

Winning public trust

Towards a wider agenda for judicial transformation

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The need for transformation of the judiciary in South Africa has been the subject of much public discussion and debate, both in the media and among legal professionals. This article argues that the key test of judicial transformation is not whether it meets some abstract standard established by students of the law, but whether judges and courts enjoy widespread legitimacy in society. It will suggest that this approach can explain why we need a more racially and gender representative judiciary if our justice system is to operate effectively – but will also argue that a concern for racial and gender change alone will not secure the public trust in the courts and the judiciary that transformation should seek to achieve. A broader reform agenda, which understands the intrinsic link between an improved judicial system and winning broad public support for a more representative judiciary, is thus needed.

The state of the judiciary – and its transformation – is entirely in the eye of the beholder.

At first glance, this seems like one of those platitudes we trot out when we are not sure that we understand where events are headed. But in reality, it expresses a key insight about the judiciary often missed in the debate on its future.

While calls for transformation and for reform of the justice system are not new – and the government has proposed changes far wider than demographic redress – the link between them is often ignored or, indeed, denied. The position adopted in this article is that racial and gender transformation will not succeed without wider reforms – and that these reforms will not produce a legitimate and effective justice system unless the demographics of the judiciary continue to change.

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THE PROBLEM WITH LAWYERS' SELF-IMAGE

Why insist that public perception is key to judicial reform?

Many lawyers and judges and much public commentary assume that the difference between legal skill and the lack thereof is clear. From this point of view, legal training and practice impart understanding and knowledge: only those who have it can interpret the law accurately and fairly.

Those who practice law are, therefore, particularly clear examples of an 'epistemic community' – a 'network of knowledge-based experts ... with an authoritative claim to ... knowledge within the domain of their expertise'.¹ Like other such communities, they claim to know more about a particular field of knowledge than the rest of us. Since this knowledge is useful to society, they claim also that our interests are best served if those who have this expertise are allowed to apply it unhindered.

According to this view, we are most likely to have the justice system we need if the judiciary is left alone to apply its knowledge unhindered by politicians or the citizenry.

But, like other epistemic communities, lawyers' and judges' claim that there is a 'right' and a 'wrong' way to apply knowledge – in this case, to interpret the law – and that the difference is clear, often turns out to be far shakier than it might seem.

Lawyers and judges are human and, like the rest of us, they have values and beliefs. Inevitably, these influence judgments not because the judge is biased but because many of the issues on which judges must pronounce are, in reality, moral choices disguised as judicial questions.

This is most obvious where, as in South Africa, the constitution is supreme and judges must interpret it. How does legal training establish whether the right to life means that we should execute murderers? How does it tell us what is hate speech and what is free speech? Or, to cite issues that have been decided by our courts, how does legal training decide whether an ill man should enjoy dialysis at public expense² or how much free water the poor should receive?³ In all these cases, the ruling will depend on the judge's values and political orientation, not on an 'objective' interpretation of the law.

This is why constitutional courts in centuries-old democracies such as the United States are constant sites of political contest⁴ and why democracies always ensure some sort of political process to choose constitutional judges. In much of constitutional law, political judgment is more at issue than legal training. And so the issue is not whether the best 'experts' have been appointed to the bench but whether members of that society – or, more accurately, those who enjoy access to the national debate – find the process by which these issues are decided to be fair.

But constitutional issues are, of course, not the only ones that require the judgment of the courts. Those who insist that legal knowledge is paramount would no doubt argue that competence matters a great deal more in weighing evidence in criminal trials or, perhaps more particularly, in sifting

through the complexities of a complicated civil action between large corporations. Obviously, legal training is important here. But even here the difference between a 'good' and 'bad' judgement is subjective. By their very nature, court actions are disputed: the accused is either convicted or acquitted, in civil actions one side wins and the other loses. And inevitably, what can seem a brilliant judgment to the victors may appear to the losers as a sign of judicial incompetence.

