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ACCESS TO EDUCATION AND TRAINING: PATHWAY TO DECENT WORK FOR WOMEN*

Dikgang Moseneke**

1 Introduction and salutations

Madam Justice BC Mocosie, President of the South African Chapter: International Association of Women Judges, fellow judges and other distinguished guests; it is a remarkable privilege to be part of this annual general conference of the South African Chapter of the International Association of Women Judges. I would like to thank you for your kind invitation to me to share this occasion with everybody here present.

It is not fortuitous that this conference is taking place during the National Women's Month. It is right and proper that we all pause to consider what women are in our private lives, in communities and within our nation. They are truly special. We owe to them our very lives, our up-bringing and all the wonderful values that make life worth living. The female sense of survival is indeed legendary. Our mothers and sisters have an amazing ability to soak up a lot of pain and to merge the other side as worthy human beings.

Those who know me will tell you that my hero of all times is my mother. I am thankful that she is alive and this very month she will be turning 86 years of age. I am grateful that her brain is still as clear as a bell. She taught me all manners I have. A firm respect for others. She spared no moment to remind me that my life is in my hands and my dignity is my responsibility. I had to wash my underwear, clean my bedroom, wash dirty dishes and she still expected me to produce A grades at school.

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** Deputy Chief Justice of South Africa. Email: moseneke@concourt.org.za.

When everything else fails, I retreat to her modest home in Mabopane and she always knows what to say to restore my challenged if not shattered world. On every year of the ten years on Robben Island, she strained every sinew in her body and every emotion in her soul in order to pay me a visit. She kept hope alive. She was a source of strength in the darkest hour. The rest is history and here am I - a proud product of a gender activist.

Well this sentimental introduction is meant to point to something very fundamental. The gendered relations in this and virtually all other societies has been a matter of remarkable inequity and unfairness. For reasons that are despicable, various societies have dealt a very unfair hand to women. This has happened notwithstanding the obvious human worth and right to equality with, if not superiority over men. We men, personally or institutionally find ways to exclude women from private and public power. These exclusionary arrangements result in the least training and experience. We create false dependence through the unequal distribution of skills and economic goods. Patriarchy is indeed more entrenched and much more wide-spread, perhaps much more debilitating than colonial racism.

This exclusion and inequality is worsened by the violent indignity, of endemic rape, domestic violence, human trafficking and religious or cultural repression of women.

It is so that no society can truly advance and claim to be free whilst at least half of it is a victim debilitating patriarchy. This brings me to what I really want to share with you in line with the theme of this annual general conference which is "Access to education and training as a pathway to decent work for women."

My remarks will be focussed on the seminal importance of judicial education and training as an important part of validating all judges, but in particular, women judges.

Every significant stakeholder in the judicial process and the administration of justice in this country seem to accept that systematic, well-resourced and effective judicial education for the entire judiciary is as necessary as it is overdue. This realisation is neither new nor exclusive to our country. Virtually every democracy in the world,

which has entrenched the rule of law and separation of powers and strives for judicial independence and social justice, has found it proper, within the context of its national objectives and specific priorities, to fashion an institution suited to train further its judiciary.

Our search for context and national objectives starts with the Constitution. It is the supreme law of our land and establishes an open society based on democratic principles, social justice and fundamental human rights. This it does in order to heal the divisions of our troubled past, to afford every citizen equal protection by the law and in the end to improve the quality of life of all citizens.

Our new constitutional enterprise carves out a new and substantially enhanced role for our courts. The Constitution itself requires courts of suitable jurisdiction to review the exercise of all public power and to exact compliance by all with constitutional dictates. Courts must when deciding a constitutional matter declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Again, competent courts must enforce rights conferred by the Bill of Rights and in doing so must consider international law and may consider foreign law. Even when interpreting the common law, customary and legislation courts must do so through the lenses of the Constitution and its normative value grid.

