THOUGHTS ON THE LEGAL PRACTICE ACT

The Bar[1] has for more than a century governed the practices and professional conduct of its members through what may best be called a system of continuous peer review. There has, for instance, up to now not been a statutory body overseeing the governance of advocates as is the case with virtually all the other professions. To ensure high standards of practice and to best serve and protect the general public[2], like-minded practicing advocates established the Bar and it has on the whole done an excellent job of governing its members. The flaw in the system is that, leaving peer pressure aside, there is no compulsion for admitted advocates to be members of the Bar. The state has until now only regulated, as opposed to governed, the profession by determining the requirements for admission, the most recent statute of this sort is the Admission of Advocates Act 74 of 1964. This laissez faire approach to governance has led to the bizarre result that, speaking generally, those advocates who may not require close scrutiny have been intimately governed by their peers whilst those who most need to be held on tight reins have not been governed at all. The quirk that a substantial cohort of advocates is un-governed in South Africa can of course not be justified by reason nor can it be defended by expedience. To right this obvious flaw, the Bar has for years advocated for the introduction of a system of compulsory Bar membership for all admitted advocates. This model (which is well-known internationally) has the benefit of strengthening the independence of the judiciary because an independent bar is, axiomatically, an element of judicial independence. The Bar's proposals fell on deaf ears. Government has rather formulated a legislative model which effectively does away with peer review and self-governance in favour of governance by a statutory body. The wisdom of the choice is jurisprudentially questionable, but it is probably constitutional and we will have to live with it.

The kingpin of the legislative scheme is the Legal Practice Act 18 of 2014. It will become effective on 1 November 2018[3] and from then on the governance of the profession will vest in the statutory Legal Practice Council that has been established by section 4 of the LPA.

It is only natural for the members of the Bar to be wary of the new system. The detailed provisions of the new system, by far the most important part thereof – will only become

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[1]When capitalised, "Bar" herein refers collectively to the societies of advocates, thus the organised part of the profession, that function at the seats of the superior courts throughout South Africa, including the Johannesburg Society of Advocates, "the JSA". T attorneys' profession is not considered herein.

[2] The benefit of good advocacy, "the glorious power of eloquence", for the body politic has been recognized for eons. The Emperors Leo and Anthemius, for instance, in 469 CE, famously extolled the value of the advocate in their advice to the praetorian prefect of Illyria : "Advocates who explain ambiguous questions that arise in the course of litigation, and who, by the ability of their defence, frequently, in both private and public matters, restore the fortunes of those who have been ruined, are not less useful to the human race than if they had preserved their country and their relatives by taking part in battles and receiving wounds. For We, do not think that those who are equipped as soldiers with swords, shields and cuirasses should be considered the only ones who protect our Empire, but that advocates, also, who have charge of cases contend as soldiers and, trusting in the glorious power of eloquence, protect the hopes, the lives, and the children of those who are distressed." Digest 2 7 14, Scott's translation 12 191.

[3] The transitional provisions of chapter 10 and the establishment provisions of chapter 2 have already commenced – the balance of the LPA commences on 1 November 2018.

known once the LPC has made rules on the many still-outstanding matters.[4] The devil always hides in the details. It is one thing to say that the LPA will have things to say about a topic such as fees but it is an altogether other thing to hear what it says. The LPA structure merely identifies the decision makers, not the decisions.

The advent of the LPA nevertheless affords us a truly unique opportunity to take stock of the governance of our profession and to reconsider the logic and appropriateness of many of the conventions and rules that we as members of the Bar have imposed upon ourselves.

Before taking a closer look at the strengths and weaknesses of the Bar, it would be convenient to sketch the structure of the profession as it developed.

A terminological matter must be disposed of at the outset: "Regulation" for present purposes means the legitimate interest of the state in setting the requirements than an applicant for admission as a professional (here, advocate) has to meet. The current requirements are contained in the Admission of Advocates Act. As matters stand, the Admission of Advocates Act does not require vocational training (pupillage) or the examination of the applicant for admission. If an applicant has the requisite academic qualification and all other things being equal, such as the nationality, age and personal – i.e. the "fit and proper" - requirements being met, he or she is entitled to admission. Once admitted, the advocate is under the discipline of the High Court and unless his or her later unprofessional conduct is so egregious that it reaches the ears of the High Court (which may suspend or strike off errant advocates) the practitioner is left to his or her own devices to practice as he or she sees fit.

