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“Of rainbows and pots of gold –Transformation of the law, society and the legal profession in South Africa” by Thandiwe Matthews

Notwithstanding South Africa celebrating 20 years of its democracy, and despite its Constitution guaranteeing the right to equality, South Africa remains one of the most unequal societies in the world, which continues to be reflected largely along racial lines. Despite numerous legislative and policy attempts to achieve substantive equality the South African legal profession- ironically as custodians of the Constitution- has been unable to avoid mirroring this reality. This paper will seek to argue that in light of the current demographic statistics, the legal profession’s inability to adequately transform, particularly in relation to race, is reflective of the binaries so common to liberal democratic frameworks. The liberal assumption of equality between individuals inhibits its ability to account for the multitude of discriminatory experiences endured by marginalised individuals and groups as a result of institutionalised discrimination. Consequently, the legal profession’s approach to transformation has been reduced to achieving demographic targets rather than to redress past inequalities and acknowledge the role that the law played in entrenching socio-political and economic inequalities. It is argued here that approaching transformation through the lenses of Critical Race Theory and Black Consciousness could address these gaps not accounted for in traditional understandings of liberalism. This approach is largely informed by the idea that the law is not practised independently from the social reality of the society it seeks to serve but is in fact in fact, a function of the social context in which it is formulated. Through an analysis of various legislative and policy interventions, as well as case law, the paper will seek to highlight the tensions that exist between Constitutional guarantees of equality and the country’s inability to effectively realise a “rainbow nation” premised on the ideals of uBuntu, as envisioned in its early years of transition. Moreover, it will seek to argue that given the significant role that the non-governmental (NGO) legal sector has played in highlighting the socio-economic disparities that persist within South Africa, this sector ought to be taking the lead in ensuring that its professional constituency adequately reflects the communities it represents, not only as a means of achieving transformation within the profession, but more importantly, facilitating substantive access to justice. It is proposed here that by encouraging law graduates and legal professionals of all backgrounds, and especially those who have a keen interest in Constitutional law to learn an indigenous African language, as well as working in the lower courts which continues to service the vast majority of poor South Africans, the NGO legal sector can play a significant role in reducing current socio-economic inequalities beyond the attainment of noteworthy judgments. It will conclude by arguing that if law is key in shaping society, then lawyers are its architects. If South Africa is to realise its constitutional objectives of becoming a society based on the values of justice and equality, the legal profession ought to represent these values in its entirety, both in terms of substance as well as form.

Introduction

In 2010, a survey¹ conducted in conjunction with US-based Cyrus R Vance Centre for International Justice and the South African Law Society, revealed that South Africa's largest corporate law firms are still dominated by white men. In particular, white male domination is visible in the upper echelons of management and ownership, where the power to actively enforce transformation largely resides. More recently, a report² released by the Centre for Applied Legal Studies (CALs) and the Foundation for Human Rights (FHR) found that feelings of marginalisation and exclusion, experienced in particular by women and black professionals, persist within the legal profession. While these studies focussed largely on the private sector, the Bar and the judiciary, it demonstrated that despite the South African Constitution (Constitution)³ promoting equality and the implementation of legislation to give it effect, the legal profession remains largely untransformed.

Section 9(1) of the Constitution guarantees equality before the law, while Section 9(3) lists prohibited grounds of discrimination. Although the approach adopted in US jurisprudence giving effect to the 14th Amendment of the US Constitution has regarded "*affirmative action measures as a suspect category which must pass strict judicial scrutiny*"⁴, in the South African context the understanding of equality includes "remedial or restitutive equality", and is not understood as "reverse racism" or "positive discrimination". Rather, it is a means to abolish all forms of socially constructed barriers to achieving equality and to address systematic and institutionalised disadvantage⁵.

I argue in this paper that a key challenge in transforming the legal profession - with a particular emphasis on race - lies in the binaries common to liberal democratic frameworks. Due to the liberal assumption of equality between individuals, it does not adequately account for the nuanced experiences of victims of institutionalised discrimination. Rather, liberalism only recognises distinct forms of discrimination that have a direct impact on an individual and are visibly worthy of condemnation⁶. In order to address these gaps, I will present two theories, namely, Critical Race Theory (CRT) and Black Consciousness (BC), which I believe can enrich liberal misperceptions about structurally embedded discriminatory practices. Essentially, CRT recognises the relationship between race, racism and power embedded in the institutional structures that govern a society, rather than reducing racism to individual experiences of discrimination. It recognises that notwithstanding the formal abolition of discriminatory laws, discriminatory practices persist⁷. BC, on the other hand, aims to challenge the social construction of race and dismantle the psychological effects of institutionalised discrimination on victims of such discrimination. It recognises that such discrimination

¹ Plus94 Research (2013) "Project Law: Demographic Survey of South Africa's Large Corporate Law Firms", available at

http://www.lssa.org.za/upload/Project%20Law_Report_20130520_Final_Revised.pdf

² CALS (2014) "Transformation of the Legal Profession: Report"

³ Constitution of the Republic of South Africa, Act 108 of 1996.

⁴ *Minister of Finance & Another v. Frederik Jacobus van Heerden* (2004) CCT 63/03, p18.

⁵ Ibid.

⁶ Delgado, R & Stefancic, J. (2001) "Critical Race Theory: An introduction", *New York University Press*

⁷ Ibid.

impacts significantly on the healthy formation of one's identity and individual understandings of equality⁸.

It must be emphasised that I am not proposing a change to the framework currently governing South Africa's democracy. Rather, the aim of this paper is to address the gaps not accounted for by traditional understandings of liberalism. In the context of transformation of the legal profession, particularly in respect to race (and to some extent, gender), it is proposed that to address these shortcomings not only does one need to examine the structures that may lead to the continued exclusion of marginalised groups, but also the effect of such exclusion on identity formation and understandings of equality within such groups.

It is argued here that the view of employment equity or affirmative action initiatives (at instances used interchangeably) constituting "reverse discrimination" further highlights the blind spots not accounted for in liberalism. It also illuminates the tensions, which exist in the framework adopted in the South African Constitution. On the one hand the Constitution guarantees equality before the law and non-discrimination on a host of grounds including race; yet on the other, it aims to account for the nuances of institutionalised discrimination inherited from apartheid.

It must be noted that in this paper, reference to the law is not to provide a legal analysis of the legislation and case law governing employment equity or affirmative action in South Africa, but rather to emphasise that law is indeed informed by the context in which it operates.

South Africa's legal profession, particularly the public interest sector, has played an invaluable role in bringing to the fore socio-economic inequalities that continue to plague its society. However, notwithstanding these judgments, South Africa remains one of the world's most unequal societies, and still largely reflected along racial lines. The legal profession itself has been unable to avoid reflecting this present reality.