In most jurisdictions courts do not enforce socio-economic rights. However, our Constitution, in recognition of the persisting social injustice spawned by our unequal past and the indivisibility of rights, makes a different choice. Our notion of fundamental rights carries the novel and salutary feature that it extends to socio-economic rights. Our Constitution commits to pursue social equity. For these reasons the government has a duty to fulfill, protect and uphold these rights and courts are commanded to give effect to these rights

It is no exaggeration to say that the role of the courts is now as expansive as the Constitution is ubiquitous. This enhanced public duty has important implication for the judicial function, which now occurs within an articulated normative plain and a society in transition. The judiciary is duty bound to give effect to the transformative design of the Constitution. It must discard the worst of our jurisprudential past whilst

preserving those parts well-suited to our new societal ideals. However, important as it is, social context sensitivity is not in itself sufficient. It is not an adequate substitute for the quintessential attributes of a good judicial officer. Beyond integrity, fairness and impartiality judges must be competent, must be efficient and must be effective. They need not be nor are they infallible. But as a bare minimum, judges must possess the tools to dispense justice.

It may be argued that in a diverse society in transition the judicial task requires an even more nuanced and competent response. However, our Constitution does not specify the level of competence or practical experience required for an appointment to judicial office. Section 174 of the Constitution requires only that an appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. In practice the burden of quality assurance rests on the Judicial Services Commission on whose advice judges are appointed.

A further relevant consideration is that the Constitution highlights the need for the judiciary to reflect broadly the racial and gender composition of South Africa. The inevitable consequence of this implied appointment yardstick is that appointments are no longer drawn only from the ranks of silks practicing at the bar. In these circumstances systematic and customized judicial instruction is indicated and would be of great benefit to the bench and society alike.

Access to justice is bound to be illusory without judicial probity and competence and effectiveness. Powerful constitutional and social imperatives permit no debate on whether or not judicial education is necessary. It is a crucial means towards equal justice for all. Whatever suited the past, in this country and other jurisdictions, today it is well settled that a judiciary worthy of the name cannot execute its task properly without a conscious, well-planned and well-resourced judicial education programme which offers lifelong learning for those charged with so important a public task. In conclusion, it bears repetition that our transition to constitutional democracy has raised sharp legitimacy, competence and effectiveness questions, which render judicial education not only desirable but urgent.

2 The objectives of judicial education

But what is judicial education? A precise definition would diminish the inherently wide scope of what judges and magistrates, once appointed to judicial office, may or ought to learn about the society they serve and the nature of judicial function. Even away from definitions, the traditional preoccupation of judicial training tend to reinforce **first** impartiality; and integrity; which would include aspects of judicial independence, ethics, judging skill, bias, even-handedness; **second** competence; which emphasizes judgment writing and delivery, conducting a hearing, evidence and procedure, interpretation of legislative instruments, special or new areas of the law or legislation, fact finding and the exercise of discretion; **third**; efficiency; which would include computer skills, electronic and manual research skills, case flow management, delay reduction, court administration, documentation and archiving and **fourth** effectiveness; which implies judicial industry and preparedness at hearing, timely judgment delivery, proper formulation of court orders and adaptability.

We learn more about the nature of judicial education by looking at its objectives. That is so because judicial training is a means to an end. Its intermediate purpose is to foster a high standard of judicial performance and its ultimate objective is to ensure a fair and efficient administration of justice. Put simply its end object is to provide justice for all.

2.1 *Background*

Since the inception of our Constitution there has been several important debates on and research into appropriate judicial education for our country. I record only the very recent background. During his term, Chief Justice Chaskalson assisted by Justice Kriegler and other stakeholders formulated an impressive and comprehensive judicial education proposal. The Department of Justice and Constitutional Development (DOJ) did not support the proposal. Even so during the terms of Mahomed CJ and Chaskalson CJ much was achieved on the induction and orientation of newly appointed judges. These training programmes were usually funded by external donors and were possible only when donor funds were availed.

On the other hand magistrates were trained at the Justice College funded and managed by the DOJ.

