Ishmael Semenya SC was appointed as chair of the General Council of the Bar of SA for 2012/2013 at the annual general meeting in Durban on 21 July 2012.

# Governance of the legal profession

By Ishmael Semenya SC, Johannesburg Bar

The 7th Annual IBA Bar Leaders Conference held in the Hague on 30 May to 2 June 2012 dealt with a subject very topical in South Africa: the governance of the legal profession. At the time of the conference, the Netherlands as well as the Republic of Ireland were considering amendments to their statutes regulating the legal profession. In the past eight years the South African Parliament has been considering the introduction, debate and possible adoption of the Legal Practice Bill (the LPB). This article seeks to look at the subject not in any didactical sense but rather as a stimulus to encourage debate on what will definitely be a career-defining piece of legislation for those who practise law and those who are consumers of legal services. I will attempt to do so using some of the arguments and debates on the matter advanced in foreign jurisdictions such as Ireland, Netherlands and Germany. I propose also to look at the arguments raised around the constitutionality or otherwise of some of the provisions of the LPB, the fears expressed around the Bill and the possible solutions that may avoid apprehensions, properly conceived or otherwise.

The practice of law in South Africa is bifurcated with those practising as advocates doing so under a distinct statute and regulated separately and apart from those who practise as attorneys; the latter also regulated separately under a different statute. The Constitution of the Republic of South Africa recognises the advocates' profession as a distinct profession and the attorneys' profession as a discrete profession. The LPB has as its objects to facilitate access to legal services, amongst others, by providing measures to ensure legal services are affordable and within the reach of the citizenry; to transform and unite the legal profession; to regulate the legal profession, in the public interest, by means of a single statute; to remove any barriers for entry into the legal profession; to ensure that the legal profession is representative of the demographics of South Africa; to strengthen the independence of the legal profession; and to ensure the accountability of the legal profession to the public. As I observe later, there is no issue with any of the objects that the LPB seeks to achieve.

There is an acknowledgement that the legal profession in South Africa is regulated by different laws which apply in different parts of the national territory and, as a result it is fragmented and divided. It is not representative of the demographics of South Africa. Entry into the profession is cumbersome and access to legal services is limited. The LPB recognises these historical impediments and seeks to address them.

Before dealing with the various provisions of the LPB which provoke vexed debate and, at times, emotional discourse, it is prudent to identify the over-arching principle which must inform any resolution of these controversies. It is this: a constitutional democracy which has, as one of its values, the rule of law, must accept as axiomatic that one of the tenets of such a democracy is an independent judiciary. By extension of logic, an independent judiciary is not possible without an independent legal profession. It is only when judges are able to exercise their powers without fear, favour of prejudice and only when the legal profession is able to operate without any political interference that the rule of law can be regarded as extant. The converse to this is that only the elected representatives in a democracy can claim the duty, if not the right, to deal with matters affecting the public interest. Elected officials are so elected, into office and out of office, on the promise they make in advancing public interest matters. It is therefore important to draw that line in the sand which identifies matters properly within the province of the legislature and the executive, on the one hand, and those which fall within the remit of the legal profession if it is to remain independent.

The one contested area becomes the nature of any regulatory and governing structure of the legal profession. The LPB contemplates a Legal Practice Council (the LPC) comprising: fifteen legal practitioners, ten of whom are attorneys and five practising advocates appointed by the Minister after receiving nominations from associations representing legal practitioners, the chairperson of the Attorneys' Fidelity Fund Board, one teacher of law appointed by the Minister after receiving nominations from law teachers or bodies of the academia, two persons appointed by the Minister who by virtue of their knowledge and experience are able to represent the interests of users of legal services, and two persons appointed by the Minister who are to represent the interests of government.

The composition of the LPC triggers intense debate on the constitutionality of the proposed Bill, with one extreme being of the opinion that any appointment to the LPC by the Minister is a direct challenge to the independence of the profession, and an argument to the contrary asserting the right of government to protect public interest matters for which it holds political and constitutional responsibility. A cursory examination of these two conflicting positions will reveal that the constitutional imperatives of access to justice, the right to choose one's occupation or profession freely and to practise such a profession as regulated by law, and access to affordable legal services, are matters that fall within the exclusive province of the executive and the legislature. The regulation of the legal profession, how lawyers perform their work, defining the parameters of their rules of

ethics, structures of their profession, rules for referral, and the right to charge reasonable fees are matters that typically fall within the exclusive scope of responsibility of the lawyers themselves.