I argue here that the current experiences of marginalised groups and individuals are typical reflections of the limitations of liberalism's binaries, referred to throughout this paper. The legal profession has failed to grapple with the multiple experiences that victims of discrimination endure as individuals, notwithstanding the fact that in certain instances, victims may also be able to identify with common experiences collectively as a means of expressing political solidarity. Current experiences of marginalisation also reflect that despite the legislative interventions made to achieve substantive equality and dismantle institutional discrimination, the inherent nature of the rigidity of law does not account for these nuanced experiences. Moreover, black lawyers continue to suffer from internal feelings of inferiority.

Furthermore, it is my view that in the recent assessments of transformation, too much attention has been placed on the upper echelons of the profession, which attention may inadvertently reinforce the pressures currently being experienced by black lawyers. I argue here that while it is important that these spaces are transformed, as this is where the repositories of power are largely concentrated, of equal importance, is transforming

⁸ Biko, S (1978) *I write what I like*, republished in 2009

the lower courts and so-called “sub-sectors” of the profession. The Magistrates Courts represented the coalface in entrenching the systematic aspects of racial oppression during apartheid, and these courts remain a crucial aspect in accessing justice for the vast majority of the South African populace. It is therefore necessary that inasmuch as we need to see more black and female representation within the elite spaces of the profession, so too do we need to see more white and male faces in spaces servicing the public sector, particularly in the lower courts.

Importantly, though, access to justice can only be effectively realised if all users of the court system feel that they have been active participants in the court process. Key to achieving this is the language that gets used. South Africa currently has eleven official languages and its Constitution has attempted to place all eleven languages on equal footing, recognising the way in which language was used as a central component in facilitating the apartheid policy of divide and rule. However, English has become predominant language of commerce and governance, despite only 9.6%⁹ of the South African populace speaking the language. Thus, African languages remain marginalised and underdeveloped.

I would like to argue that in order to achieve the goals of both the transformation of the legal system, as well as the legal profession, the NGO legal sector should be taking the lead in facilitating such transformative processes beyond monitoring the efficacy of initiatives taken both at State level and within the profession itself. Such participation ought to be viewed as an essential component in developing the legal system, particularly by those interested in the development and implementation of Constitutional law. By encouraging young lawyers of all backgrounds to become fluent in an indigenous African language, in addition to spending some time being employed in the public (or State) sector, the NGO legal sector could play a more substantive role in facilitating access to justice, in addition to obtaining precedent-setting judgements in its quest to reduce the rampant inequality currently being witnessed in South African society.

I will conclude by arguing that if law is key in shaping the society that it governs, then lawyers are its architects. As custodians of the Constitution, the profession itself must embody the principles contained therein. Although the legal framework is laden with gaps due to the binaries so common to liberal democratic frameworks, those gaps are capable of being filled if those in privileged positions are able to recognise them. Notwithstanding the potential tensions that exist within the South African Constitution in respect to its equality provisions, it also provides sufficient room to account for the country’s past and achieve substantive equality if implemented in a nuanced but relevant manner.

In the words of Justice Ngcobo¹⁰:

“In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our

⁹ SouthAfrica.info (2014) “The languages of South Africa”, available at www.southafrica.info

¹⁰ See Note 4 above, p16; also *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*, 2004 (7) BCLR 687 (CC).

Constitution recognises that decades of systemic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it”.

Challenging the Liberal Binary – Race Politics, Critical Race Theory and Black Consciousness

At its core liberalism assumes equality between individuals. It, however, does not account for the differences that may arise between individuals due to the historical development of the society concerned or the role that State institutions may have played to construct those differences. Even when attempting to account for these socially constructed differences, liberal theory has been criticised for operating in distinct binaries. It does not take into account the varied experiences of those who have been victims of institutionalised discrimination, creating both similarities and differences between them. The inability of liberalism to adequately account for the variety of discriminatory practices that marginalised groups experience has resulted in the continued discrimination of such groups notwithstanding the political transition to liberal democracy¹¹. For example, while issues of race and class are distinct from each other, they are also related because they both relate predominantly to white wealth; however, liberalism does not adequately accommodate the experience of both forms of discrimination simultaneously¹².

Critical race theory (CRT) aims to address the nuances that liberalism does not account for. Originating out of legal scholarship in the United States in the 1970’s, by a group of lawyers scholars and activists who recognised that despite of the progress made legally through the Civil Rights movement, much of the work implementing these advances had either been stalled or negated¹³. With a particular focus on the United States, CRT recognises the relationship between race, racism and power embedded in the institutional structures that govern a society, as well as its social fabric. Challenging the notion that the law is neutral and “colour-blind”, CRT rejects liberalism on the basis that the framework supports the assumed notion of meritocracy. Rather, according to CRT, the law underpinning liberalism is a vehicle that solidifies wealth, power and privilege at the expense of marginalised groups. Liberalism creates the false presumption that if everyone works hard, anyone can attain wealth and privilege, but ignores the systemic inequalities resulting from institutionalised racism¹⁴.

The critique of liberalism’s approach to race advocated by CRT is rooted in the argument that the “colour-blind” approach reduces racism to individual experiences of discrimination, such as confronting intolerant attitudes, irrational behaviour and prejudice¹⁵. Through the lens of CRT, the concept of white supremacy need not relate only to racist right-wing extremism but refers to a system that governs political, legal,

¹¹ Grahn-Farley, M (2008) “Race and Class: More than a Liberal Paradox”, *Buffalo Law Review* (56), 935-952.

¹² Ibid.

¹³ See Note 6 above.

¹⁴ UCLA School of Public Affairs – Critical Race Studies “What is Critical Race Theory?”

¹⁵ See note 6 above.

economic and cultural social structures and in which whites maintain overwhelming control and power¹⁶. As such, the mere operation of dominant routines and practices that govern social structures perpetuate domination, oppression and injustice¹⁷, thus keeping marginalised groups in subordinate positions. Only a form of “colour consciousness” that recognises how marginalised groups are excluded from the dominant structures that govern a society, as well as ensuring an understanding of the contextual development of those institutions, will adequately address the gaps that the liberal “colour-blind” approach to race does not account for¹⁸.

CRT further draws from the concept of *anti-essentialism* derived from post-colonial feminist theory, emphasising that an individual’s identity cannot be fixed, categorised or boxed as one universal common experience between individuals of the same group¹⁹. CRT’s emphasis on anti-essentialism becomes relevant to the South African experience to challenge the inherent nature of the rigidity of law that continues to exist in post-apartheid South Africa, especially given the role that law played in creating homogenous and oppressive racial categories during apartheid²⁰. However, CRT simultaneously acknowledges certain commonalities that exist between individuals of marginalised groups, required to strategically politicise issues and collectively tackle systemic disadvantage and structural power. Closely linked to anti-essentialism, CRT also recognises the value of *intersectionality*, not accounted for in liberalism; namely, that individuals can experience multiple forms of discrimination simultaneously²¹.

