Redressing the racial imbalance in the law

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In this contribution the author raises a very interesting viewpoint concerning the so-called racial imbalance in our judiciary. He cites the example of Botswana where the majority of judges remained white despite the fact that colonial rule was abolished in that country as far back as 1966. The author therefore argues that in a democratic country there is no inherent need for a racial balance on the bench. The reason why a racial imbalance has become crucial in South Africa – so the author argues – is principally because the law was used as an instrument of racial oppression. It follows that once a fully democratic South Africa has been established the racial composition of the bench should no longer be of such prime importance as it is at present. (See also the first editorial in this issue).

Introduction

South Africa has experienced more far-reaching changes in its social structure and legal system in recent years than it has known in almost its entire history. There are even more fundamental changes ahead, the precise extent and nature of which are still to be determined. We can be sure of only one thing: The ramifications of change will be felt throughout all sectors of society. Periods of extensive change are accompanied by considerable uncertainty and the uncertainty, in turn, raises fundamental questions. For those of us who like their lives well regulated and who prefer the equanimity of social stability, it is a time for soul-searching and the reassessment of basic values.

One of the issues which is being raised increasingly frequently and which emerged at the National Bar Conference held in Durban in July 1991 was the need to redress the racial imbalance in the law. Is there, in fact, a need to redress the racial imbalance in the law. If so, what lies beneath this need? The question appeared, in the form in which it was raised, to be directed principally at the judiciary, but its implications overflow and impinge on the professions of both advocates and attorneys.

At the outset, it needs to be recognised that the need to redress the racial imbalance in the law has to be
The fact that earlier Nationalist governments deliberately sought to establish their own “racial balance” only serves to prove the point. No inherent need for racial balance

Despite the racial imbalance in the bench, the issue of redressing the racial balance has never surfaced as an issue in either Botswana or Bophuthatswana. Of course, it can be argued that there is a certain measure of selective exposure involved. Persons tend to seek out the company of those like themselves and hence exposure to otherwise “unsocial elements” in the society is limited. However, legal practitioners come into contact with criminals, potential criminals and encounter a wide range of clients with diverse backgrounds. The writer has picked up critical comments of the social and governmental systems and of particular judicial officers, but significantly there has not been a discernible murmur about the racial imbalance in the law. The lesson to be drawn from this is that there is no inherent need for a racial balance. In most countries of the world, judges are not a mirror reflection of the population from whence they are drawn and there is good reason for it. For one thing an inclination for learning and an expertise in the law are not uniformly diffused throughout the community. Even “thinking” has been described by that great British philosopher, Alfred Whitehead, as a form of “perversion”.

Racial oppression

The reason why a racial imbalance has become crucial in South Africa is, principally, because the law was systematically used as the prime instrument of racial oppression. The remaining magistrates were all past and present, are or were expatriates and were not drawn from the society over which they adjudicate.

Botswana and Bophuthatswana

The writer believes that some insight into the need to redress the racial imbalance in the law can be gleaned from his experiences in the two jurisdictions in which he principally practises; namely, Botswana and Bophuthatswana. These countries are not unique in Southern Africa. It is more than likely that similarities will be found in Swaziland, Lesotho and the remaining TBVC countries. For purposes of this analysis, it is necessary to put aside the question of whether or not Bophuthatswana is a “child of apartheid”. The answer to that question involves different considerations to those raised here and the discussion of the legitimacy of the state, at least in this context, will only serve to confuse rather than clarify.

Both Botswana and Bophuthatswana have overwhelmingly black populations, both are committed to democratic principles and have a Bill of Rights entrenched in their Constitutions. In some respects, therefore, they resemble the South Africa of the future. Both countries have a marked racial imbalance in their judicial officers. When the writer commenced his legal practice in Botswana some 12 years ago, there was only one local who held the most junior magistracy. The remaining magistrates were all expatriates, principally from the United Kingdom and Sri Lanka. The Chief Justice at the time (the Honourable Hayfron-Benjamin who came from Nigeria) was black, but the remaining judges were white. Throughout this period the majority of the judges remained white. Two of the present judges of the High Court of Botswana are black, while the remaining three judges are white. The black judges, both past and present, are or were expatriates and were not drawn from the society over which they adjudicate.