In early 2006, leaders of the judiciary and the executive had a discussion on the principle, which should underpin judicial education and the fate of the Justice College in Pretoria. The discussion assumed a significant form when in October 2005, in a letter to the Chief Justice, the Minister, adopted the following stance:

“The faculty for the training of the whole of the judiciary will be independent. This means that this faculty shall be separated from the structure in which the other faculties are allocated and shall be managed independently in all material aspects. The location thereof shall also be decided by the judiciary.

The separation of the faculty of judicial training from the faculty for the training of civil servants requires also that the budget be allocated accordingly to either faculty. This will require that a mechanism be found for the accounting of the budget allocated to be done in terms of the Public Finance Management Act.

These changes will necessitate that I revisit the Justice College, its structure and its operations and transform it into an institution that will enable the Department to provide the training necessary for prosecutors, civil servants and the staff of the Master’s office and the office of the State Attorney”.

On 31 October 2005, the Chief Justice convened a meeting of the Interim Advisory Committee on Judicial Education on which is represented several judges, the Judicial Service Commission, the Justice Ministry, the Director General of Justice, the General Council of the Bar, the Law Society of South Africa, the National Prosecuting Authority, the Magistrate’s Commission, magistrates’ organisations (JOASA, ARMSA and LCMC), the Justice College, Society of Law Deans of South Africa. The meeting welcomed the attitude of the Minister and appointed a steering

committee chaired by Deputy Chief Justice Moseneke to formulate a plan of action towards the establishment of a judicial education body.

The steering committee met on 10 February 2006 and adopted several far-reaching proposals on the establishment of a judicial education body. The substance of the proposals is set out in what follows now.

2.2 *Features of the judicial education body*

The name. The judicial education body for South Africa is known as the **South African Judicial Education Institute (SAJEI)**.

Legislative framework. The Institute has been brought into being by national legislation and not by *ad hoc* or administrative arrangements between the judiciary and the executive arm of government. Its mandate carries the force of national legislation consistent with our broader constitutional framework and other applicable law.

Target group and beneficiary. The target group and beneficiaries of the training offered by the Institute is judges, aspirant judges, military judges, magistrates and aspirant magistrates. The training makes provision for the orientation and training of newly appointed judicial officers and continuing judicial education for appropriate categories of judges in active service. Orientation training will be compulsory for all newly appointed judicial officers. Similarly, any judge or magistrate who is elevated to a higher court or a position requiring new or additional leadership skills should submit to compulsory training suited to the new appointment. In principle the education programme of the Institute should reach all judges on an elective or minimum attendance basis.

Whilst the main thrust of the Institute should be the domestic junior and senior judiciary, it should, subject to appropriate financial arrangements, have the power to train judicial officers of neighbouring territories and other countries on the African continent and elsewhere, at their request.

In most Commonwealth and other democracies the training task of their judicial education institutes or academies includes judicial support staff. That appears to be so because in those jurisdictions the judiciary itself appoints, manages and remunerates its staff out of the national budget allocation to the judiciary through the Chief Justice. However, in our case support staff to the courts is employed by the DOJ. It is therefore appropriate to explain that there are historical and practical reasons for excluding support staff from the target group of the new Institute. We have cause to believe that the Ministry has formulated comprehensive plans to train staff other than judicial officers.

Functional and curricula independence. The legislative framework creating the Institute provides for an independent body, controlled and managed by the judiciary in a manner that ensures functional and curricula independence, as well as direct budgetary accountability under the PFMA Act and other legislation regulating management of public funds. The reality, as you will realise in a moment, is a little different.

Source of funding. The primary duty of funding the activities of the Institute rests with Parliament. An annual budget of the Institute is voted for and allocated by Parliament and provision is made for an accounting officer of the institute who shall, as required by law, account to the national treasury. Ideally the Institute accounts to Parliament for the proper and lawful use of money allocated to it. The one wrinkle and the biggest challenge to the Institute is the statutory provision that appoints the Director-General as the accounting officer of the Institute. This means that the funds of the Institute, so voted by Parliament, are under the custody and control of the DG. The Institute is yet to succeed in accessing the voted funds in order to implement its project.