"Governance" on the other hand - and again for present purposes - concerns the ongoing practices of professionals and includes the very important topics of professional conduct and the meting out of sanctions for breaches of the rules of ethics of the profession, the training and testing of aspirant practitioners (vocational training or, in our case, pupillage), the identification of leaders (our silk selection process) and important rules of practice such as the rights and wrongs of self-promotion, the vetting of premises from where one may practice, and so forth. Insofar as the organised part of the profession is concerned, governance is provided by the bar council of each voluntary association. It is important to note that our governance is essentially a "bottom-up" system: We are all peers, by convention between us we assign our powers to scrutinise each other to the Bar. The societies have, in turn, created the General Council of the Bar and empowered it to provide co-ordination between the constituent bars. But the GCB has no original powers over the constituent bars, and they are in any event limited. All this will change under the LPA. It provides for a top-down system with the original power of governance residing exclusively in the LPC. It may delegate powers but is not obliged to do so.

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[4] The statutory scheme at present consists of the LPA, the Code of Conduct (GN 1 of 2017 GG 40610 of 10/2/17), Rules made by the National Forum (GN 401 of 2018, GG 41781 of 20/7/18) and Regulations made by the Minister (GN R1020 of 2018, GG 41`879 of 31/8/18). The scheme is only a framework. The LPC will for instance still in the future determine the precise rules concerning training, discipline and even matters as pedestrian as the fees payable to it. It is, of course, in these details that the true impact of the new system will be felt.

As remarked above, we can only explain the Bar backwards, historically – what we have today was not envisaged in a forward-looking manner. It came about as follows: When the Union of South Africa was formed there were two ex-British colonies and two Republics. The colonies received most of their advocates from the ranks of barristers trained through the Inns of Court system. The legal system of England has always relied heavily on quick-witted, procedurally proficient barristers. For the practicing barristers of the late 1800s and early 1900s, "law" was not an academic subject but a collection of rules and techniques. A university qualification was not a requirement to become a barrister and those wishing to enter the profession had to undergo vocational training – akin to an apprenticeship – at one of the four Inns of Court and pass the examination set by the profession – a system of pure self-governance. On the other hand, the erstwhile Republics got the bulk of their advocates from continental European universities who taught law for use in inquisitorial procedures with far less emphasis on process and far more on the substantive law than was the case in England. The first Admission of Advocates Act 19 of 1921 of the Union of South Africa opted for a broad-church approach by recognising both persons who had doctorates from the universities of Leiden, Amsterdam, Utrecht or Groningen and those who had been called to the bar in England as suitable to be admitted as advocates here. The Dutch doctors who meandered south knew a lot of academic law but not the tricks of the trade whilst the barristers who came here knew the tricks but might never have studied law at a university.

Faculties of law, offering the LLB degree, were established at the South African universities as and when universities were created throughout the 20th century. The LLB was the senior degree, aimed at providing training for aspirant advocates and subjects such as criminal and civil procedure and evidence formed part of the curricula of the LLB degrees. LLB graduates were consequently able to practice with no need for further training.

The quality of the LLB degrees, specifically in so far as the procedural subjects was concerned, deteriorated over time just as the demands of practice increased and the Bar realised that LLB graduates do not have adequate background and training to be let loose on the public and from the 1970s the system of pupillage – harking back to the English system – was introduced by the Bar. Pupillage was initially not aimed at teaching course material, but to sensitise and induct the aspirant member to the ethos and demands of practice. Course work was later introduced and from the 1980s pupils were also examined. The GCB in due course created the National Examination Board that set papers and marked them. Pupillage was extended to a year when the duration of the LLB shrunk from five to four years and the LLB ceased to be the senior law degree and became the only law degree. There have also been add-ons to pupillage, such as the highly successful advocacy training programme.

The position today is thus that an aspirant practitioner first has to get him- or herself admitted as an advocate in terms of the Admissions Act. He or she can then decide to become a member of the Bar. To do so, he or she has to apply for pupillage. Virtually all the societies have more applicants than they can accommodate and there is fierce competition between aspirant pupils for the available berths – some bars subject the aspirants to written entrance examinations, others measure the applicants against makeshift sets of criteria that invariably create distortions and controversies.

The pupils then undergo a regimen of lectures that are provided by well-meaning members who may or may not be proficient in matters didactic. The pupils then have to sit and pass the NEB's examinations and undergo advocacy training. Once all these hurdles are cleared, the pupil member becomes a member and must find a group to join (in Johannesburg) and then he or she must find work – not a mean feat in the highly contested market. Members are also subjected to not-inconsequential subscriptions and fees, have to perform pro bono services, are compelled to practice from locations directed by the Bar Council, give time and service to their societies (the JSA, in our case) and suffer the close scrutiny of their peers.