No 'objective' standard can tell us which side was right and the question of who is a 'good' judge will thus always be a matter of opinion. Thus a prominent legal scholar accepts that 'legal brilliance' may not be the chief qualification of the 'good' judge and that qualities such as an even temperament, a sense of fairness and a commitment to independence may be more important qualities than a view within the 'epistemic community' that she or he possesses outstanding legal ability.⁵

This observation can be extended beyond the individual judge to the institution: the test of a 'good' judiciary, one which serves its society's needs well, is that it should be seen by most of society as even-tempered, independent and fair. This is far more important than whether it is seen by the legal community to be technically expert. To put the same point another way, we ought to judge our judiciary and our justice system by its legitimacy among the citizenry, not by the peer review of the legal profession.

This is not simply a normative point. It might well be a question on which the survival of an independent judiciary depends.

A reality rarely recognised in South African debate is that threats to the independence of the judiciary are inevitable in new democracies and are not unheard of in much older ones. There is nothing normal or natural about the idea that judges can tell elected politicians that the laws they pass or the decisions they take are invalid. And so, wherever courts do enjoy this power, political office-holders are likely to see it as irksome and to seek to challenge it or to dispense with it. Given this, the tests of judicial independence South Africa has recently experienced – such as complaints by

political leaders that judges are biased against senior politicians⁶ – are not crises; they are simply evidence that South Africa experiences the same pressures as other democracies. The key is not whether judicial independence is challenged but whether it survives the challenge intact. This will depend on political support in society for the judiciary's independence: if key interest groups do not see the judiciary as a valuable guarantor of their rights, they will not defend judges' independence if it is threatened. Legitimacy is thus key to the survival of an independent judiciary. On this criteria, how does our judiciary fare?

THREATS TO THE JUDICIARY'S CREDIBILITY

South Africa's judiciary enjoys assets that are often taken for granted here but are not available in many other societies.

Firstly, citizens do not believe that judges are corrupt: survey evidence reveals that the majority of citizens still trust the courts, despite the controversies which have beset them over the past two years.⁷ While many South Africans might take this for granted, there is nothing automatic about the perception that, whatever may be wrong with our justice system, our judicial officers are not bought. Corruption among judicial officers is a problem not only in countries of the global South but also in developed northern countries like the United States of America.⁸

Secondly, and possibly flowing from the first, respect for judicial decisions is high in South Africa. Court orders are respected, at least in public, by those whom they negatively affect – even when they are politicians engaged in conflicts. Thus the Inkatha Freedom Party accepted the Constitutional Court's 1996 decision to certify the constitution even though it had objected to it on grounds that prompted a political battle which nearly derailed the constitutional settlement.⁹ Since South Africa became a democracy, the government has not defied any judicial orders, even though it may have dragged its feet in implementing them. (The celebrated Grootboom housing judgment would be a case in point, as would cases of provincial non-

compliance, which stem more from capacity constraints than a reluctance to comply.) But this happens even in societies where respect for the law is assumed. Even where citizens might be moved to criticise a court ruling, they do not contest its legitimacy.

These two assets are, as noted above, more important than those who take our democracy for granted seem to assume. They suggest that, despite the society's deep divisions, the judiciary does not yet face a legitimacy crisis. But there are significant warning signals that the legitimacy the judiciary and the justice system need is in danger.

Firstly, there is said to be a significant trend among more affluent citizens and companies to use private arbitration rather than the courts.¹⁰ While this is in line with international trends, it could be a response either to a perception that the judiciary is no longer to be trusted under majority rule, or to the severe overload of the justice system, or both. Some analysts have argued that private arbitration is functional to the system because it relieves pressure on already overburdened courts and judges.¹¹ But, whatever its concrete effects, its use does suggest that a key section of society, with considerable access to capital and skills, seeks to bypass rather than use the system, a trend with clear negative implications for its legitimacy as a means of resolving conflict.

Secondly, elsewhere among the business and professional elite, participants in a Black Management Forum symposium on the constitution held in April 2010 complained that the courts repeatedly found against black individuals or black-owned businesses seeking to use legal action to speed up black economic empowerment. They argued that this was a symptom of an 'untransformed' judiciary and that the solution was to ensure that far more black judges were appointed.¹² This highlights in a direct way the link between transformation – understood as enhanced racial representativeness – and legitimacy. Among some sections of the emerging black professional and business elite, then, court decisions on key issues will not be legitimate as long as whites continue to hold a disproportionate share of judicial posts.

