

Race and Gender Transformation of the Bar and Bench

For the purposes of our short discussion on this vexed topic, I have elected to use the Johannesburg Bar, as a representative group as well as the members of the Bench nationally to derive two simple ideas germane to this topic. I explain these later. I also focus only on the female members of the Bar and the Bench (the so-called historically disadvantaged group), so as to foster a conclusion that without legal compulsion, the reversal of centuries of exclusions, repressions, oppression and miseducation is not achievable.

As they say, numbers don't lie. Of the 250 justices countrywide, as at March of 2018, 26% of those are black females (referring to African, Coloured and Indian) and 10% of them - white. And of the 1181 members of the Johannesburg Bar, 182 are female and black, with 10 of them being Silks. The white females count is 191, 17 of whom are Silks. This paints the gloom picture that after 24 odd years of the so-called democracy, lamentably, black women outnumber their white counterparts by 16% on the Bench and white women at the Bar are fractionally more than their black counterparts with 17 white female Silks squaring against 10 black female Silks. Black women have done better on the Bench than at the Bar – no surprise.

The first supreme fallacy.

To make black and white women a single category distorts the history and is a lame attempt at analysing our present. The undeniable historical fact is that white women,

as a distinct group, have enjoyed historical privilege contrary to black women, and still continue to do so. They still have male attorneys as husbands, brothers, cousins, family friends and share religious and other social interactions; have accessed in the past, and continue to access, better schooling, primary, secondary and tertiary education; which story is radically different regarding the majority of black women. Majority of black women come from societies characterised by poverty, unemployment, inferior education, under-resourced schools, single-parent headed families, with the added burden of looking after members of the extended family at times under a single roof. Equal treatment of the two classes as one, is an aberration. So, if black females have made embarrassing progress, it is still largely explained by what follows.

A comparison is often drawn between white females and white males and the disadvantage of the former relative to the latter, to couch the debate as a 'gender' issue. This fallacy, advanced to equate white women with black women, deliberately ignores the stark truth facing black women as articulated above. White women do not have the disadvantage of race to contend with. Black women do. At what point therefore is this distinction recognised? To deny the inherent inequality between black women and white women not only undermines the plight of black women, it perpetuates the historical advantage of white women.

Transformation is merely a buzz-word. It is a word that does not appear in our constitution nor does it appear in any statutory instruments other than in the foreword of those statutes and some codes of good practice. Transformation is neither an

enforceable right nor a legal obligation. It is something that we speak about in *fora* such as this one and our professional governance structures. It helps us decry our abominable past; intellectualise the need for remediation and romanticize the future. No self-respecting lawyer would want to justify the atrocities of racial exclusion. It however does not impose a sense of obligation upon us to do something about it, whether in redress of the past or to guard against the perpetuation of the very abominable past we decry. Those who engage in discussions about how to correct those continuing ills, challenge any idea that gets considered with what could be veiled as intellectual dishonesty (disguised as rationality and the rule of law). I have in mind as an example the amendment of the constitution of the General Council of the Bar (SA), which seeks to buttress the right of veto by white-dominated constituent Bars regarding matters of transformation. I can say more.

So, our topic: is it all a gender battle for political correctness, or a necessary assault on male privilege?

To answer those questions, I give only one example. With regards the appointment of judges in the country, the constitution requires, the Judicial Service Commission, responsible for the appointment of judges to recommend fit and proper men and women to the Bench, to recognise the need for the Judiciary to reflect broadly, the racial and gender composition of South Africa. This is a constitutional imperative which, to the chagrin of some, has been vociferously defended by the Judicial Service Commission. The only explanation that black women appear gradually to claim their rightful space on the Bench, apart from their intellectual acumen, has been the

religious adherence of this constitutional injunction by the Judicial Service Commission.

Assault on male privilege? Assault must be a choice word for those who have achieved that pole position not through any distinctive industry or intellectual prowess (what gender for a noun!!) but through chauvinism, misogyny, exclusion and yes – the law. By law, in this country, women could not be admitted as lawyers until late in the 20th century and even then, it took many years before black women were admitted as lawyers. There is still an embedded, pernicious and distorted perception that women, though qualified, are inept at the practice of other disciplines of the law. They must largely be doing family law, and certainly not construction law. Our constitutional jurisprudence has exposed this lie, with some of the most erudite judgments of the court penned by women judges. For to the privileged, equality feels like a disadvantage.

I therefore hazard a suggestion, as part of the correction of our shameful history, that we, by law, enact a legally enforceable instrument, such as the State Attorney's Act, which prioritises black women for procurement of legal services by the state and those private legal service providers who also do business with the state. So finally, black women are a distinct group not to be lumped together on grounds of gender alone and that legal compulsion is not only morally, ethically and legally indicated but the very minimum we can do. With time and opportunity, I can explain myself further.

IAM Semenya SC

Johannesburg