Bophuthatswana always had more black (and local) magistrates than Botswana and also has a local as the Registrar of the Supreme Court which Botswana has never had. Of the eight trial judges in Bophuthatswana, only one is black and he is not a native Motswana.

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Racial oppression

The reason why a racial imbalance has become crucial in South Africa is, principally, because the law was systematically used as the prime instrument of racial oppression. Sydney Kentridge correctly pointed out at the Bar Conference that the bench in South Africa stood as a bastion against apartheid. (See the address reproduced in the October 1991 issue of Consultus. Editor). One must indeed marvel at the ingenuity of judges who succeeded in attributing the most benevolent of motives to legislators whose pernicious intentions had been made well known. But when the last bit of ingenuity had been used up, the fact remains that tens of thousands of people were forcibly removed from their homes, large numbers imprisoned for minor offences, individuals debarred from certain occupations, inequalities in pay permitted and security legislation designed to stifle political opposition as well as other hurts inflicted which could not have taken place without the sanction of the courts.

Apart from the deliberate use of the law as an instrument of racial oppression, there was also an unconscious bias in the treatment of blacks. Contrary to a widely held belief, the idea of the unfair treatment of blacks in the courts did not originate with Barend Van Niekerk. Harry Morris, who practised many years before most of us, knew or thought he knew what a “Bar” was, had the following observations to make:

“Our troubles are
(1) That we have far too many prosecutions for trivial matters, especially in the case of Natives.
(2) That minor offenders are too heavily punished, particularly Natives.
(3) That serious offenders are too heavily punished with scandalous inadequacy, except in the case of Natives.

I have never heard of a European being sentenced to death for rape. Natives have been hanged.

The tenderness for the white man and the penal differentiation between White and Black in Transvaal are by now part of our traditions.”

There you have it. The simple answer to the question “Why is there a need to redress the racial imbalance in the law?” is that in racist societies there is a need to redress the racial imbalance. A large portion of the population feels that the courts are an instrument for the protection of white privilege and that they are so alienated from the feelings of blacks that they cannot be expected to understand them. Lack of confidence in the courts cannot be remedied by admonishing people that they must not have those feelings. The fact that earlier Nationalist governments deliberately sought to establish their own “racial balance” only serves to prove the point.

Dual Bar

All this raises the issue of where the black judges are going to come from.
The Bar has an insufficient number of experienced or qualified black advocates to effectively reduce the racial imbalance. The racial imbalance in the Bar is accordingly the next institution to be looked into. This raises the issue of whether the dual Bar is not an impediment in the redressing of racial inequality.

In Botswana both advocates and attorneys have the right of appearance in the High Court and in the Court of Appeal. This situation arose at a time when there were comparatively few resident practitioners in the country. The number has increased tremendously in the past few years and the time has perhaps arrived to consider raising the qualifications in order to raise the standard of practice in the highest courts. Experience in Botswana shows that granting the same right of audience to attorneys and advocates does not reduce the costs of litigation. There are attorneys who charge the same rate as silks. The better attorneys recognise the need to brief counsel. The frightening part consists in listening to an attorney who charges P6 000,00 for a one-day trial (about R8 000,00) and renders his client about as much assistance as a high school student would.

The writer acknowledges that there are attorneys who are better lawyers than some advocates. In the writer’s experience, the most outstanding attorneys recognise that their time is most efficiently spent in not going to court. The problem arises with those attorneys who do not realise their limitations. There are also many magistrates and professors of law who would probably make good judges. While this is so, the writer is of the opinion that the Bar provides the best training ground for the acquisition of legal expertise and hence of appointment to the Bench. Having been at the Bar is no guarantee of success on the Bench. Conversely the fact of not having been at the Bar does not mean that a man (or woman) will not make a good judge.