The Legal Services Regulation Bill 2011 in Ireland contemplates the establishment of a Legal Services Regulatory Authority (the LSRA) consisting of eleven members appointed by the government with one lay member appointed as a chairperson of the LSRA. It also provides that no fewer than four members of the LSRA shall be women with stipulated periods of office for such members. Notable is that the government will have the power to remove a member from the LSRA where the member's removal appears to be necessary for the effective performance of the functions of the LSRA. This at first blush will surely show the direct influence of government in the regulation of the legal profession, an issue which, were it to be part of our law, would not survive constitutional muster. The LPB does not have these types of excesses. Of the twenty one members of the LPC, the legal profession is responsible for the appointment of by far the majority.

In an address to the Law Society Annual Conference of the Netherlands on 14 April 2012, Mr Shatter TD, the Irish Minister of Justice, Equality and Defence spoke on the topic 'Regulation, Representation and the future of the Legal Profession.' In addressing the Legal Services Regulation Bill 2011, the Minister described the rationale for the Bill being 'to establish independent regulation of the legal professions to improve access and competition, make legal cost orders more transparent and [to] ensure adequate procedures for addressing consumer complaints.' The trigger for the structural reforms, said the Minister, was because 'existing mechanisms of self-and co-regulation have not sufficiently met the targets of transparency and competitiveness necessary to inspire lasting public confidence and to encourage sectoral growth and competition in a modern, open, recovering economy. It is not surprising therefore, that many legal practitioners already find themselves pushing out the boat of new practice models and business technologies and stand ready and able to embrace the processes of modernization and reform. In the face of such past and recent history I cannot accept, therefore, the emotive and misleading contention that the Legal Services Bill of 2011 is some kind of sudden, opportunistic or otherwise malevolent ambush on the legal sector.' The observation could be made with equal force in the assessment of our own legal transformation and the arguments posited in opposition of change.

Speaking on the obdurate cultural posture the profession appears to take with respect to the ineluctable change that must follow given the history of the Irish people, Minister Shatter said something equally valid about South Africa:

> 'I would like at this point to refer briefly to the strong, historic and deeply embedded cultures which permeate both legal professions. While these cultures have their virtues in seeking, to a large extent, to preserve the professional independence and integrity of our work they also carry an amount of dusty baggage. For we are not the only professionals who embrace high standards of professionalism - indeed, like other professions we have to invoke disciplinary procedures when the need arises. The ethical principles and procedures to which we adhere already dovetail to some degree with other professions – for example, we mirror the profession of accountants in relation to the auditing and financial management of our practices upon which the securing of Practising Certificates depends. Indeed, in our day to day businesses we are already happy to rely upon the supporting services of such professionals and their work ethic. Our collective lawyerly culture should not blind us to the opportunities for a coalescence of our interests with those other professions while duly upholding those principles which we hold so dear. From the perspectives of both lawyer and politician I cannot but recall the words of the guru of organisational culture EH Schein, "The bottom line for leaders is that if they do not become conscious of the cultures in which they are embedded, those cultures will manage them."'

There is clearly a familiar ring with respect to what is happening at home. This is despite an acknowledged reality of the distortions created by our legal past that continue to plague our legal landscape. In Ireland the nemesis is called culture; back at home it is squabbles about race and racism, its impact and most importantly the dissonance about the correct model to dismantle the inequalities and to achieve an agreed legal transformation.

Germany, in summary, paints a different picture. The Council, consisting of seven members who are elected by the assembly of the Bar, does not have representation of non-lawyers in the issues affecting the regulation of its members. The telling distinction however is that the duties of the Council do not include public interest matters. The duties of Council are typical trade unions functions such as: to protect and promote the interest of the Bar, to advise and instruct the members of the Bar in matters of professional ethics, to mediate between members in cases of disputes, to monitor the performance of the duties incumbent on the members and to take steps to issue reprimands when required, to propose appointment of members on the disciplinary court and to the Higher Lawyers Court, to make proposals to the German Federal Bar, to cooperate in training and examining students and trainees, et cetera. There can be no reason for participation by political interests in such a structure.

The next area of contestation relates to the discipline of members. At present, a complaint of professional misconduct against a member must be submitted to a committee of the Bar Council comprising of lawyers only. In the event of the appeal the complaint is escalated to the General Council of the Bar (the GCB) which also comprises of lawyers. A complainant who is dissatisfied with the outcome of the complaints processes, including the appeal, is left to engage a lawyer to prosecute his or her complaint through litigation. It is difficult to resist the indictment that the system is opaque and perceived to be unfair. Talking on the public confidence necessary in the provision of legal services, Minister Shatter articulated the problem thus:

