICA*

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Our Constitution differs from many others in a fundamental respect. Most constitutions reflect the outcome of a change which has already taken place, and lay down the framework for the new society. A key theme of *our* Constitution is the change which is yet to come — the transformation which is yet to come. All three of our post-apartheid Chief Justices have told us this.

Justice Ismail Mahomed said this in the *Makwanyane* case:

> 'In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different. . . . The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.' (*S v Makwanyane* 1995 (3) SA 391 (CC) para 262)

Justice Arthur Chaskalson said this in the *Soobramoney* case:

> 'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.' (*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 8)

And our present Chief Justice, Justice Pius Langa, has expressed it as follows:

> 'The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and

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transformation characterises the constitutional enterprise as a whole.' (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 21)

Transformation is therefore at the heart of our constitutional enterprise. I have to say that I despair of politicians who should know better, and who say repeatedly that the word 'transformation' does not appear in our Constitution. True, it does not — but the theme of transformation is a fundamental premise, probably *the* fundamental premise, of the entire document.

This must mean that the judiciary, too, must change. The call for transformation of the judiciary is therefore correct. What we need is to clarify is what we mean by that call. One can think of three meanings:

(1) The judiciary must be transformed in demographic terms — it must be more representative of the nation which it serves.
(2) The judiciary must be transformed in its underlying attitudes — it must embrace and enforce the principles of a fundamentally new legal order.
(3) The judiciary must be responsive to the goals of the democratically elected government.

Let me start with demographic transformation.

A judge or magistrate who presides in a case does so on our behalf. He or she gives judgment on behalf of all of us. In the twenty-first century, in a democratic South Africa, there is something utterly incongruous about this being done overwhelmingly by white men. If we are all to have confidence in the judicial system, we need to feel that it belongs to all of us. We need to identify with the judiciary *and* to feel that it identifies with us.

This is not just a matter of numbers. We have to face what I think is the inescapable fact that in general, black judges are more likely than white judges to understand and have some connectedness with the life experiences and concerns of the people who constitute the majority of our country's people.

Let me give you a real-life example of this. A few years ago I was involved in a case in which the local municipality was seeking the eviction of a group of homeless people from municipal land. The advocate for the municipality, a white man, was speaking with some passion about the unlawfulness of what these people had done, in moving onto land that was not theirs. The judge, an African from a humble background, then interjected: 'But we know how this happens — we all have family or friends who find themselves in this position.' The advocate was rendered literally speechless: he found this an astonishing statement. The judge thought that he was simply stating the obvious — because he had a natural understanding of, and identification with, the dilemma of the people who were involved.

That, at least, is the position for the current generation. As we move towards a more clearly class-based society, there will be a growing class of people who are black, but have no lived experience of deprivation or of being discriminated against, and who have only limited contact with people who do have that lived experience. It is not obvious that when that happens,

they will be significantly better able than their white colleagues to understand and have some connectedness with the life experiences and concerns of those who are poor or otherwise marginalized. However, even when that happens the purely demographic issue will remain — namely whether the judiciary is a fully South African judiciary, speaking for the whole nation.

There is a widespread perception that race *does* count in judging. A recent survey asked two thousand respondents in the seven metropolitan areas of South Africa whether the race of a judge has an influence over how he or she judges a case. Fifty-one per cent of respondents — with no difference between racial groups — agreed with the proposition that race does have an influence. Only just under a third, 31 per cent, disagreed (Research Surveys *Do South Africans trust the judiciary?* Press release (17 July 2005)). That perception is another reason why we need a judiciary which is not demographically skewed towards one part of our population.

Public confidence in the judiciary is essential if the courts are to succeed in their critical constitutional functions. As Justice John Evans of the Canadian Federal Court of Appeal has put it:

> 'Courts require public confidence to perform the delicate task of balancing rights. Judicial independence is a necessary condition for obtaining and maintaining this confidence, without which the courts' legitimacy . . . will rapidly erode, and with it human rights and the rule of law.' (John M Evans 'Judicial Independence, Human Rights and the "War on Terror"' in Interights *Access to Justice in a Changing World* (2004) 56)

Those who care deeply about human rights and the rule of law should be amongst the leaders of the call for demographic transformation of the judiciary.