The principal difficulty is that the qualities of a good judge are not readily amenable to objective measurement. Attributes such as “compassion”, “worldly experience”, “breadth of vision”, “inclination for learning” and “sensitivity to the community and its changing standards” cannot be computed with any meaningful accuracy. The only attribute with any prospects of success as an objective criterion is “experience” and that, by itself, is a poor indicator. All in all, some appointments from the ranks of attorneys, academics, magistrates and foreign judges will probably not be disruptive provided that it is recognised that the Bar remains the main source of recruitment for the Bench.

Jury system

In light of the need to recognise the need to redress the racial balance, another look needs to be taken at the jury system. Juries are a discredited institution in South Africa and for good reason. One could not hope to obtain a more unrepresentative group of “one’s peers” than the jury system as it existed in South Africa. If there is indeed a feeling of confidence in being tried by one’s genuine peers, there is less need to tamper with judicial appointments. The experience in Western Australia as outlined by Mr Justice Ipp at the Conference at least justifies another look at the system. Furthermore, much progress has been made in research on juries since the system was last used in South Africa. Thus experimental research at Columbia University’s Institute for Social research suggests that small juries (about 7) work more effectively than larger juries (12 to 15 members).

Is there any prospect that the need to redress the racial imbalance can be avoided by judges proclaiming “We are now good guys and we have a Bill of Rights in our pockets”? This is wishful thinking. In the first instance, the Bill of Rights is not a panacea for all our problems. Furthermore, in neither Botswana nor Bophuthatswana has the Bill of Rights fulfilled the high hopes expected of it. Botswana was fortunate to have Hayfron-Benjamin as its Chief Justice for a period. His background and training was in constitutional law, but he had few opportunities to exercise his talents in Botswana. In spite of this he did manage to “find” constitutional issues in the most unlikely places. In the modern world the principal culprits in the infringement of human rights are governments. The acid test of a Bill of Rights arises in a direct confrontation with the government and there have been few cases of this sort in Botswana. A recent judgment by Horwitz AJ involving a case of citizenship based on sex discrimination placed the government in a tizzy which on the face of it was not justified having regard to the narrow ambit of the issue traversed.

Direct confrontations

Bophuthatswana has had more instances of direct confrontations with the government. The high water mark for the Bill of Rights came in the judgments in the Smith1 and Marwane2 cases. Hiemstra CJ in Smith’s case proclaimed the end of “legal positivism” by virtue of the Bill of Rights. The demise of positivism has not been recognised in subsequent judgments although neutral references have been made to the applicable part of the Smith judgment. Marwane’s case was a judgment of the South African Appellate Division, of which not all portions were palatable in Bophuthatswana. The present trend, at least in the General Division, takes the line of asserting that if the meaning of a statute is clear, the Court must give effect to it. In other words, it is a return to judicial positivism. There need not be a Bill of Rights for all the good it does. This line of reasoning is ostensibly based on the judgment of the Bophuthatswana Appellate Division in the Segale case. With respect, the Segale case merely determined that the same rules of interpretation applied in Bills of Rights cases as in other cases. The ratio is expressed in the words: “If the wording of the statute is clear and unambiguous they state what that intention is.” The Court did not state that “you give effect to it”. This is precisely the evil that a Bill of Rights seeks to avoid. There is a second step to the process; namely, once you have ascertained the meaning, does the statute conflict with the Bill of Rights? If it does, it should be struck down, failing which a Bill of Rights becomes meaningless.

Both Botswana as well as Bophuthatswana have yet to take heed of the admonition by Judge Arbour in her keynote address at the Bar Conference (published elsewhere in this issue. – Editor) that it is undesirable for government always to be seen opposing attempts to enforce the Bill of Rights.