> 'Times, the economy, the world and the government have changed. Consequently, in the new Legal Services Regulation Bill we find a deepening of reform ambitions and structures beyond the model of supervised self-regulation introduced by the previous Government under the Legal Services Ombudsman Act 2009. That model has been obsolete by this Government's commitment to more independent regulation of the legal professions bolstered by the relevant EU/IMF/ECB Programme undertakings. The 2009 Act left of the duality of regulatory and representational functions to persist in the professional bodies concerned-with all of the working conflicts and tensions inherent in this duality. It also failed to completely bridge the gap of

public confidence especially in relation to the objectivity of complaints procedures and transparency of legal costs notwithstanding the extent to which these perceptions may or may not be justified and the improvements made by the professional bodies in these areas. To my mind, the 2009 Act also perpetuated an unhelpful blurring of the distinction between the regulatory and representational functions of the professional bodies in a way which can be detrimental to the full pursuit of relevant interests when complex issues arise. In putting clearer light of the day between representational and regulatory domains of the Law Society and the Bar Council the new Bill provides a better path to the future for the legal professions that should have positive resonance within the theme of this conference.'

The LBP mitigates the problem. It contemplates the establishment of the office of a legal services ombud whose functions, powers and duties include investigating and making recommendations to the LPC and the Minister, the power to receive a complaint, to investigate any alleged failure of the LPC or Regional Councils to deal promptly, effectively with a complaint, to investigate any complaint referred to him or her by a court, and such matters. The limitation however lies in the provisions that clearly point to the influence of the executive in relation to the appointment of the ombud and more pointedly in relation to the appointment and tenure of the Director General providing the administration services of this office. Other jurisdictions, such as Germany, admit participation of courts. And a proper case can be made for the participation of lay people on the disciplinary structures to remove perceptions of self-interest and to engender public confidence in processes of this nature.

There are other arguments that the LPB offends against the Constitution where it provides for the transfer of assets of voluntary associations such as the Bar. The cry is that this constitutes constitutionally impermissible expropriation. This complaint would be valid if the reality were not that the assets of the Bar would merely transfer to the statutory substitutes. For argument's sake, the Johannesburg Bar Council will under the Legal Practice Act be a statutory structure operating at a regional level under a name such as the South Gauteng Regional Council dealing with matters concerning the advocates in that Chamber. This will mean, in this example, that the library of the Johannesburg Bar will be 'transferred' from the JBC to the South Gauteng Regional Council. The books and the other library assets, and members of staff will continue to operate as is; the election of the Council members may still be done as currently happens but now under the particular provisions of the Act or the rules and regulations dealing with such matters. This cannot amount to an expropriation.

Access to justice also raises issues of controversy particularly when it relates to reasonableness or otherwise of fees charged for legal services. In the past, the test for whether a fee was appropriate was that of reasonableness benchmarked against a number of factors including the guidelines which were determined by the Bar. The guidelines were a reasoned aggregation of those factors that would inform a member given the member's seniority, nature of the brief, its complexity, and what would be an appropriate fee in the circumstances. To that would be added a sanction of professional misconduct if a member charges a fee that is unreasonable. When the fee parameters were considered by the Competition Commission to raise possible anti-competitive characteristics, the Bar discarded the guidelines leaving members to charge fees which were 'reasonable.' That standard without reference to any particular yardstick is almost meaningless. In the recent judgment of the Constitutional Court in *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another,* the court reduced counsel's fees from a taxed amount of R240 000 to R180 000 in the one instance without giving reasons beyond stating that most of the work would have been done in the courts below. In Germany, fees for legal services are set, for the most part, by law – the Lawyers Compensation Act, an approach thoroughly discouraged by many South African legal practitioners. The question that begs for an answer is what the correct *via media* is. I leave this question unanswered. But whatever the answer, such an answer must include tampering by consumer interest bodies who will mediate the reasonableness of fees charged by the legal profession.

Outside the complexities that confront the legal profession regarding the LPB lie the practical consequences for the advocates' profession when the LPB becomes law. All practising advocates will do so having been registered to practise under the Act. This means all the 'independent' advocates who are not members of the GCB and who currently have vested rights including the right of audience in the courts will be similarly admitted and registered. They will not have to undergo pupillage or examination to practise the same way as members of the GCB. The new regional structures for the advocates' chambers will have to provide pupillage to every eligible member for pupillage. With the current pupillage structure it is not possible to achieve that outcome. On the other hand, it will not be tenable to assert that a person who is suitably qualified will not be entitled to practise a profession of choice as the Constitution guarantees because there are insufficient pupil mentors to provide the training. The rule that advocates are to practise under a building approved by the Bar Council will also buckle under immense pressure. Most of the buildings for the accommodation of chambers are in the most affluent parts of the city like Sandton or Brooklyn for Gauteng. These locations are clearly beyond the affordability lines of many who would want to practise as advocates.

The training of pupils is already a very expensive exercise. It was an intervention which however explains the improvement in the results of pupils. The pass rate in the 90s was hovering around a little more than the second quartile. Now the pass rate is in the fourth quartile – a huge improvement. If this current format is lost it will have an inescapable but equally foreseeable consequence of impacting negatively on those who join the Bar in the future.