There is no need for us to feel any squeamishness about the proposition that the judiciary should more clearly reflect who we are. Those considerations are and always will be very significant. In the United Kingdom serious work is now being done to attempt to achieve a more 'representative' judiciary. The need for a broadly representative judiciary is underlined in a society such as ours, which is still so deeply divided on racial grounds. This means a judiciary which broadly reflects who we are, and who all of us are, both majorities and minorities.

The second meaning of transformation to which I referred is transformation of underlying attitudes — embracing the principles of a fundamentally new legal order.

Courts tend to be conservative in nature. A core part of their function is to determine what the existing rights are, and to protect and enforce them. Part of the legend of South African law is the story of how the courts on occasion resisted the introduction of racially discriminatory measures, including the removal of 'coloured' people from the common voters' roll. It seems to me that the proper way to understand this is that apartheid was a radical programme for the restructuring of South Africa. The judges on occasion resisted radical changes which impacted on existing rights. In this manner, they obstructed a radical social programme.

In those instances, the attack on existing rights was from the right. One can readily find examples from the other side. Much of the continuing left-wing suspicion in the United Kingdom of granting extensive powers of judicial review — typified by the sustained writing of Prof John Griffith in successive editions of his book *The Politics of the Judiciary* — rests on a concern that judges, as a result of their class and professional background, will resist and obstruct redistributive social change by these sorts of techniques. One has to say that the evidence from the UK, where Griffith is writing, has provided significant support for this concern. In *Roberts v Hopwood* [1925] AC 578 at 594, the House of Lords famously held that it was not 'reasonable' for a local council to adopt a policy of paying all of its employees at least a minimum wage, and that it was not entitled to do so. The council, said Lord Atkinson, was not entitled to make decisions based on 'eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages'. In 1955 the Court of Appeal invalidated the Birmingham Town Council's concession to old-age pensioners, entitling them to travel free on the council's buses and trams (*Prescott v Birmingham Corporation* [1955] Ch 210). And in the 'Fares Fair' case in 1983, the House of Lords quashed a property rate which the Greater London Council had levied in order to subsidize passenger transport in London (*Bromley LBC v Greater London Council* [1983] 1 AC 768).

Roger Smith, the Director of JUSTICE, has argued that for a variety of reasons, in more recent times the argument of Professor Griffith has 'become increasingly difficult to maintain' (Editorial 'The fertility of human rights' (2005) 2:1 *JUSTICE Journal* 5–6). The fundamental point remains valid, however: we do need to ensure that social transformation is not obstructed by the judiciary. What, then, do we need to do to ensure that?

The key is to ensure that our courts are firmly rooted in a transformative jurisprudence. Judge Robert Bork, not one of my judicial heroes, has suggested that one of the reasons courts can swing so greatly from one extreme to the other is that they do not have a unifying theory of what they do. In South Africa we have a Constitution which is very explicit on this subject. Justice Langa has explained it clearly:

> 'All statutes must be interpreted through the prism of the Bill of Rights. . . .The purport and objects of the Constitution find expression in sec 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values.' (*Investigating Directorate: Serious Economic Offences* (supra) paras 21–2)

What we need is a transformative jurisprudence which is firmly anchored in the fundamental constitutional values — human dignity, the achievement of equality, and the advancement of human rights and freedoms. Judge Bork is unfortunately right in pointing to the extreme way in which the pendulum can sometimes swing. India provides an example which should give us cause for reflection. The Indian Supreme Court of the 1980s was the great human rights court of our time. After a somewhat dismal showing during Indira Gandhi's state of emergency, in the 1980s the court swept aside procedural

obstructions to justice and embraced a pro-poor human rights jurisprudence with an insight and passion which were truly inspiring, and which taught and energized lawyers and judges in many parts of the world. The emblematic judgment of the time was the 1985 *Olga Tellis* case (*Olga Tellis v Bombay Municipal Corporation* (1985) 3 SACC 545) in which the court wrote movingly and empathetically of the plight of the homeless. Yet only fifteen years later, in the *Almitra Patel* case, the court rejected an argument that slum-dwellers should not be evicted unless alternative land was made available, with the comment that '[r]ewarding an encroacher on public land with free alternative site is like giving a reward to a pickpocket' (*Almitra Patel v Union of India* (2000) 2 SCC 679 at 685).

