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CONCOURT A GOOD PLACE TO START GENDER TRANSFORMATION

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Transformation, transformation, transformation. This has been the rolling drumbeat behind judicial appointments over the past few years. While some appointments may have sparked controversy, there can be no denying that transformation of the judiciary is of great importance to our nation.

It is, after all, a constitutional imperative, since section 174(2) of the constitution requires that the judiciary reflect broadly the racial and gender composition of South Africa.

The conservative Institute for Accountability in Southern Africa has accused the Judicial Services Commission (JSC) of having lost its way by not appointing suitable candidates to fulfil judicial vacancies in the Western Cape. JSC spokesman Dumisa Ntsebeza responded by stating that the JSC would not apologise for making section 174(2) of the constitution the focus of its appointments. The Cape Bar Council subsequently had a successful challenge to the JSC upheld in a judgment by the Cape Town High Court, in which the court found the JSC's decisions to have been inconsistent with the constitution, unlawful and, consequently, invalid.

As this debate ensues further, attention also needs to be paid to the gender aspect of transformation. For while racial transformation has commanded much of the spotlight, the gender dimension seems to have been sidelined.

As of January 2012, only 27 percent of the country's permanent judges were female, with women holding only 65 of the 233 positions on the Bench. This is not a great improvement from June 2009, when only 42 out of 205 were female.

Our highest court in the land, the Constitutional Court, has only two females among the 10 serving justices. At no time in the past 18 years have there been more than three women judges sitting in

the court. These figures are disheartening and surprising, because while this problem is not unique to South Africa, the country has made a specific commitment to address the gross inequities of the past. It is here that we embrace non-sexism as one of our founding values and emphasise the need to move from a past of inequalities to a future that embraces a transformative society.

Wouldn't the courts, specifically the Constitutional Court, be a good place to start?

There are plenty of high quality female judges with a strong commitment to human rights and constitutional democracy who are suitably qualified to serve in the Constitutional Court, but for some reason are not willing to accept nomination or else not enough is being done to attract their candidacy.

Why the fuss with having more female judges, one may wonder? Does gender really matter?

Yes, it does and it should be non-negotiable. Although times have changed, some would argue that the judiciary is still a hostile environment for women. Having more women on the bench is not only about making a statement as regards equality and being representative of demographics – it is also important to do so because it provides judicial legitimacy by ensuring that the voice of women is heard directly on the bench.

Legitimacy stems from public confidence and the perception that courts are properly constituted to act in the best interests of society. Having more women on the bench is not just about numbers, it is about changing perceptions and attitudes that litigants are encouraged to approach the court knowing that they are represented in some manner or form, and will not be faced by a wall of men looking down upon them.

An equitable gender representation on the bench would be an emphatic way of showing more than 50 percent of our population that the justice system respects them and their interests.

This gender disparity has not gone unnoticed, with Justice Minister Jeff Radebe acknowledging in June 2009 that he remained concerned about gender representativity on the bench, pointing out that there was not a single female judge president in the country. The first woman Judge President was only appointed in 2010. In October 2011, CP Fourie, another spokesman for the JSC, stated that it remained concerned at the low number of women being nominated as judges.

With one Constitutional Court interview scheduled for June 9, and another vacancy arising next year, this would seem like a fitting time for the JSC to pro-actively ensure that gender transformation takes the front seat.

The JSC should simply say: these two seats are reserved – for women. The current four candidates who will be interviewed in June consist of three men and one woman. The JSC is required to advance four names for every Constitutional Court vacancy. Hence unless the JSC is willing to say that one or more are unappointable, it will be compelled to send all four to the president.

Former Constitutional Court Justice Yvonne Mokgoro once suggested that "... in the context of South Africa, it may not be constitutionally unreasonable for the JSC to take a most drastic corrective action, devoting a particular session to the consideration of women only for judicial appointment,

advancing the currently much-needed gender balance in the judiciary and doing so having invited nominations for women only”.

That time has now come. This would be a fitting occasion for the JSC and the president to fully embrace the idea of transformation by paying heed to the much-neglected area of gender.

As slow as the process has been thus far, we can transform the judiciary one woman at a time, starting with the current vacancy on the Constitutional Court.

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