Whatever the solutions, for as long as every lawyer remains an officer of the court, free to exercise independent judgment in the exercise of their professional judgment, being subject to the rules of ethics – control and supervision by courts, owing a duty of candour to the court, protecting the interest of the client to ensure that the client enjoys and receives a fair trial, being free to champion the attainment and enforcement of fundamental rights and freedoms under the Constitution, able to sue the State without fear or favour or executive disfavour, disadvantage or disapproval, the profession will be an independent one and obedient to the rule of law demanded by the Constitution.

The role of governing structures such as the Regional Councils exercising delegated authority will remain to set rules, regulations, practice notes and codes of conduct for their members, and will

retain committees such as a professional sub-committee, pupillage committees, liaison committees, etc, and maintain their role in the field of legal vocational and educational training.

In conclusion, I regard this time as the most propitious for the Bar to seize the moment and grasp the nettle, instead of pontificating and pointing to the shortcomings in the LPB. The more constructive approach is to put proposals that in our judgment will cure the limitations in the LPB rendering it constitutionally compliant and protecting the interests of the profession, whilst serving the public interest at large.

There is ongoing engagement by the GCB with the Law Society of South Africa to present joint submissions to the parliamentary portfolio committee dealing with the LPB. I undertake to update the members on any progress on this front. A

01 November 2012

See also on the Legal Practice Bill: 'The rule of law: The importance of independent courts and legal professions' by former Chief Justice Arthur Chaskalson on page 51 of this issue.

# World Bar Conference June/July 2012 – London



Report by Izak Smuts SC to the annual general meeting of the GCB

The World Bar Conference was hosted by the Inner Temple, London, from 29 June to 2 July 2012. I am grateful for the opportunity afforded me to attend the conference, and report on it below.

**Friday 29 June**

## Court facilities

The conference programme commenced on Friday morning with a visit to the Rolls Building, opened in late 2011, where the Chancery Division, the Admiralty and Commercial Court and the Technology and Construction Court are currently housed. The state of the art facilities are rendered extremely efficient with ultra-modern IT services, which provide for electronic filing, electronic access to exhibits and records, and interactive electronic programming available to litigants in the course of proceedings. Those participating in this visit were addressed by the Justice Christopher Clarke, who serves on the Bench of the Commercial Division, and who gave us a description of the workings of the court. Of interest to me was the fact that the court provides extensive adjudicative services to non-residents of the United Kingdom, many of whom litigate in this court because they cannot expect justice in their home jurisdictions. Also memorable was the judge's express recognition of the significance of an independent profession to ensure that justice was truly served.

Michael Todd QC, chair of the Bar of England and Wales, also presented his views on the functioning and significance of the new court facilities. We were thereafter treated to a tour of the court facilities, which are extremely user-friendly, with electronic notice boards outside each courtroom displaying the court roll for the day in question, and conference and meeting facilities which are for hire on a daily, weekly and monthly basis, or for the duration of trials. These facilities are apparently used in lengthy trials by litigation teams which install electronic servers and secretarial services on site for the duration of their trials.

## Council meeting

Over the lunch hour, I attended the council meeting of the International Conference for Advocates and Barristers (ICAB), the organisers of the conference. The meeting was held at Erskine Chambers, the chambers of Michael Todd QC, chair of the bar of England and Wales. At the meeting, Noelle McGrenara QC, one of the co-chairs of ICAB, announced that she would be standing down from that position at the next meeting of the council, which would coincide with the IBA conference in Ireland in October. Stephen Hockman QC, the other co-chair of ICAB, who will continue in office, raised the fact that ICAB had originally been established to provide some platform for the international referral profession outside of the constraints of the IBA. ICAB had resolved to organise a regular purpose-bound conference specifically for the referral profession, in which role it had succeeded very well, but also to articulate views on the rule of law, and the independence of the judiciary and the legal profession, in which role it had not maintained a high profile in recent years. It was agreed that that the council should give more attention to this role in the future.

Also under discussion was the role of the referral profession within the International Bar Association. There appears to be a power struggle within that organisation, and internal restructuring resulting from that power struggle threatened to consign the Forum for Barristers and Advocates to a rather irrelevant organisational division. It was agreed that this move should be resisted with all available resources, and that we should attempt to be repositioned along with the Judges' Forum, with which there was in any event significant cooperation within the IBA. The question was raised as to whether the continued participation of the referral profession within the IBA was meaningful, but the general consensus was that it remained valuable to our profession to retain our links with that organisation.

Paul O'Higgins SC, leader of the Irish Bar, reported with concern about the draft legislation regarding regulation of the