How does this happen? Part of the explanation may be the variability which inevitably comes from generally having only two judges, taken from a very large bench, sit in each case. But Usha Ramanathan has shown that this case was not an eccentric deviation: it reflects a broader trend ('Illegality and Exclusion — Law in the lives of slum dwellers' International Environmental Law Working Paper (2004) 2). What *Almitra Patel* and other Indian cases demonstrate, I think, is that if the process of judicial appointment is not substantially insulated from the consequences of short-term and ephemeral changes of political mood or allegiance, courts are very vulnerable to those changes. It demonstrates, too, the necessity to work unremittingly at establishing a jurisprudence which is firmly anchored in transformational principle. This has implications for the appointment of judges, which I address below.

Today we call for a purposive approach in the interpretation of the Constitution, the statutes and the common law — to promote the underlying purpose of the law. But one can immediately see the risk: a 'purposive' approach begs the question 'whose purpose?' How do we decide what that purpose is?

That raises the third possible meaning of transformation, which I described earlier as the proposition that we need a judiciary which is responsive to the goals of the democratically elected government. A version of this meaning was recently expressed as follows by the Minister of Justice:

> 'We do need very good judicial officers that are truly sensitive to the environment, understand and try to move away from their orientation of the past and begin to understand what we seek to do in the new dispensation.' (*http://www.sabcnews.co.za/politics/government 29 June 2005* (last accessed 30 June 2005))

It seems to me that in principle the Minister is right, subject to one reservation. It seems to me that she is entirely correct in contending that we need a judiciary which will 'try to move away from their orientation of the past and begin to understand what we seek to do in the new dispensation' — if by 'what we seek to do in the new dispensation' she means what *the nation* seeks to do in the dispensation *created by our Constitution*, not what the *ruling party* seeks to do from time to time. It is legitimate to require that the judiciary be committed to the new national ethos, to the social transformation which the Constitution requires and promises, and to the new society which we are building. This is a profound commitment that goes beyond a

commitment to reading words carefully. All of us, and that includes the government, are entitled to insist that our judges meet this standard. It is what the Constitution requires.

In appointing judges we therefore need to make a fundamental issue the assessment of whether they are seriously committed to the profound social transformation which is required by the Constitution. We can judge that from an analysis of their work both during and since apartheid, from what they have said and from what they have done. In this context, blackness is not enough.

The reservation about the possible implications of the Minister's statement is that this commitment should not mean a commitment to the ruling party, or to ignoring the failure of the government to act in accordance with the requirements of the law. What has to be guarded against is any explicit or implicit suggestion that judges or magistrates should ignore or bend the law in order to comply with either the new national ethos, or with what the government will find convenient. That is not a transformed judiciary. It is a depressingly familiar judiciary.

Again, there are lessons to be learnt from India.

After independence the government of India embarked on a programme of land reform. The Supreme Court of India resisted mightily. In a series of cases it read the Constitution of India in a strained and highly restrictive manner in order to promote the interests of property owners (the history and the cases are conveniently summarized by Matthew Chaskalson 'The problem with property: Thoughts on the constitutional protection of property in the United States and the Commonwealth' (1993) 9 *SAJHR* 388 at 389–94). When the Parliament amended the Constitution, the court continued to attempt to circumvent the plain words of the Constitution.

The judgment of history is that the attempts by the Indian Supreme Court of the 1950s to obstruct land reform and preserve existing property rights, in the face of clear constitutional injunctions to the contrary, were illegitimate. Ultimately, they were also destructive of the public legitimacy and authority of the court. They led to calls for a 'committed' judiciary, which before long became a demand for a submissive and subservient judiciary, and the introduction by government of various devices to attempt to secure this. (For a penetrating account of this history see Granville Austin *Working a Democratic Constitution: A History of the Indian Experience* (2003).)

We do need our judges to be committed to the transformation which the Constitution requires. That transformative approach has to permeate everything the judges do — not just the great constitutional cases, but also the 'routine' cases involving everything from contractual disputes to maintenance claims to sentencing in criminal cases. We can no longer automatically rely on the authority of cases decided in an entirely different dispensation. We have to learn continually to test whether that authority is still valid in a country that has changed and has still to change fundamentally. This is a very difficult task requiring insight and imagination.

Governments that have been disappointed by a judicial decision are sometimes tempted to argue that the decision is undemocratic, because it

goes against the wishes of the democratically elected government. But the transformed society contemplated by the Constitution is a society in which the judges are genuinely independent, and hold us to our highest values and promises to each other. That is the fundamental majoritarian commitment. I have no doubt that South Africans overwhelmingly want a judiciary that is genuinely independent, and which will hold the government to account on their behalf. The Constitutional Court has emphasized that the accountability of those who exercise public power is one of the founding values of our Constitution (*Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC) paras 74–6). We need to be clear on this. Genuine and fearless independence is a basic element of the transformation of the judiciary. Judges who are supine or who back off because they do not want to annoy an elected government are unfaithful to the Constitution. Appointing such people is constitutionally impermissible.