As already pointed out by Modiri²², who advocates for a post-apartheid CRT that situates race within the legal, political and social discourse, the current approach to transformation adopted in South Africa has resulted in legal scholars, practitioners and judges overlooking the manner in which racial identities and hierarchies have been woven into social systems including law. Particularly in South Africa, where law was used as a vehicle to institutionalise white supremacy and white privilege, CRT becomes relevant even in post-apartheid South Africa, as these forms of domination continue to exist alongside racial exclusion, with access to wealth, education and power still largely defined along racial lines²³. Moreover, the notion that the end of apartheid as a legal system of governance has led to the equal enjoyment of formal legal rights regardless of race, has resulted in blind spots not being addressed in South African race discourses. Language such as “previously disadvantaged” reinforces the idea that the marginalisation of black South Africans is limited to the historical experience of apartheid and ignores the reality that notwithstanding the abolishment of institutionalised racism, marginalisation continues to be experienced²⁴.

¹⁶ Modiri, M (2012) “The Colour of Law, Power and Knowledge”, *South African Journal on Human Rights*, 28, 405-436

¹⁷ *Ibid.*

¹⁸ See note 6 above.

¹⁹ *Ibid.*

²⁰ See Note 16 above.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

In the context of South Africa, the critique of the liberal approach to race is not new. In an attempt to challenge the effects of the social construction of race during apartheid and the negative impact of such classifications on the psyche of those considered “non-white”, the Black Consciousness Movement (BCM) aimed to dismantle the psychological effects that apartheid had on black people. Due to the approach adopted by the apartheid regime, which sought to divide South Africa’s “non-white” population into bizarre racial categories and further entrenched through institutional discrimination, the BCM aimed to unify these various racial categories through the collective term “black”²⁵. As explained in 1971 by the movement’s leader, Steve Biko:

“Being black is not a matter of pigmentation – being black is a reflection of mental attitude; merely by describing yourself as black you have started on a road towards emancipation, you have committed to fight against all forces that seek to use your blackness as a stamp that marks you as a subservient being”²⁶.

BC’s commonalities with CRT therefore, lies not so much in the language used but rather in the conceptualisation of the collective and systemic experiences of discrimination and oppression. The term “black” thus became a means of resistance and defiance to the social construction of race imposed by the apartheid State. As explained further by Biko²⁷, Black Consciousness (BC) *“seeks to infuse the black community with a new-found pride in themselves, their efforts, their value systems, their culture, their religion and their outlook to life”*.

While CRT emphasises the effects of institutionalised discrimination embedded in social structures notwithstanding the formal abolition of discriminatory laws and practices, BC highlights the psychological impact of such discrimination on the healthy formation of one’s identity and individual understandings of equality. It is therefore proposed that in effectively addressing the shortcomings presented by the binaries so common to liberal democratic frameworks, not only does one need to examine the structures that may lead to the continued exclusion of marginalised groups, but also the effect of such exclusion on the identity formation and understandings of equality within such groups.

Transformation and the Law

Law is largely informed by the context in which it operates. It, in turn, plays an integral role in shaping both a country’s socio-political and socio-economic trajectory, as well as its national identity required to achieve desired outcomes. In the early years of consolidating South Africa’s democracy, the term “rainbow nation” became the symbol of South Africa’s transition after the downfall of apartheid. However, it has been argued²⁸ that the term’s focus on racial harmony assumed that the predominant conflict in South Africa centred around race alone. It ignored the class conflict also created by apartheid, and equally important to the democratisation project. According to Habib²⁹ therefore, key to achieving Constitutional democracy would be, *inter alia*, the

²⁵ Biko, S (1978) *I write what I like*, republished in 2009.

²⁶ *Ibid*, p52.

²⁷ *Ibid*, p53.

²⁸ Habib, A. (1997) “South Africa – The Rainbow Nation and Prospects for Consolidating Democracy”, *African Association of Political Science*, 2(2), 15-37.

²⁹ *Ibid*.

achievement of a national political identity where the majority of the country's citizens perceive themselves in South African terms and a perception amongst the majority its populace that attempts were being made to transform the racial character of ownership relations in the South African economy³⁰.

During or about the same time that efforts were being made to recreate South Africa's national identity as one of racial harmony, and in order to incorporate marginalised African "culture" (referring here both to African social practices and customary law) within the country's mainstream social structures, the term *uBuntu* became the foundation of the new Constitutional order. As explained by Justice Yvonne Mokgoro³¹, the concept is not easy to define, especially translating it to another language from the abstract. This approach defies the essence of the African worldview. She states:

"...I will not attempt to define the concept with precision – that task is unattainable. In one's own experience, it is one of those things that you know when you see it".³²

In essence, the root of *uBuntu* lies in the anti-individualistic conduct that may threaten the collective survival of the group. Key social values include group solidarity, compassion, respect, and human dignity³³.

Mogkoro³⁴ therefore argued that the incorporation of the concept of *uBuntu* into mainstream South African jurisprudence – in a manner that consciously and strategically aligned African social innovations and historical cultural experiences with contemporary legal notions and techniques – would be a means of creating a legitimate system of law for all South Africans³⁵. *uBuntu*, and not victimisation, was also key in creating a national identity premised on understanding rather than vengeance, and reparation rather than retaliation, in order to achieve the socio-political transformation as envisioned in both South Africa's interim and final Constitutions³⁶.

The Constitution and various forms of legislation have been enacted attempting to give effect to the abstract concepts of "rainbow nation" and *uBuntu*, in order to achieve the broader objective of substantive equality and inclusive citizenship. While section 9 of the final Constitution³⁷ recognises the right to equality and equal protection before the law, it also recognises the need for redress and reparation due to the effects of marginalisation stemming from institutionalised discrimination inherited from apartheid. In terms of section 9(2):

"Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to

³⁰ Ibid, 19.

³¹ Mokgoro, Y. (2012) "uBuntu and the Law in South Africa" in Cornell and Muvangua (eds.) *uBuntu and the Law: African Ideals and Post-apartheid Jurisprudence*, Fordham University Press, 317-323.

³² Ibid, 317.

³³ See note 31 above.

³⁴ Ibid.

³⁵ Ibid, 321.

³⁶ See note 31 above.

³⁷ See note 3 above.

protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.

