Of holy cows and china shops

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Some six or seven years ago, during the De Klerk/Gorbachev era, I suggested to the convenor of the Duma's human rights committee that the common challenge facing our two countries was to unshackle a repressive political system without letting it disintegrate.

No, he politely but firmly corrected me: Russia's task was incomparably more daunting than ours. In his country the concept of law had been debased, its private practitioners had withered away and the function of the judiciary had atrophied. Apartheid South Africa, whatever else might be said of it, acknowledged the role of law in society and its judges generally sought to apply it conscientiously. This, so he said, was largely thanks to an independent Bar that had remained the repository of professional legal ethics, the protector of forensic traditions and a source of judges worthy of their title.

Perhaps he rhetorically overstated the case, but the importance of an independent Bar is both indisputable and widely accepted in countries sharing an English forensic tradition. Notwithstanding differing statutory frameworks and cultural contexts, bodies of lawyers offering special courtroom expertise continue to flourish in such jurisdictions, from Hong Kong to Harare and from Windhoek to Victoria. The primary reason is, of course, that specialist barristers are an integral part of the court as a functioning organism, the quality and volume of judicial output being commensurate with the input of the Bar. Hence the well-known plea by Chief Justice Warren Burger for the establishment of an American Bar dedicated to appearances in the Supreme Court.

In the second place, experience has shown that advocates practising on their own, independently, competitively, continuously and without choosing their clients or cases, not only build up forensic skills that are beneficial for the dispute-resolution business of the courts but – osmotically, coincidentally and as a bonus – develop professional objectivity and intellectual independence. Falcons are not trained in a henhouse; detached perspective and independence of mind and conscience, the primary qualifications for judicial office, are not developed in corporate cloisters. The ability to absorb, organise and distil data, to discern the essence of a case beneath the overburden of conflicting allegations of fact and contentious submissions of law, and to arrive at an objective conclusion as to the best outcome, is not an innate gift. It is an acquired skill, an ability, a capacity that is developed by continuous and varied exposure to many different court cases. And it does not seem to be sufficiently understood that forensic training, whether for advocates and/or for judicial officers, should ideally be done on the job. Our method of resolving disputes is pre-eminently practical. The stuff of litigation is common sense and its source experience.

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Justice Johann Kriegler was a leading advocate and former chairman of the Johannesburg Bar Council.

Controlled environment

What seems to be even more widely overlooked is that, in the third instance, the Bar as it has evolved in this country not only underpins the adversary system and provides a judicial training ground, but does so in a controlled environment. The vast majority of practising advocates in this country are members of organised professional societies and function under the dual and interactive supervision of their peers and the courts. The obligation to keep chambers cheek by jowl with colleagues, the individuality, the egalitarianism, the emphasis on collegiality rather than competition, the shared professional facilities and the rules of professional ethics, etiquette and practice, between them constitute a frame of reference within which people from vastly disparate backgrounds learn from – and with – one another in an atmosphere of professionalism. Advocates practise in the open, under the watchful eye of their colleagues, subject to the discipline of their Bar

councils and, ultimately, under the critical scrutiny of presiding judicial officers.

Thus the South African Bar enables aspirant advocates to perfect their craft on the job. As they cut their teeth on relatively simple cases, they are growing in confidence, competence and forensic maturity. At the same time they are continuously exposed to the atmosphere and culture of the courts in which they practise. Day in and day out they, being sole practitioners, have to take individual responsibility for analysing, researching, preparing and advocating a random selection of successive causes. This they have to do with a dual commitment to their client's cause and the broader interests of the administration of justice. And so they grow judicial muscle.

No direct cost to the state

The most serendipitous aspect of the advocates' profession at the present stage of our country's development is that it manages to perform all of these functions at no direct cost to the state. Although life at the Bar is hard, with no security, no guarantees, no safety-nets, there has for many years been no shortage of eager and ambitious entrants to the Bar who are prepared to pay its price in the hope of eventually succeeding. The professional and financial advantages of making a success of a career at the Bar are indeed not only sufficiently attractive to draw a steady stream of aspirants, but sufficiently rewarding to enable top practitioners to accept judicial appointment at the materially inferior level of remuneration that is affordable by the state.

Let us revert to the Russian jurist's evaluation of the South African Bar in the dark days. Many advocates remained committed to the cause of freedom under the law, competent senior silks continued to stock the bench and the courts continued to function as judicial institutions. It was not easy. During the fifties, sixties and seventies successive ministers of justice and the politically influential attorneys' lobby, each with its own peculiar objective, sought to bring the Bar to heel, the former by dark predictions of statutory control and the latter by threatening the Bar's demise by cannibalism. They had different ideological points of departure, but the objective of both attacks was to put an end to the Bar as an independent institution. For many years the time, efforts and money of the GCB were expended on reactive strategies to ward off these threats.

It would be wrong to romanticise the role of the Bar under apartheid. Of course the egregious discrimination that characterised South Africa as a whole was not only evident in the formal court system but was reflected in the skewed profile of the Bar. And advocates are not saints. They are in practice for a living and often focus too narrowly on their own interests. Accusations of elitism, profiteering and arrogance were levelled at the profession or some of its members, not always unfairly. (More than a decade ago I had occasion to speak of islands of privilege in a sea of misery, and to warn that impaired access to legal services was widening the gap between law and justice.) But the Bar of the nineties has made a determined and sustained effort to identify its shortcomings and to come to grips with them.

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Independent and competent Bar necessary

That is as well, for the advent of constitutional democracy has greatly increased the responsibility of the judiciary; and, concomitantly, the Bar's role has become much more demanding. Constitutionalism, unqualified acknowledgement of the supremacy of the law and a fully justiciable Bill of Rights heralded a new set of fundamental values in which a fearless, independent and competent Bar must be regarded as essential. Now that the supremacy of the law is firmly established in our land, now that a manifestly independent and representative judiciary is a constitutional imperative, the Bar as the traditional wellspring of and training ground for the judiciary has become really indispensable. More than at any time in the past, the organised advocates' profession has a vital role to play in the reformation of the administration of justice, both as a component of the court structure and as the principal reservoir of the talents, experience and skills necessary for its reformation.

It is therefore to be hoped that the Bar will be called upon by the bench, the Ministry and the Department of Justice to play its part in accelerating the elimination of the inequities that disfigure the face of justice. Given the requisite administrative backing and political support, the Bar should be well able to continue remedying the racial and gender imbalances in the composition of the profession and the bench. It is well equipped to promote and accelerate the professional maturation of judicial aspirants from disadvantaged backgrounds. For centuries the advocates' profession in this country and in kindred jurisdictions has trained, guided, shaped and polished its members to fit them for judicial office. In the current climate of limited public resources yet limitless needs, it is important to remember that the Bar has done that job at no cost to the taxpayer. Whosoever handicaps the Bar in its transformational endeavour does so at her or his peril.

One can but speculate as to the motives behind recent pronunciamentos about the unification of the legal profession. Unfortunately political newspeak or declarations of resolve to put down holy cows reveal little of the thinking, if any, behind such statements. Indeed, the tone, style and starting point of the statements published to date suggest that the problem is not so much holy cows but over-eager young bulls stalking them in a china shop.