Constitutional Court

In the new South Africa, the establishment of a Constitutional Court is
justified by the imperatives of the situation. There is also much merit in seeking to have such a Court reflecting a "balance" in the composition of the population. This need not be a "racial balance" but could be a balance reflecting interest groups such as workers, business, legal practitioners, women’s groups and language or cultural groups. A case can be made out for the appointees to have a strong commitment to democratic ideals rather than having a background in legal practice, of which a training in South African law appears to be an impediment. There would be scope for eminent academics in law who have done much to democratise our legal thinking.

There is perhaps more hope for the future of a Bill of Rights in South Africa than in Botswana or Bophuthatswana. In both these countries, the Bill of Rights was introduced in order to show that the country dissociated itself from the type of government in South Africa. However, a Bill of Rights hammered out as part of a "constitutional deal" with other safeguards has more prospects of succeeding.

Public funds

One expected consequence of the need to redress the racial imbalance is the use of public funds to achieve this purpose. It is no secret that the first Nationalist government used the civil service to solve the "Poor White Problem". One can scarcely complain if the same procedure is used in order to provide employment opportunities for blacks. Quick promotions are also likely. It would probably not be a bad thing if state attorneys were instructed to give a disproportionate number of briefs to black counsel to give them the opportunities which circumstances have conspired to deny them. Legal aid funds may also be used to give both black attorneys and advocates a greater share of litigation practice. But in the final analysis, the best hope for redressing the racial imbalance in the law is the increasing affluence of the black population. This lesson is evident from both Botswana as well as Bophuthatswana. Whatever may be said about Bophuthatswana it did succeed in ridding its people of apartheid without bloodshed and of raising the living standards and per capita income of the population more rapidly than would otherwise have been the case.

Antithesis

In many ways, the deliberate redressing of a racial imbalance is the very antithesis of what democracy is about. There are imbalances in all societies and not all these imbalances are hurtful. Have you noticed the preponderance of Afrikaans names in South African rugby teams or English names in cricket teams? The team of athletes that the writer would most like to see represented at the Olympic Games would be as unlike the general population as it is possible to be. Those who qualify should have exceptional athletic ability, a dedication to their sport and a determination to win. In short, they should be rather unique persons and quite unlike the general population. The idea of redressing a racial imbalance can only be justified as an interim measure. As Sydney Kentridge put it: "It is the price that we have to pay for apartheid." We will have reached maturity as a nation when we don’t care a fig for the social groups from which our judges are recruited. Democracy, like justice, is colour-blind.

The Bar’s future

The old South Africa as we knew it is no more. There is no need to bemoan the passing of entrenched privilege. There are those who throw up their hands in despair as if everything that they have worked for has been lost. The Bar has a case for its continued existence on the merits. There is no need to be obstructive in pursuit of this aim. As individuals and as a profession we are all able to influence the development of events. In doing so we can all look forward to a bright future.

FOOTNOTES

2 HH Morris, The Forty First Years, (Juta, 1948), p 129.
4 Smith vs Attorney-General, Bophuthatswana 1984 (1) SA 196 (B).
5 S vs Marwane 1982 (3) SA 717 (AD).
6 Some examples are Monnakale and Others vs Government of the Republic of Bophuthatswana and Others 1991 (1) SA 598 (B) and Tumagole vs President of Bophuthatswana and Others 1991 (1) SA 628 (B).
7 Government of the Republic of Bophuthatswana vs Segale 1990 (1) SA 434 (BA).

ERRATUM:

4 (1991) Consultus 104

Vervang die woorde "artikel 95 van die Grondwet, 1961 (wat nie deur die bestaande Grondwet herroep is nie)" deur die woorde "artikel 69 van die Grondwet, 1983".

The draftsman of today is supposed to prepare the maximum of laws within the minimum of time, to express the intention of some anonymous, mythical person whose identity is not easily established and to express that intention in language so clear that not only a reasonable man understands, but a malicious man cannot misunderstand it . . . Here is a task for a superman . . . Hiranandani: The Modern Law Review, vol 27.