The Employment Equity Act (EEA)³⁸ recognises “*that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.*” Further, the Broad-Based Black Economic Empowerment Act (BBBEEA)³⁹ was established in order to “*promote the achievement of the Constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution...*” In terms of this Act “black people” is a generic term referring to African, Coloureds and Indians, as per the socially constructed racial categories imposed during apartheid.

These legislative attempts to achieve substantive equality have been challenged on the basis of constituting unfair discrimination and contrary to the values of equality expressed in the Constitution. However, as explained by Justice Moseneke in the Constitutional case of *Minister of Finance & Another v van Heerden*⁴⁰ the right to equality must be viewed in the context of the country’s history and the underlying values of the Constitution. In the quest of achieving a society based on non-racialism and non-sexism, one must have a conception of equality that goes beyond “*mere formal equality and mere non-discrimination which requires identical treatment...*”⁴¹

Justice Mokgoro, in the same case, states the following:

*“It is no mistake that our Constitution uses the phrase “achievement of equality”. The tremendous indignity and political oppression that characterised years of apartheid was coupled with the systemic entrenchment of economic disadvantage for millions of South Africans. The vast majority of this country’s wealth remained then and remains still, as a consequence of the entrenched disadvantage, in the hands of a minority....”*⁴²

The case also acknowledges that in certain instances, there may be “*windfall beneficiaries*”, or rather advantaged individuals who are exceptions within marginalised groups. However, this is not sufficient to undermine the legal efficacy of affirmative action schemes, and its value must be measured against the majority rather than the minority to which this reality may apply⁴³.

Notwithstanding the analyses provided in cases such as the one cited above as to why attempts to achieve employment equity in its current form is not contrary to the Constitution, perceptions that these attempts constitute “reverse discrimination”

³⁸ No. 55 of 1998.

³⁹ No. 53 of 2003.

⁴⁰ CCT 63/03

⁴¹ *Ibid*, 16.

⁴² *Ibid*, 43.

⁴³ *Ibid*, 24.

continue to persist in South African society. As noted by Padayachee⁴⁴, both proponents and opponents of employment equity or affirmative action believe in the ideal of equality. However, opponents argue that assigning preferential treatment to previously marginalised groups will entrench the barriers it seeks to eliminate and that the desired social cohesion will not be achieved; rather it will create further resentment and hostility between race groups. Furthermore, according to opponents, justice requires that only individuals who actually experienced personal harm should be compensated, rather than entire groups or classes of people at the expense of other. This approach, it is argued, will result in innocent individuals, particularly innocent white males, being penalised through no fault of their own. It is further argued that one be rewarded solely on the basis of one's abilities rather than inherent characteristics such as race or gender, and that preferential treatment based on these inherent characteristics will reinforce the perception that beneficiaries cannot succeed on their own without legislated employment equity initiatives⁴⁵.

I argue in this paper that these perceptions highlight the blind spots not accounted for in liberal democratic frameworks, which prioritises individual rather than group experiences. On the one hand the South African Constitution guarantees equality before the law and non-discrimination on various grounds including race; yet on the other, it aims to account for the nuances of institutionalised discrimination inherited from apartheid. Tensions are therefore bound to arise.

In the South African context, group experiences are crucial in understanding past and present human rights violations. According to Valji⁴⁶, the TRC's narrow mandate to focus solely on gross human rights violations and individual acts of violence, which occurred due to political conflict, ignored the systemic everyday experiences of apartheid – now legally defined as a crime against humanity. Quoting Mamdani⁴⁷, violence in South Africa was committed in defence of racialised privilege, “*aimed less at individuals than at entire communities, and population groups*”. Consequently, the experience of apartheid was confined to a minority of perpetrators, defined as state-agents, and victims, defined as political activists.⁴⁸ These early attempts to consolidate South Africa's democracy demonstrate CRT's critique of liberalism's “colour-blind” approach that allows only for the redress of extremely blatant racial harms, which is visible and worthy of condemnation, while systemic discrimination remains unaddressed.

Similarly, while the incorporation of *uBuntu* into South Africa's mainstream legal system attempted to acknowledge the role that law played in systematically causing divisions within the country's populace, its emphasis on the restoration of peace and the prioritisation of the collective has also been interpreted to mean that engaging with the

⁴⁴ Padayachee, PG (2003) “*A Study of Affirmative Action and Employment Equity in Higher Education Institutions in KwaZulu-Natal*”, University of Pretoria.

⁴⁵ *Ibid*, 74-78.

⁴⁶ Valji, N. (2004) “Race and Reconciliation in a Post-TRC South Africa”, *Centre for the Study of Violence and Reconciliation*, paper presented at conference entitled “Ten years of democracy in South Africa”, Queens University (Canada), May 2004.

⁴⁷ Mamdani, M (2000) “The truth according to the TRC” in I. Amadiume and A. An-Naim (eds.) *The politics of memory: Truth, healing and social justice*, 179.

⁴⁸ *Ibid*.

country's past of institutionalised discrimination will reinforce division rather than eliminate it. The term "black", for example, incorporated into the BBBEEA has not been interpreted through the BC lens as collective resistance to the superficial racial categories imposed by apartheid but rather as a result of the delineation of "black" to these very racial categories, transformation in this regard has been reduced to quotas. Notwithstanding the various explanations proffered by the country's highest court detailing why substantive equality in the South African context requires more than mere formal equality, policies aimed to redress institutionalised discrimination further reveal the challenges presented by liberal binaries.

As demonstrated in a recent opinion piece by one of the country's prominent law firms⁴⁹- which advocates for differentiation within groups to prevent preferential treatment of those from (previously) marginalised groups who appear to no longer need such preferential treatment (the so-called "windfall beneficiaries")- liberal binaries do not allow for the multiple forms of discrimination individuals emanating from such groups may experience. In critiquing the approach adopted in the *van Heerden* judgment the piece states:

"On a purposive interpretation, the legislature could not have intended for all black people to benefit from restitutionary measures, but rather for all people who had previously been victims of unfair discrimination and were still disadvantaged. Should any person or category of persons fall outside of this ambit, there no longer exists a rational link and they cannot benefit from affirmative action".

Twenty years into South Africa's democracy, there is still an inability to locate the law as a means to address the effects of decades of institutionalised discrimination. This failure has also resulted in the inability to acknowledge that the operation of dominant routines and practices within social structures may perpetuate the exclusion of individuals from marginalised groups notwithstanding Constitutional guarantees of formal equality or the apparent progress of a minority of individuals emanating from these groups.