The system that has evolved is not perfect but also not altogether bad. To repeat what is stated at the beginning: the most serious flaw of the elective Bar system is that it is not compulsory so that the inferior applicant for pupillage who is not admitted by a society can practice from informal and improvised facilities, with no peer review or training. The failed advocate who cannot afford the Bar's subscriptions may leave it and practice outside the Bar. The person who does not want to do pupillage can simply by-pass the Bar completely. The second flaw in the system insofar as pupillage is concerned, is that some of the lectures are amateurish and often degrade into the telling of personal anecdotes. The courses also have very little, if any, substantive content. The JSA, for one, has made attendance of the lectures compulsory. The lectures are presented at the level of the lowest common denominator leaving many pupils bored stiff and angry at the wastage of time.

The foundational feature of the advocates' profession is that it is a referral profession. In 1997 it was definitively held that an advocate who accepts instructions without the involvement of an attorney is guilty of unprofessional conduct for which he or she may be suspended from practice or struck from the roll by the court. (See **De Freitas v Society of Advocates Natal** 2001 3 SA 750 (SCA).) The court has the common law power to discipline any practitioner, including advocates of the independent stripe.

The LPA is the culmination of many years of putative attempts to reform the profession. The original aim was to fuse the two branches of the profession into one. The greatest win for the profession in its campaign for survival was that the LPA accepted that the two branches should remain separate. The concession, however, came at a great cost for the Bar. In the first place, advocates and attorneys are to be governed by the same council on which the advocates will have the minority representation. Should push comes to shove, and the attorneys and the other members of the LPC close ranks against the advocate members on any issue, the advocates will lose. The second concession is the creation of a hybrid between the attorneys' profession and that of the advocates. This is the "trust account advocate": contemplated in section 34(2)(b) of the LPA. This memorandum does not concern the trust account advocate and how and to what extent these practitioners will be members of the Bar, remains to be seen.

The main functions of the Bar in our present structure are:

To provide pupillage. This is done by individual members. The Bar may request a member to serve as mentor and it is unprofessional to refuse to do so (without a reasonable excuse).

To provide advocacy training to pupils. This is done by members who volunteer to do so.

To provide lectures and to serve as examiners. Once again, this is voluntary work of the members.

To scrutinise the applications for admission of all applicants – not only of potential pupils. The Bar does this as custos morum of the profession. The Bar from time to time opposes such applications, sometimes at great cost for the members.

To apply to the High Court for the suspension from practice or the striking off of advocates who demonstrate that they are no longer fit and proper to be advocates. Once again it performs this task as custos morum of the profession.

To give advice to the members on professional or ethical issues.

To discipline errant members by launching enquiries into their alleged professional misconduct, to subject them to hearings and to punish those found guilty of misconduct. This thankless task engages a large number of volunteer members.

To provide infrastructural services, such as libraries, to the members.

To liaise on behalf of the members with the Bench, the Law Society and other Bars.

To identify persons worthy for recommendation of senior status to the State President.

To assist needy pupil members financially as well as members who have fallen on hard times (through the Bar Benevolent Fund).

The LPA takes over all the functions relating to the admission and removal of advocates to and from the roll, the training and examination of pupils, all professional matters, including discipline and matters such as fees. All these matters will vest in the LPC. The LPA also provides for the payment of fees to the LPC. It does, however not promise infrastructural benefits, such as the library services and it is completely void of any "soft" elements, such as imbuing advocates with the ethos of the profession.

In respect of pupillage, a comprehensive new process is envisaged:[5]

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[5] The rules regarding practical vocational training required for admission as an advocate appear from regulation 7 of the Regulations of 31 August 2018, which reads:

"7 **Practical vocational training requirements that pupils must comply with before they can be admitted by the court as legal practitioners**

(1) A person intending to be admitted and enrolled as an advocate must-

(a) serve under a practical vocational training contract with a person referred to in subregulation (4) for an uninterrupted period of 12 months after that person has satisfied all the requirements for a degree referred to in sections 26(1)*(a)* or *(b)* of the Act; and

(b) prior to or during service under a practical vocational training contract complete a programme of structured course work, comprising compulsory modules, of not less than 400 notional hours duration in the aggregate over a period of no longer than six months.