Location, corporate identity and culture. The Institute is required to choose its location, develop a campus appropriate to its public mandate and in time cultivate an identity as well as its own culture. That would be a culture best suited to advance the characteristics the Constitution envisages for the judiciary and the people it serves.

Composition and powers of governing council. The legislative framework provides for a governing council of the Institute, which consists of a majority of judges and magistrates. All other stakeholders appropriately are presented on the governing council. The council assumes the ultimate responsibility for the management of the Institute, which includes the power to appoint the Chief Executive Officer and the senior executive management of the Institute and all committees which are necessary, to achieve the authorised objectives of the Institute. The first chief executive stayed in office for a month only. That in itself is a long story.

Importantly, the governing council is vested with the power to appoint a faculty board, which shall have the competence and power to formulate and direct all education and training of the Institute. The faculty board must from time to time decide the mode, content and level of tuition. The faculty board shall appoint appropriately qualified persons or bodies, whether full time or *ad hoc* to conduct the training and education.

In conjunction with the faculty board, the governing council must create a research capability on matters relevant to the formulation of dynamic and customised judicial education programmes. When appropriate, the board must develop techniques or tools to receive feedback from users of the justice system and to measure the impact of judicial education the Institute offers.

Executive management. There shall be an executive management of the Institute made up of the Chief Executive Officer, senior management and staff on whom the day-to-day administration of the institute shall vest. The executive management shall be appointed by and be answerable to the governing council.

Centre of excellence. The Institute must strive to achieve the highest possible standard in judicial education subject to the values and broader objectives of our Constitution. To this end, the Institute must build close ties and cooperation with regional and international judicial education institutes and other related bodies in democratic jurisdictions.

It is crucial to emphasize that until the Institute is established and functional, external donor funds will remain helpful, however, the primary responsibility of providing financial support for training of newly appointed judges must squarely fall on the fiscus. It bears repetition that a task so important to the well being of our state and its people cannot be left to the uncertainty of donor funding.

Special programme to accelerate training of women. During the term of Minister B Mabandla a special programme to accelerate the training of women who seek to be eligible for the appointment as judges was established. She made it then known that her Ministry has secured the funding necessary for this programme. Judge President Ngoepe led the team, which was charged with the implementation of this programme. Once the Institute has been established, a programme such as this one will ordinarily be implemented in-house. It is however clear that there is no reason why the programme should not proceed. If anything, it should be supported and funded as currently planned.

3 Conclusion

As we have seen, the Institute has not commenced delivering live lectures. The Justice College continues to train magistrates until the Institute is in a position to integrate the College fully into its operations. A mechanism is yet to be found on how to resolve the dilemma of the DG being the accounting officer of the Institute, on the one hand, and the Institute being operationally independent and effective, on the other. Until we find a solution, our operations will stay stalled.

These birth pains, I am confident, we will overcome. An urgent indaba between the judiciary and the executive should resolve these matters soon. We can't wait any longer before we impart and receive effective continuing judicial education.

An indispensable part of our constitutional project is to empower and to liberate women. It remains true although trite that when you train a woman you train the nation. Within the judiciary there is a dire need for a far greater level of gender transformation. We sorely need more female judges and magistrates and more

female judicial leaders. We must take urgent steps at all levels of entry and training to ensure a larger and more equitable representation of females in the judiciary.

The way we dispense justice must respond to the gendered nature of a variety of challenges in society. And the best source of validation and respect is competence which is an indispensable ingredient for a good judge. Access to justice, particularly by the marginalised, requires imaginative, sensitive, committed and competent judges. We need judges who are needs driven and who are determined to vindicate rights of aggrieved litigants impartially and without fear or favour. That deep instinct of fairness which seems to abound in women would be a great asset to our judiciary. We must continue to transform until there is a better life for all.

Thank you for listening and God Bless.