Thirdly, grassroots citizens clearly have their doubts about the legitimacy of the judicial process. The issue here is not social and economic rights, but crime. In these cases residents respond to murders, rapes or other crimes against the person by insisting that the judicial process is inadequate to deal with the problem. Attempts by grassroots citizens to rely on vigilantism rather than the courts may not directly express dissatisfaction with judges; it may reflect frustration with poor policing. But more than a few are prompted by the belief that criminals are not convicted by the courts, either because they are able to afford lawyers who win their acquittal, or because witnesses will not testify.¹³ The issue here is not a perception that individual judges are incapable of dispensing justice, but that the system cannot do this. This has implications to which we will return. But it does indicate that the problem of judicial legitimacy may be more deep-rooted than an exclusive focus on the bench's demographics might suggest.

UNDERSTANDING THE PROBLEM – AND ITS SOLUTIONS

These trends do not necessarily mean that the judiciary's legitimacy is in terminal decline or that the justice system's integrity is in mortal peril. But they do suggest that the apparent consensus on respect for the judiciary is fraying at the edges. They also indicate the multiple pressures that face any attempt to win broad legitimacy for the judiciary and the justice system. What does this say about the way forward?

Firstly, the concerns of black business and professionals confirm that the racial composition of the judiciary is a core test of legitimacy in key constituencies. The argument that black judges will inevitably empathise with majority aspirations is simplistic – much like the expectation that women public representatives will be certain to champion women's concerns. But activist black lawyers and business people are not the only citizens whose support for the justice system would be enhanced if the judiciary more accurately expressed the society's demographics. In a society in which race has long been the key fault line, the race of judges is likely to enhance judicial legitimacy among the

majority even if it is not decisive. Much the same point might be made about enhancing the representation of women on the bench: it will not automatically ensure that the judiciary enjoys more legitimacy among women, but is likely to help.

Lack of progress on gender is clear: only 49 of 216 judges are women¹⁴ and pressure is building here for swifter change. On race, the picture is more complex. Most judges are now black but whites remain over-represented: by mid-2009, 44% of judges were white.¹⁵ It is difficult to evaluate this. While it is the policy of the ruling party to assess progress against the country's demographics, there is no evidence that strict racial proportionality is needed to ensure legitimacy. But, while it would be misleading to suggest that full legitimacy can only be achieved if the bench directly reflects society's demographics, it is equally clear that the bench does need to be predominantly black if the judicial system is to enjoy the required legitimacy among black elites who are, of course, likely to remain an important social constituency.

Obviously the society's racial divisions mean that these gains in black legitimacy may be won at the expense of further decline among whites, in particular professionals and business people. This may create the impression that the circle cannot be squared because what is legitimate to elites among the racial majority is certain to erode it among the minority. But racial attitudes are not immutable and in South Africa there is much evidence that minority views do change – during the period when apartheid was unravelling, it was not uncommon to find swift shifts in racial attitudes once changes, which were feared before they were introduced, turned out not to be threatening. White support for the Immorality Act, which banned inter-racial sex, dropped from 61% a year before it was repealed in 1985, to 38% after repeal became a *fait accompli*.¹⁶ In the post-apartheid period, the appointment of a black Minister of Finance prompted a sharp drop in the value of the Rand. Some years later the same minister, Trevor Manuel, was seen as a guarantor of white business confidence.

This suggests that a decline in the judiciary's legitimacy among whites is not an inevitable

consequence of a more representative judiciary – attitudes will depend on how this change is experienced by white professionals and people in business. And this implies that the challenge is not whether to change the composition of the bench, but how to do it.