No government likes it when a court holds that it has acted unlawfully, or that it has not done what the law requires it to do. We have recently seen this in the United Kingdom, where the response of government at high level has been very discouraging. Decisions by an experienced High Court judge on the obligations of the National Asylum Support Service met with an angry response from the then Home Secretary, Mr David Blunkett:

> 'Frankly, I'm personally fed up with having to deal with a situation where Parliament debates issues and the judges then overturn them. I don't want any mixed messages going out so I am making it absolutely clear that we don't accept what Justice Collins has said. . . Parliament did debate this, we were aware of the circumstances, we did mean what we said and, on behalf of the British people, we are going to implement it. We will continue operating a policy which we think is perfectly reasonable and fair.' (*The Independent* 20 February 2003, *The Times* 20 February 2003, quoted in Anthony Bradley 'Judicial independence under attack' [2003] *Public Law* 397 at 400)

In a newspaper article Mr Blunkett said that it was 'time for judges to learn their place' (quoted in Bradley op cit 402). In an interview he said: 'If public policy can always be overridden by individual challenge through the courts, then democracy itself is under threat' (*Daily Telegraph* 21 February 2003, quoted in Bradley op cit 402).

More recently, the Prime Minister himself has 'warned' judges who have been 'blocking' deportations and other features of his anti-terrorist legislation that he will have 'lots of battles' with judges if they block the deportation of terrorists (*The Guardian* 27 July 2005, *The Times* 27 July 2005, *The Independent Online* 16 August 2005).

One of the sources of this tension in the relationship between government and the judiciary seems to be the recent decision of the House of Lords in the Belmarsh case (*A v Secretary of State for the Home Department* [2004] UKHL 30). In that case the Law Lords held that internment or detention without trial measures introduced by a recent statute were irrational and discriminatory because they applied only to foreigners. Understandably, the government did not like that. But the correctness of the view of the House of Lords was shown by the recent London bombings, in which the bombers were apparently all British citizens. This demonstrates the importance, even in a question of such high policy, of oversight by independent people who

enforce the constitutional rules which we have agreed are to apply to everyone, and who are less susceptible to the pressures of short-term popularity.

Our government has by contrast been remarkably restrained when judges have decided that it has acted unlawfully. The tone set by President Mandela's response after the Constitutional Court had set aside a decision made by him (*Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)), namely that if the Constitutional Court had said he was wrong then he must have been wrong, has by and large been followed. We have not seen intemperate attacks by Ministers such as Mr Blunkett, and neither have we had the spectacle of a government leader 'warning' the courts, in advance of cases which will undoubtedly reach them, of the consequences of their failing to decide the cases in a manner consistent with the government's wishes.

What is also important, I believe, is that there is not significant evidence of deliberate non-compliance with orders made by our courts. Such non-compliance as we have seen has for the most part been the result of simple incompetence, as in some cases involving the Eastern Cape Department of Welfare. The failure of effective compliance with the requirements of the Constitution as explained in the *Grootboom* case (*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)) raises questions of a lack of attentiveness and a lack of competence in some areas, but I do not think it can fairly be described as deliberate non-compliance. While contempt proceedings had to be brought to compel the Mpumalanga government to comply with the judgment in the *Treatment Action Campaign* case (*Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC)), by and large there has been compliance with the judgment, even if not always with great enthusiasm.

With the exception of the Minister of Health, who was reported as having said that the *TAC* judgment required her to poison people (she subsequently denied having made that statement: 'Tshabalala-Msimang denies "poison my people" comment' *www.sabcnews.com/south_africa/health* last accessed 9 July 2005), by and large the response of government to unfavourable judgments has been exemplary. This is not something to be taken for granted, and the government is entitled to very substantial credit in this regard.

However, it is difficult to avoid the uncomfortable feeling that the response of some is not directly to attack the judiciary, but instead to try to see to it that judges are appointed who will not rock the boat, and who will be deferential when a case involves what they regard as 'policy' questions which are the exclusive preserve of the executive and the legislature — in effect, of the ruling party. (Cf the remarkable submission on behalf of the government in the *TAC* case (supra) that the courts did not even have jurisdiction to pronounce on the lawfulness of the government's policy with regard to the provision of anti-retroviral medicine to prevent mother-to-child transmission of HIV.) There is a risk that the need for transformation may be manipulated by those who in fact seek a compliant judiciary.