Mind the Gap – the role of the legal profession in facilitating transformation

It cannot be disputed that the legal profession, particularly the public interest sector, has played an invaluable role in highlighting the numerous socio-economic disparities that continue to plague South African society. Moreover, it has contributed to developing South Africa's Constitutional jurisprudence thus providing much needed content to both civil-political and socio-economic rights contained in its Constitution. Landmark judgments such as *The Government of the Republic of South Africa & Others v Grootboom*⁵⁰ rendered socio-economic rights justiciable and stated that rights should be understood in their social and historical context. Quoting Justice Yakoob⁵¹:

"Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the

⁴⁹ Visagie, D. & Burger, S (2014) "Affirmative Action: the (missing) link between benefit and disadvantage, *The Times Newspaper*.

⁵⁰ CCT 11/00

⁵¹ *Ibid*, p19

foundational values of our society are denied to who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to reach their full potential”.

Judgments such as the one cited, which place socio-economic rights on somewhat equal footing as civil-political rights have often been the first of their kind, thus catapulting the South African Constitution as one of the most progressive in the world. However, notwithstanding these judgments, South Africa remains one of the world’s most unequal societies⁵², and still largely reflected along racial lines. A recent report⁵³ revealed that the increase in the skilled black workforce (managers, professionals and technicians) increased from 15% in 1994 to 18% in 2014, while in the white workforce this number increased from 42% in 1994 to 61% in 2014. This has been the case notwithstanding the increase in unemployment from 22% in 1994 to 25% in 2014.

Despite the integral role that the legal profession has played in obtaining these judgments, the legal profession itself has been unable to avoid mirroring South Africa’s current reality. A recent survey⁵⁴ of 12 of South Africa’s largest corporate law firms revealed that while 53.4% of the legal professional employed were females, of those white females constituted 26% at equity partner level, while only 5% were black African females. While men constituted 46.6% of employees at firms participating in the survey, 45% of the salary partners, 72% of the managing partners and 80% of the CEO’s were white males. According to the Law Society of South Africa (LSSA)⁵⁵, which regulates the attorneys’ profession, as at March 2013 of the total practicing attorneys registered (21 463), 64% were white male, while only 12% were black female. This is not withstanding the steady increase of black and female law graduates. In 2011, for example, the LSSA recorded that 55% of South Africa’s law graduates were female, while 61% were black. Although more female attorneys were admitted to the profession in the same year (56%), only 47% of the attorneys registered were black, while 53% were white. The Bar regulating South Africa’s advocates, and from which pool judges are primarily selected seems to fare even worse – only 4.5% are black African females⁵⁶.

The statistics therefore indicate that despite the legislative measures put in place to facilitate transformative employment equity processes, particularly in respect to gender and race, South Africa’s legal profession remains dominated by white men.

⁵² In 2011, World Bank rated South Africa’s Gini coefficient at 0.65

⁵³ StatsSA (2014) “Employment, unemployment, skills and economic growth: An exploration of household survey evidence on skills development and unemployment between 1994 and 2014”

⁵⁴ Plus94 Research (2013) “Project Law: Demographic Survey of South Africa’s Large Corporate Law Firms”

⁵⁵ LSSA (2013) “Further submissions by the Law Society of South Africa on the Legal Practices Bill”, available at

<http://www.lssa.org.za/upload/Further%20submissions%20by%20the%20LSSA%20on%20the%20Legal%20Practice%20Bill%20May%202013.pdf>
<http://www.lssa.org.za/upload/Further%20submissions%20by%20the%20LSSA%20on%20the%20Legal%20Practice%20Bill%20May%202013.pdf>

⁵⁶ Du Plessis, C. (2014) “A new old boys’ club?”, *City Press*, p8.

While there is a pressing need for interrogating the transformation of South Africa's legal profession, this inquiry cannot halt at the mere quantification of black female professionals versus white males. As a recent report released by the Centre for Applied Legal Studies (CALs)⁵⁷ demonstrates interrogating transformation in terms of both race and gender poses a great challenge. As argued in the report, the debate itself has been reduced to talent versus diversity. However, in its effort to account for the variety of discriminatory practices experienced by marginalised groups, the report reproduces a mere description of various themes of discrimination. The categorisation into "themes" of discrimination reflects the choices people are forced to make as a result of the binaries presented by liberalism. Although the report is largely descriptive of the feelings of exclusion that individuals from these groups tend to experience, what is telling is that the recommendations do not call for a change in law or policy, but rather for a change in attitude from various sectors in the profession to address these feelings.

The gender/race binary is also reflected in recent discussions about transformation of the judiciary. Increasingly, concern has been raised that although there has been improvement in the racial composition of the judiciary, it is still dominated by men. Only two of South Africa's Constitutional Court judges are women, and within the attorneys' profession, women (of all races) currently constitute only 35%⁵⁸. In a recent incident⁵⁹, a black African female judge requested to be transferred from sitting on the Bench of one court to another both situated in the rural province of the Eastern Cape, in order to be closer to her family and attend to her children. She detailed the strain her family was under as a result of her not being at home on a fulltime basis, and the burden of having to constantly commute between one town to the other to fulfil her obligations both as a judge and a mother. The lack of empathy relayed by the interviewing panel reduced her to tears, to which the response was (and notably by a black African female panellist): "*That will not get you any sympathy from us*". Her request was denied on the basis that she failed to demonstrate "sufficient cause", notwithstanding the panel constituting lawyers with credible human rights track records.

Although the lack of gender equity within the judiciary is cause for concern, the experiences of white women in South Africa are markedly different from those of black women, and even to those who appear to be of the same class. Notwithstanding apartheid's patriarchal biases, white women benefitted from the same material privileges that all white South Africans benefitted from. As such, they were not (and I would argue, are still not) subjected to having to make the same choices as their black counterparts, such as the one described in the paragraph above. Despite the class privileges that many black women may have been exposed to (and here I refer to those who form part of the new black elite), which may have not been experienced by their white female counterparts, once they enter the profession these women will have very different experiences because of the racist and patriarchal practices so deeply rooted in the profession as an institution. Black women are subject to the same racial discrimination as their black male counterparts, as well as having to endure the gender

⁵⁷ CALS (2014) "Transformation of the Legal Profession: Report"

⁵⁸ Ibid.

⁵⁹ Malala, J. (2014) "The Big Read: No way is this transformation", *City Press Newspaper*, 14 October 2014.

discrimination exercised often by both black and white males in the sector. Consequently, many end up leaving the profession quite early into their careers because they feel defeated, regardless of their perceived class privilege.