An approach that rests solely on ensuring that racial quotas are met is likely to entail a significant loss in legitimacy among whites. By contrast, a strategy that recognises the need to ensure that change occurs in a way that makes a transformed judiciary more appealing to this constituency may be most likely to achieve legitimacy among black and white elites. And that requires, at the very least, processes of judicial selection which are seen to be fair – a requirement which seems often to have been forgotten in the recent round of Judicial Services Commission hearings. In a sense, JSC interviews of judges achieved the worst of both worlds – racial and gender change was fairly limited but the rhetoric of Commission members created the impression that white men were no longer tolerated on the bench.¹⁷ Precisely the opposite is required – a process that is seen to give each candidate a fair hearing but also produces significant racial and gender change. Clearly also, the more the JSC is seen to defend the interests of power-holders and sitting judges rather than citizens (a conclusion some have drawn from its refusal to hear the complaint against the Judge President of the Western Cape that alleged he had tried to influence fellow judges to find in favour of the State President),¹⁸ the less legitimate – and the less transformed – will the judiciary seem to be.

Enhanced legitimacy for racial change may also depend on a form of transformation that would assist grassroots citizens and that is not often seen as a key feature of the transformation debate – a swifter, more citizen-friendly justice system. Besides serving citizens better, this would signal to doubters that a demographically representative judicial system can be effective too.

A further reform task must be an attempt to ensure a judicial system more accessible to those who currently lack the resources to access it. A judicial system that is as transparent as possible is also a transformation priority – a judge who, for

example, rules on a racially sensitive dispute without giving any reasons for the ruling is certain to diminish the system's legitimacy.¹⁹ When the judge happens to be white and the person against whom the ruling is made is black, the legitimacy of the justice system may well be impaired by the perception that courts are being used to buttress minority values and interests as they were under apartheid. Judicial independence does not mean that judicial officers are unaccountable: explaining judgments to society as well as to the parties to an action is an elementary form of accountability, which should be mandatory for any judge. This issue is a challenge for the judiciary. The more it impresses on its members that their independence is not unlimited because it must be constrained by the need, at the very least, to explain why judges reach their rulings,²⁰ the more likely it is that the essence of judicial independence, the need to ensure that judges rule on the strength of their conscience, will be preserved.

A more efficient, accessible and transparent system – one in which access to justice is not delayed for long periods and is affordable to all, and in which judges see a need to account speedily and fully for their decisions – may not automatically allay grassroots suspicions that our judicial system allows criminals to escape sanction. Improved policing may do more to enhance confidence than a reformed judicial system, because citizens' perceptions that the guilty are often not punished may be a function of inadequate policing rather than weaknesses in the courts. But it is surely trite to point out that a system that does not convince citizens that it is accessible, fair and independent of private and public power-holders, will not retain widespread legitimacy, whatever the bench's demographic composition.

CONCLUSION

In summary, further progress towards a more demographically representative judiciary is essential to convince most citizens that the judicial system is fair and independent. But, while this is a necessary condition for legitimacy, it is not sufficient, for two reasons.

Firstly, a concern only with racial and gender representivity is likely to ensure the continued erosion of the system's legitimacy in the eyes of whites, and perhaps of other racial minorities too. Evidence suggests that a demographically representative bench can win the trust of sceptics in the racial minorities, but only if progress is made in making the judicial system more accessible to most people, ensuring that proceedings are swifter, and encouraging the independence of judges and courts.

Secondly, while greater racial and gender representivity might satisfy some lobby groups, it will not on its own address the wider threat to legitimacy posed by grassroots citizens' doubts that the system protects them. Reforms such as those proposed here are needed if the judiciary is to retain public trust.

On both grounds, a broader transformation agenda than that which currently seems to be occupying the minds of key participants in the debate on judicial change is essential. To be sure, proposals for reform that address far more than demographics have been placed on the table, by government as well as other parties. But these broader questions of judicial transformation have tended to be lost of late in the polarised racial debate. They need to be revived, not only because change is badly needed, but because racial and gender change will be far easier in the context of a wider reform agenda.

South Africa's divisions mean that further demographic change is needed if the judiciary is to win sustained legitimacy. But despite these divisions and the pressures on the courts created by a high crime rate, it is possible to win broad public legitimacy for a more demographically representative judiciary – but only if demographic change is seen as a necessary component of a much broader reform agenda.



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NOTES

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