The judiciary *is* changing, and much more rapidly than some people are willing to acknowledge. Of the fifty-three judges appointed between 1995 and June 2004, 89 per cent were black (Government Communication and Information Services *South African Yearbook 2004/5* at 385). There have certainly been some bad appointments — and here I am not referring to race — which burden and weaken the system. But that is not surprising: the more surprising thing, for those brought up in the old school, is how many people who previously would never have been considered qualified for appointment have done very well indeed. It is clear that some of what were previously considered prerequisites for competent judges are not prerequisites at all. To be a good judge, you do not need to have been a senior counsel with extensive experience of private practice. That has been a liberating discovery because it opens up our range of choices, and facilitates the construction of a high-quality and broadly representative judiciary.

We do need to take great care that the appointment process does not generate either the reality or the perception that white males, however well qualified, need not apply — either because they will never be appointed at all, or because they will never be appointed in the face of even a remotely credible opposing black or female candidate. If that happens the judiciary will be very seriously weakened, at a high cost to all of us.

There are some worrying signs of a more general unwillingness on the part of well-qualified candidates to make themselves available for appointment. One reason, I suspect, is a sense that those involved in the appointment process are insufficiently open-minded, and too easily committed to anterior decisions about who is to be appointed to a particular post, even before candidates have been interviewed. We have recently seen the Judicial Service Commission reopen the nomination process after the closing date, because insufficient candidates had been nominated. That should worry all of us, and particularly those who are responsible for making appointments.

Another worrying matter is what I sense is a growing concern among members of the judiciary that the executive, in its legitimate concern about transformation and the efficiency of the courts, is now inclined to micro-manage many aspects of the judiciary — to the extent of wanting to take on the power to decide when judges may take leave, to regulate the hours when the judges must be physically present at the seat of the court, and to make the rules of court. Many judges experience this as a sign of a lack of confidence in them and in their integrity. It is, frankly, demoralizing. It will further discourage suitable people, black and white, from making themselves available for appointment. In this regard we need to remember that while judges are paid well, and receive very significant fringe benefits, most skilled and experienced lawyers are very much better paid. They also have a very significant degree of independence in their professional lives. Most of them will take a very significant income drop on appointment as judges. They nevertheless make themselves available for appointment for a variety of reasons, one of which is the status, respect and independence accorded to judges. If they feel that they will be treated disrespectfully, and that they will

become civil servants, many of the best of them will simply choose not to make that career change.

If many of the best-qualified people — by which I do not mean just white men — decline to make themselves available for appointment, the quality of our judiciary will be diminished. With that, our ability to achieve our constitutional ideals will be undermined.

The Constitution requires that government have the self-confidence and courage to appoint people who will read the law honestly and independently, within the framework of a commitment to the transformational goals of the Constitution. The result will, on occasion, be judgments which the government finds uncomfortable or annoying. That is part of the commitment to accountable democratic government. The point was well expressed in a recent editorial in a leading newspaper in Thailand:

> 'There are those who say democracy is the free election of a government, but that is barely the beginning. The true test of democracy is the accountability of those privileged enough to serve the voters. Almost every nation holds elections. Those that are truly democratic hold the elected officials responsible for carrying out legal policy.' (*Bangkok Post* (5 July 2004) 48, quoted in Michael Kirby 'Upholding human rights after September 11: The empire strikes back' in Interights *Access to Justice in a Changing World* (2004) 49)

That is really the challenge to the new generation of judges, most of whom quite rightly are black. It is whether they will be able to transcend the purely racial dimension of transformation, which is important in itself, but is not enough. And it is also the challenge to the government and the ANC. When the constitutional negotiations took place, the ANC displayed great courage and confidence in opting for a Constitution with a Bill of Rights which placed substantial power in the hands of the judiciary. It was not an obvious outcome that democratic government should be constrained in a way that undemocratic government never was. But that choice was made, and I believe that the past ten years have vindicated and justified the courage and confidence which the ANC showed in this regard. The challenge now is whether it will have the courage which is required for a sustained commitment to the true and fundamental transformation of the judiciary, which is necessary if we are to achieve the social, political and economic transformation which our Constitution demands — and promises.