I argue here that the experiences of black women described above, and as advocated by CRT, are typical reflections of the limitations liberalism's binaries. The legal profession has failed to grapple with the multiple experiences that black women endure as individuals, notwithstanding the fact that in certain instances, black women may be able to identify with common experiences as a collective as a means of expressing political solidarity. As such, black women can simultaneously identify with discriminatory experiences with each other regardless of class, as well as with the experiences of white women, regardless of race. It further reflects that despite attempts by the employment equity legislation to achieve substantive equality and dismantle institutional discrimination, the positivist approach to law that continues to exist in post-apartheid South Africa does not allow for these nuanced experiences. Consequently, and notwithstanding South Africa's evolution into Constitutional democracy, black women's experiences of discrimination and exclusion have not as yet been fully accounted for as they continue to be subjected to having to make the choice between advocating for racial transformation or gender transformation but never both. The dominant practices rooted in patriarchy and racism that continue govern the legal profession thus perpetuates the exclusion and marginalisation of black women.

Moreover, black lawyers (both men and women) continue to suffer from internal feelings of inferiority. Another finding in the CALS⁶⁰ report revealed that a black senior advocate would prefer to refer matters to white junior advocates, despite the availability of black junior advocates, primarily because his white colleagues underestimate black juniors, and because he himself was underestimated as a black junior. There is an inherent fear that if a black advocate fails to perform, it will serve as a confirmation that all black professionals are ill equipped with the required skills. Consequently, work is referred to white advocates by black professionals in an attempt to avoid confirming the prejudice that black advocates are incompetent. Again, this reveals the blind spots not accounted for by liberalism's "colour-blind" approach to race, and why BC remains relevant in the post-apartheid context in order to address them. It highlights that despite South Africa celebrating twenty years of democracy, the psychological impact of decades of institutional discrimination and exclusion has had a profoundly negative impact on the healthy formation of black identity and individual understandings of equality.

It is acknowledged that the legal profession as a whole is inherently conservative, and more so in South Africa. As noted by senior advocate Izak Smuts SC⁶¹, roughly 342 years of racial and gender discrimination produced a legal profession and judiciary that lived alongside, and enforced, racism and sexism, coupled with authoritarianism and suppression. More legislative interventions are currently underway to address the shortcomings of the profession – these include the recent promulgation of the Legal

⁶⁰ See Note 57 above.

⁶¹ Smuts, I. (2013) "On transformation and the legal profession", address to NGO Ndifuna Ukwazi, 10 September 2013.

Practices Act⁶², which will require a newly formed Legal Practice Council to, *inter alia*, develop programmes to empower historically disadvantaged legal practitioners and candidate legal practitioners; as well as proposed changes to the Bachelor of Laws curriculum to ensure that law graduates are better equipped to perform in the legal profession. However, as argued throughout this paper, while policy and legislative interventions aimed to fast track transformation are welcomed, the success of any law is largely dependent on the will of those who exercise power to implement it. Until there is a clear understanding as to what transformation ought to mean within the legal profession and the South African context in general, the transformation process will likely continue to be stalled.

Importantly, much of the research on transforming the legal profession appears to be focussed on targeting the elite strata of the sector, namely the corporate legal sector and the judiciary, with recommendations geared primarily toward the private sector and the State. I would like to urge the public interest (or NGO) legal sector to reflect on its own professional constituency, and how representative it is of South Africa's race and gender composition, as well as the role it ought to be playing in assisting with the transformation of profession, in conjunction with the role that it has been playing in transforming society, particularly in relation to the advancement of civil-political and socio-economic rights.

It is noted that the NGO sector is donor dependent to survive, and consequently subjected to the consequences of fluctuations in the economy. However, as argued by Cote and van Garderen⁶³, public interest litigation attracts a lot of media publicity, which can attract further investment notwithstanding the political challenges some benefactors may have with NGO's acting against the State. It is also acknowledged that that it may be difficult to recruit skilled and experienced lawyers given the limited amount of funding and resources available to the sector⁶⁴. However, it can no longer be argued that South Africa lacks the skills required by the sector given the amount of graduates currently being produced by the country's law schools. In addition, it can be inferred from the LSSA's statistics that the lack of transformation is not only confined to South Africa's corporate and judicial legal environment, but also extends to the NGO legal sector.

Cote and van Garderen⁶⁵ further explain that in the context of public interest litigation relating to refugees as an example, dispelling myths held by some members of the judiciary and black communities that NGO's are middle-class organisations that cannot relate to people from these communities, diversity within the NGO sector is essential to rid itself of this assumption. The authors note that black lawyers are largely underrepresented in the public interest legal sector. I would argue further that given the increasingly racialised context South Africa currently finds itself in, that transformation of the NGO legal sector is essential to send a message to the government and South African society at large that litigating public interest issues is not limited to white

⁶² 28 of 2014

⁶³ Cote, D and van Garderen, J (2011) "Challenges to Public Interest Litigation in South Africa", *SAJHR*, 27, 167-182.

⁶⁴ *Ibid*, p176.

⁶⁵ *Ibid*, 177.

lawyers expressing their dissatisfaction with black governance on elite platforms such as courts (while the black populace is reduced to protesting in the streets), but that these are issues that concern all who believe in the rights enshrined in the Constitution, both black and white.

Moreover, much has been written about what constitutes a “conscious lawyer” or a “fit and proper” person required to sit as a judge. I agree that the determination of merit needs to include both the technical and analytical skills required to be a competent lawyer, in addition to a thorough understanding of the country’s social, political and economic reality⁶⁶. I further agree that these characteristics are not limited to one’s race. However, it is my view that too much attention has been placed on the transformation of the upper echelons of the profession. I would like to argue that while it is important that these spaces are transformed, as this is where the repositories of power are largely concentrated, of equal importance, and particularly in relation to the development of a “conscious” lawyer, is transforming the lower courts and so-called “sub-sectors” of the profession.

This limited approach to transforming the sector fosters the notion that there are only certain spaces where one can gain credibility as a competent lawyer, and consequently adds to the perpetual inequalities that we currently see plaguing the profession. Being “conscious” also requires being conscious about one’s race, gender and class privilege. Although the new Legal Practices Act provides for community service for law graduates and legal practitioners, such participation needs to be understood not as fulfilling the legislative requirements to be qualified or as a form of charity or sacrifice, but rather that working in these spaces is equally important to the transformation of the country as a whole and facilitating access to justice. We cannot forget the role that the Magistrates Courts played in entrenching the systematic aspects of racial oppression during apartheid, including the pass laws, segregation laws and detentions without trials implemented on a daily basis⁶⁷. As advocated by Tilley⁶⁸, if we claim that judges matter for ordinary people, they should matter at all levels of the courts, and especially those which service the majority of South Africa’s people. She states:

“If we are to take the transformation of the judiciary seriously, we need to be building capacity from the ground up. The magistracy cannot be a sinecure for failed lawyers, who sleep in court, ignore court orders, and don’t get on with the business of judging....the transformation of the judiciary requires that we behave as though judges matter. In all things.”

