

GENDER EQUALITY IN LAW...THE UNFINISHED BUSINESS

In October 2012 The Commission for Gender Equality (CGE) received a complaint that the pace of gender transformation in the judiciary was too slow.

The irony is that a discussion document was published in the Government Gazette on 13 July 2018 by the Department of Trade and Industry, six years later.

This basic fact already speaks volumes as to the momentum of gender transformation. Nevertheless, an exposition on this discussion document will follow.

The aim of the document is that it will be dissected at the National Summit to be held on 1 and 2 November 2018 when transformative plans can be initiated.

The “Apartheid effect” resulted in the judiciary having 165 judges, comprising of 160 white men, 3 black men, 2 white women and no black women in 1994.

Democracy ushered in three Constitutional sections to address the skewed proportions in representation in the judiciary, namely:

1. The section 9 right to Equality
2. section 174(2) calling for “...the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”
3. A Chapter 9 independent statutory body in the form of the CGE

The complaint advanced to the CGE was that during 2009 to 2012, the Judicial Services Commission interviewed 211 applicants for 110 vacancies and just 24 women were successful. However, the figures at the General Bar Council painted a more transformative picture with 561 female advocates out of a total of 2 384.

Since the 2012 complaint at the CGE, a number of measures were actively implemented to transform the statistics on female representation, the most notable being:

1. An incumbent’s potential was given due regard when appointing Acting Judges
2. The Law Bodies were called upon to make recommendations for Acting Judges
3. Acting Judges were appointed after having taken cognisance of the need for the Judiciary to better reflect the racial and gender demographics of the country

As at 30 March 2017, the following were the ratios of the permanent judges:

1. 73 Black male and 41 Black female
2. 58 White male and 26 White female
3. 15 Coloured male and 11 Coloured female
4. 13 Indian male and 9 Indian female

In the Magistracy there were 56% male magistrates and 44% female magistrates as at 30 March 2017.

Advocates registered at the General Council of the Bar as at 30 April 2017 had a mere 27% female count and 73 males registered.

There are statistics in support of the fact that globally, female presence in the profession is a challenge. Yet, in South Africa, we should be immune to a degree to the slow pace of transformation. Gender equality is a founding principle of our Constitution and more importantly the gender issue has been given legs in the form of the various statutory bodies responsible to ensure that the issue maintains momentum.

Despite the fact that there are large numbers of females entering the profession, the trend is that they are absorbed into advisory roles within corporates. Corporate roles are seemingly able to better suit the time and family responsibility constraints faced by women.

The hurdles that have been identified for the disparate representation in the South African context are:

1. A social misconception that women are inferior to men in certain complicated areas of law. Entrenched gender roles also state that women cannot work the requisite hours as they have to maintain a home and family life too
2. Sexual harassment, especially of junior females, dampens the spirit and cuts short many women's legal ambitions
3. There are a number of social and psychological issues that deter women from fully releasing their potential. The effects of bigotry, a largely fraternal legal system and a profession that is largely geared to accommodate male career trajectories have had a large influence in women leaving the profession at early stages or stagnating at lower levels.

The discussion paper does propose solutions to counter the stumbling blocks:

1. The formulation of laws to accommodate women in terms of working hours and paternity leave
2. Education of legal students on matters relating to gender, equality, patriarchy and sexism
3. Mandatory courses on sexual harassment
4. Statutorily enforceable succession plans for the leadership roles in the profession
5. Implementing functional mentorship programmes such as the "The Training Programme for Aspirant Women Judges" which yielded about twenty female appointments as Judges

Being a practicing female advocate is also a minefield. In a commendable effort to actualize change, the Department of Justice has set objectives for the Office of the State Attorney for the 2018/2019 financial year as follows:

- 80% value of briefs are to be assigned to previously disadvantaged practitioners
- 27% value of briefs and 40% number of briefs are to be allotted to female advocates

The briefing patterns need to be amended so that capable women are briefed on complex matters and not the default “male counsel”, that is the norm.

Aspirant female judges encounter the following issues:

1. An inadequate number of female nominations by the Law Bodies
2. An opaque process by the Judicial Services Commission on its shortlisting methodology
3. Women not willing to avail themselves for the fulfillment of high profile roles

Also, the judiciary tends to embrace aspirants from the pool of advocates (made up mainly of white males). There has been a concerted effort to now include incumbents from the attorney’s roll which has a higher number of females.

The suggested methods of improving the status quo are:

1. Re-aligning the criteria for the appointment of Acting Judges
2. Promoting applications by women for Acting posts
3. Passing an unambiguous shortlisting process by the JSC for appointments
4. Initiating compulsory mentorship programmes where senior female practitioners shadow permanent Judges
5. An even distribution of all facets of legal work

All of the proposals detailed above will encounter a funding challenge. There remains much work to be done to transform the judiciary into a utopia of equality. The discussion document provides the groundwork for a meaningful debate. Transformation of the profession is a continuous process that needs to be looked at with new eyes. Female practitioners themselves can help their cause by initiating changes. The orthodox view is that male practitioners should mentor females. However, there are women practitioners with a wealth of experience who are better placed to mentor junior female practitioners. Women would thus be able to aid their own skills transfer and not be solely reliant on the assistance rendered externally. This transfer of skills process should be a structured one with defined measurables.

Despite the obstacles faced, women continue to enroll for the LLB degree in droves and this alone should be heartening and serve as motivation for us to do better for the present and future generations of legal practitioners.