(2) Attendance at any training course approved by any existing society of advocates, the National Bar Council of South Africa or the General Council of the Bar for which the pupil registered before the date referred to in section 120(4) of the Act and in respect of which the required attendance was completed within a period of 12 months after that date is regarded for purposes of these Regulations as compliance with the requirements of subregulation (1)*(b)*.

(3) Subject to the provisions of the Act, any period of service before the pupil has satisfied the requirements of the degrees referred to in subregulation (1) is not regarded as good or sufficient service in terms of a practical vocational training contract.

(4) A pupil may be engaged or retained under a practical vocational training contract by an advocate-

(a) who is enrolled and practising as such; or

(b) in the full time employ of, or who is a member of-

(i) Legal Aid South Africa, established in terms of the Legal Aid South Africa Act, 2014 (Act 39 of 2014);

(ii) a legal aid institution which has been approved by the Council for the purpose of engaging pupils and who is responsible for supervising the training of pupils so engaged; or

(iii) any other institution approved by the Council for the purpose of engaging pupils and who is responsible for supervising the training of pupils so engaged.

(5) An advocate engaging a pupil-

(a) as contemplated in subregulation (4)*(a)* must have practised as an advocate for a period of not less than three years, or for periods of not less than three years in the aggregate during the preceding four years; and

(b) as contemplated in subregulation (4)*(b)* must have practised as an advocate for a period of not less than three years, or for periods of not less than three years in the aggregate during the preceding four years prior to being engaged by Legal Aid South Africa or the institution concerned.

(6) Service by a pupil to an advocate while that advocate is not practising or has not practised as provided for in subregulation (5) is not deemed to be service under a practical vocational training contract for purposes of these Regulations.

(7) An advocate referred to in subregulation (4)*(a)* may, at no time, have more than one pupil and an advocate referred to in subregulation (4)*(b)* may, at no time, have more than six pupils in the aggregate engaged or retained in terms of a practical vocational training contract.

(8) When an advocate dies or retires from practice or has been struck off the Roll any advocate who complies with the requirements of these Regulations may take cession of the practical vocational training contract of the pupil, despite the fact that the cessionary may then have more than one or six, as the case may be, pupils, under contract.

(9) The compulsory course work referred to in subregulation (1) must be standardised and uniform and comprise the following modules:

(a) for pupils intending the [sic] be admitted as advocates referred to in section 34(2)*(b)* of the Act, bookkeeping as contemplated in regulation 6(10)*(i)*;

(b) advocacy skills, including trial and motion court proceedings and attendance of court proceedings;

Under the present system one must first be admitted as an advocate before commencing pupillage (or, in exceptional cases, very soon thereafter). A benefit of this apparently incongruous position (first admission, then training) is that pupils have the right of appearance and can argue matters and move applications as part of their vocational training. Under the new system, a person must first undergo pupillage and the requisite examination before he or she can be enrolled as advocate.

The numbers of pupils are regulated by the Bar Council in the present system. Every indication is that anyone who complies with the other requirements of enrolment must be accepted by the LPA as a pupil. This may lead to the flooding of the profession. But, the problems caused by pupillage being centralised, go much further. As matters stand, a sizable proportion of the Bar Council's annual budget is spent on pupillage. Bar members are presently content to surrender their privacy for the period of pupillage because the pupil is a member of the Bar. Under the new scheme mentors will have to accept pupils who may have no wish to join the JSA. Moreover, non-members who have not themselves undergone pupillage will in future be mentors. This can only lead to the impoverishment of pupillage.

Under the present system only juniors of five year standing can be mentors. This age is reduced to three years under the new system, once again threatening the integrity of the system.

Members are, as matters stand today, ethically compelled to serve as mentors. The relationship between mentor and pupil is regulated by convention. Under the new system, there will be contracts between mentors and pupils spelling out rights and obligations. It is a trite proposition of our law that contractual relations may not be foisted onto a person. This might result therein that some potential members may simply refuse to take pupils.

By far the most problematic aspect of practical vocational training under the new system is that all pupils will have to undergo course work in a number of subjects that have not been offered by the NEB before now. It is wholly unclear who will decide on the curricula, who will compile the courses, who will present lectures (or course material, should the

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(c) alternative dispute resolution;
(d) civil procedure;
(e) criminal procedure;
(f) professional conduct and legal ethics of advocates;
(g) legal writing and drafting;
(h) constitutional law and customary law; and
(i) information and communication technology for practice, and associated aspects of cyber law.