It is therefore necessary that inasmuch as we need to see more black and female representation within the elite spaces of the profession, so too do we need to see more white and male faces in spaces servicing the public sector, such as the lower courts or community advice centres or legal aid services. I advocate here that the NGO legal

⁶⁶ Solik, G (2013) “Transforming the judiciary: who should judges be?”, *The People’s Law Journal*, 1, 4-11.

⁶⁷ Darch, E. and Calland, R. (2013) “Role of the Courts and Judiciary in advancing Access to Justice”, *Department of Justice and Constitutional Development*.

⁶⁸ Tilley, A (2014) “Asked and answered: Do judges matter at magistrate court level?”, *Daily Maverick*, available at www.dailymaverick.co.za.

sector has a vital role to play in this regard. It is in these spaces where the administration of justice to those who require the protection of the Constitution the most occurs; it is in these spaces where we determine whether the implementation and realisation of the rights contained in successful Constitutional court judgments has indeed occurred; and it is in these spaces where we are able to play an active role in sculpturing a society based on the values of *uBuntu*, justice and equality.

Transforming the bottom – the role of language and the lower courts

Learning another language is not only learning different words for the same things, but learning another way to think about things. – Flora Lewis (my emphasis)

If you talk to a man in a language he understands, that goes to his head. If you talk to him in his language, that goes to his heart. – Nelson Mandela

It has been argued⁶⁹ that if culture determines our attitudes, tastes and values, then language is the central feature of culture, as it is in language that culture is transmitted, interpreted and configured. Culture has become key in contemporary debates about identity, social cohesion and the development of a knowledge-based economy. Moreover, language and literacy are crucial for societal development. As advocated by the Prah⁷⁰:

“A society develops into modernity when its citizens are literate in the languages of the masses....It is not possible to reach modernity if the language/languages of literacy and education are only within the ambit of small minorities. Historically, the jump towards expanded knowledge production and reproduction in societies is only possible when the languages of social majorities have been centrally placed”.

South Africa currently has eleven official languages, in an attempt to recognise the diminished use and status of indigenous languages⁷¹. The Constitution states further that “*the State must take practical and positive measures to elevate the status and advance the use of these languages*”⁷². As such, the Constitution has attempted to place all eleven languages on equal footing, recognising the way in which language was used as a central component in facilitating the apartheid policy of divide and rule⁷³. In the early years of South Africa’s democracy it was recognised that multilingualism was invisible in the public service, in most public discourse and in mass media. Efforts were therefore made to develop a National Language Plan recognising, *inter alia*, that African languages were marginalised due to past discriminatory policies and as such should be maintained and developed.

However, the relationship between language and culture is only one aspect of why language is important to societal development. According to the 2011 national census⁷⁴, the majority of South Africans speak isiZulu (22.7%), followed by isiXhosa (16%) and

⁶⁹ Prah, K. (2006) “Challenges to the promotion of indigenous languages in South Africa”, *Centre for Advanced Studies of African Society*, Cape Town

⁷⁰ *Ibid*, p4.

⁷¹ Section 6, Constitution of the Republic of South Africa, Act 108 of 1996.

⁷² *Ibid*, Section 6(2).

⁷³ See Note 69 above.

⁷⁴ SouthAfrica.info (2014) “The languages of South Africa”, available at www.southafrica.info

Afrikaans (13.5%). Only 9.6% of the country's population speaks English. Notwithstanding this disparity, English has become the most visibly dominant language in the country, and maintains its status as the predominant language of commerce and governance. Consequently, and contrary to what was envisioned in the Constitution, African languages remain marginalised and underdeveloped.

Acknowledging the mistrust that apartheid caused toward the rule of law, in order for the new Constitution-based system of law to dispense justice and reach its egalitarian goals, *access to justice* first needed to be provided. In the last two decades the legal system has been transformed with a view of extending access to justice to the 90% of the population who had previously been excluded⁷⁵. More courts have been established, particularly in so-called previously disadvantaged communities, with the creation of specialised courts to address priority areas such as small claims, equality and sexual offences. In addition, in early 2009 the then Department of Justice and Constitutional Development (DOJCD) launched pilot indigenous language courts in Zwelitsha in the Eastern Cape and Khayelitsha in the Western Cape, where court proceedings and the accompanying transcriptions were conducted in isiXhosa, the dominant language in both areas. Thus, not only was access to justice enhanced but there was also less dependence on interpreters and the risk of human error in translation was reduced⁷⁶.

However, despite the establishment of more courts to serve the majority of the country's people⁷⁷, including measures taken to ensure that they are affordable and accessible, access to justice remains stalled because they are unable to cope with the case load leading to unacceptable delays in the resolution of cases; infrastructure is sub-standard and inaccessible to people with disabilities; and courts remained understaffed and incapacitated with staff who possess the requisite skills⁷⁸.

According to the LSSA⁷⁹, a key challenge in respect to transformation of the legal profession relates to access to justice and equitable access to quality legal services by the majority of South Africans. Not only does this include gender and race diversity, but also the quantity and geographical spread of practitioners, particularly in rural and historically black communities. Coupled with this is the scarcity of legal and technical skills in certain areas of the law such as commercial and Constitutional law, particularly in the lower courts and amongst lawyers from historically disadvantaged communities.

Consequently, part of the need to establish the Legal Practice Act was to ensure the provision of legal services to all people who require it thereby ensuring equal protection and benefit of the law for all. Importantly, it was also to ensure an efficient and effective legal profession that incorporated a people centered approach to the delivery of legal services⁸⁰. It was therefore recognised that a transformed profession in its entirety, both in terms of constituency and mindset, would be vital to ensuring a transformed judiciary.

⁷⁵ See Note 67 above.

⁷⁶ *Ibid*, p12.

⁷⁷ There are 761 Magistrates' Courts of which 700 are currently operational, see Note 67 above.

⁷⁸ See Note 67 above.

⁷⁹ LSSA "Key Principles underpinning transformation of the legal profession: Consultation with the Legal Profession"

⁸⁰ *Ibid*.

A Way Forward: Capacitating the Lower Courts and Promoting Indigenous African Languages

I would like to argue that in order to achieve the goals of both the DOJCD in terms of transforming the legal system, as well as the LSSA with respect to the legal profession, the NGO legal sector has the opportunity to take the lead in facilitating such transformative processes beyond monitoring the efficacy of initiatives taken both at State level and within the profession itself. I propose here that the NGO legal profession has a significant role to play in ensuring that the lower courts established to provide access to justice for the majority of the country's people, are in fact realising their intended objective. By actively encouraging young law graduates as well as skilled professionals - from all backgrounds - to spend time capacitating these courts in a variety of roles such as practitioners, assessors or clerks, it will assist in furthering access to justice, particularly in rural areas. However, such participation ought not to be viewed as "community service" required as provided for in the Legal Practice Act but as an essential component in developing the legal system, particularly by those interested in the development of Constitutional law. The experience of working in these courts that directly service under-resourced communities should be of equal value as working in well-established NGO's that may be representing these very communities in the higher courts. It is in the lower courts where the values and objectives of the Constitution, as well as the progressive judgments emanating therefrom, ought to be practiced and lived.

Moreover, it is my view that advocating for race and gender transformation within the upper echelons of the profession is of less value if such transformation is not being achieved throughout the society it seeks to govern. Despite the establishment of 67 designated centres serving as specialised Sexual Offences Courts, by 2011 only 6 remained because of a decision taken by the then Minister of Justice to incorporate these courts within the mainstream court system. Consequently, the conviction rate of sexual violence offenders has dropped significantly, while gender-based violence continues to afflict South African society⁸¹. Although decisions such as these lie beyond the control of lawyers, it is my view that if more skilled lawyers were employed in the public service sector, these decisions would be more challenging to implement. The backgrounds and diversity of professionals employed in these environments would also place more pressure on the State to provide better infrastructure and resources to adequately equip the lower courts. Currently, the lower courts appear to be have been neglected not only by the State, but by members of the profession representing all sectors. In order to witness the realisation of a society embedded with a culture of human rights, transformation ought to be prioritised both at the top and the bottom segments of the legal sector.

Moreover, contrary to what was envisioned by the first custodians of the Constitution, African customary law has not been developed alongside mainstream law in a manner that aligns African social innovations and historical cultural experiences with contemporary legal principles and practices. For example, the establishment of Traditional Courts in rural communities - intended to resolve disputes using African customary law and enhance access to justice by allowing people a choice as to whether

⁸¹ See Note 67 above.

to bring a claim in the Traditional or Magistrate's Court – has encountered many challenges due to the absence of a uniform legislative framework. In addition, the Traditional Courts Bill, which sought to regulate the functioning of the Traditional Courts, was proposed and then withdrawn, as its content would possibly have violated numerous Constitutional rights⁸². In this instance, it cannot be argued that the State has not taken significant legislative steps in transforming the legal system. However, it is up to the profession at large to ensure that these courts are adequately capacitated with professionals who possess the requisite knowledge of both the Constitution and African customary law to ensure that the values of both legal systems are realised in a solid legislative framework, and the potential abuse of power subverted.

Importantly, though, access to justice can only be effectively realised if all users of the court system feel that they have been active participants in the court process. Key to achieving this is the language that gets used. A key recommendation of the DOJCD report⁸³ was that courts need to be mindful of using intimidating legal jargon when addressing members of the public because key to accessing justice is understanding what judicial officers are saying. While it is acknowledged that initiatives have been undertaken to translate that Constitution and the Bill of Rights into “plain” English, as well as indigenous languages, when accessing the court system itself, the predominant language used is still English. Consequently, noting that roughly only 9% of the South African population speaks English, access to justice and the court system has in essence been denied to the majority of the population who live under its rule.

I would therefore propose that in addition to the various Constitutional literacy campaigns that have been launched to enhance public knowledge of the Constitution, that there is an active drive within the legal profession to ensure that all law students and practitioners, and particularly those interested in practicing within the arena of Constitutional law, are fluent in at least one indigenous language dominant in the jurisdiction in which they practice. Such knowledge would not only assist in fostering access to the justice system for the communities practitioners seek to represent but it will also assist in the development of African customary law in line with the values contained in the Constitution if such indigenous languages are used within the courts in actual argument. It will also assist in elevating African languages to the same level as English, to the extent that they may also become languages of commerce and governance. As noted by Prah⁸⁴, Afrikaans too was once considered a slave language, but within less than 100 years became a language of modernity, science and technology capable of producing space rocketry and heart-transplantation. The elevation of Afrikaans to achieving this status was, however, a matter of political choice exercised by those in power.

Importantly, as was the case with Afrikaans during apartheid, language plays a crucial role in the development of a society's social fabric. A recent report⁸⁵ revealed although a small percentage of South Africans cited language as the most divisive identity in the

⁸² See Note 67 above.

⁸³ See Note 67 above.

⁸⁴ See Note 69 above.

⁸⁵ Wale, K. (2013) “Confronting Exclusion: Time for Radical Reconciliation; SA Reconciliation Barometer Survey: 2013 Report”, *Institute for Justice and Reconciliation*, p16.

country, language remains an important aspect of identity politics and critical issue in education policy development. There is also relationship between “mother-tongue” language and material exclusion in South Africa – the high majority of English and Afrikaans speakers emanate from high income groups, while those who speak indigenous African languages, particularly Xhosa, North Sotho and Zulu fall into the lowest income groups. Language therefore constitutes a critical component of the intersection between the race and class division that South Africa is currently battling with.

Within the profession itself, the CALS report revealed that particularly in the corporate sector, clients associate the accent with which a black lawyer speaks English to his or her ability. Consequently, this erodes the confidence of black lawyers who may not *appear* to be proficient in English, indicating again that the relationship between race, class and language is experienced by black people daily. As a result of these assumptions, black lawyers are not only marginalised but may place added pressure on themselves (in addition to the pressures experienced from the general work pressure associated with the profession) to be absorbed into the dominant institutional practices by trying to emulate the rituals and routines of their white (predominantly) English-speaking counterparts. I would like to propose that if equal pressure were placed on South Africa’s English-speaking minority to speak an indigenous language, it would play a significant role in eliminating the fissures that still divide its society.

Through learning another language, not only will native English-speakers invariably also learn about the customs associated with that language but more importantly, black people may have the opportunity to take pride in their own languages and cultural practices in all space, including professional ones. It will also provide native-English-speakers with the opportunity to experience the manner in which society has been structured to maintain their race and/or class and/or gender privilege through the mere use of language.

Conclusion

Throughout this paper I have sought to argue that the challenges plaguing the transformation of South Africa’s legal profession – and similarly its society in general – have more to do with the political will of those in positions of power rather than with the law itself. While the law is laden with gaps due to the binaries so common to liberal democratic frameworks, those gaps are capable of being filled if those in privileged positions are able to recognise them. A conscious lawyer need not have lived the experience of marginalisation or discrimination if he or she is able to position him- or herself within such positions of privilege; and a conscious profession ought to be capable of recognising how mere practices and routines common to it may unintentionally entrench such privilege and perpetuate inequalities that currently exist within the profession. Transformation must be approached in a holistic manner and the legal profession in all sectors is no exception. If we are to realise a society based on the values of human dignity, equality and justice then the legal profession ought to represent these values first and foremost, both in terms of substance as well as form.