(10) The training provided in terms of this Regulation must be standardised by the Council in terms of norms and standards."

courses be by correspondence) and, most importantly, who will pay for all this if they are not correspondence courses. It remains to be seen where and when will lectures be presented (if they are not correspondence courses). Once again, it can hardly be expected that the members of the Bar should pay for courses attended or completed by persons who have no wish to become members of the voluntary associations.

There are also some incongruities with the planned new scheme. For instance, pupils will have a limited right of appearance – but they will not be admitted at that point.

From all this it is clear that the core functions of the Bar will be subsumed by the LPC after 1 November 2018. It is, of course, possible that the LPC may delegate some of its functions to the Bar. But this may also not happen. The raison d'etre of the Bar has been replaced by the raison d'etat of the LPA.

Does the Bar have any role to play in the LPA regime? As pointed out above, the LPA has taken over the bulk of the functions of the JSA. What will remain are the hard infrastructural services that the Bar renders, such as library services, and the soft ethos that it seeks to perpetuate.

It is, of course, possible that the LPC will delegate some of its powers relating to pupillage, training, examination and discipline to the Bar. But it remains to be seen whether this will indeed happen. All advocates, not only advocates who are members of the Bar, will be eligible to take pupils. The training that the Bar presently offers to its pupils will have to be offered to all pupils, whether or not they intend to become members of one of the Bar. But, the LPC will remain accountable for pupillage, training and discipline and it will levy fees and subscriptions on all advocates who are registered with it to perform this function. The consequence of this will be that there will be a flow of funds from the general members to the LPC and the LPC will have to utilise the funds to pay for the functions that it is by statute obliged to fulfil. Should it appoint other institutions, such as the voluntary associations, to perform its functions on a delegated basis, then it should, surely, pay those institutions to perform these functions. In short: It is possible that the JSA, as delegatee of the LPC, may perform some of the functions that it presently performs, but it will have to do so on a quid pro quo basis, namely that it be paid for the work that it does. If this is so, then any other entity could perhaps be appointed to perform the work, such as the law schools that have been established by the Law Societies and that operate independently from the Societies.

Although there might in the short term be a rally for old times' sake by the present members around the Bar and although they may truthfully say that the Bar will never die, the prospects are that given time, Bar members will question why they should pay subscriptions to both the Bar and the LPC. Unless the Bar can provide something over and above the functions fulfilled by the LPC, the Bar will not survive in the long term. One of the reasons for this pessimistic view is the demographics of Johannesburg. When the JSA was formed more than 100 years ago, there were only a handful of advocates practising in Johannesburg. They had similar backgrounds

and similar views about the future and they had similar ideas about the role of advocacy in society. They also stood in a special relationship with the bench because the judges were appointed from their ranks. It made perfect sense for the elite group of lawyers to practice in close proximity to one another so that they could cross-pollinate each other with knowledge and perhaps even some wisdom. But, the Bar has grown exponentially and it is by no stretch of the imagination the elite branch of the profession today – it is not even the principal source from which judges are appointed and it has no special relationship with the bench. It is far too big to be housed in a single set of premises and it has devolved into groups that are virtual bars themselves. Some of the Johannesburg groups are larger than most of the voluntary associations that are found at the other seats of the High Courts.

Money will in the end play the decisive role in the structure of the advocates' profession in Johannesburg. Members will baulk if they have to pay group fees, subscriptions to the JSA and LPC fees. They will be compelled to pay the latter but may question paying subscriptions to the JSA if their groups can offer the benefits that the JSA originally offered to all its members namely chambers, a community of like-minded advocates who share common views and who can enrich each other by informal contact in group common rooms. It seems inevitable that the middle tier will disappear.

The prospects are, it would seem, that the groups that have been established in Johannesburg will be far more important than any other voluntary affiliation. Although the LPA is clear in its terms that an advocate is a sole practitioner[6] there can be little doubt that the groups will, within the parameters of the JSA, become more corporatized as time marches on. This would track developments elsewhere in the world.

There is much to say for a more corporatized group structure within which individual advocates may practice. In the first place, the group can establish a special identity and in this manner attract work for the group more efficiently than individual advocates can when practising virtually anonymously in a massive organisation, albeit supremely unorganised. Groups can respond much better to the demands of practice than a large organisation such as the JSA will ever be able to do. Groups can establish close relationships with the bench, commercial entities and so forth. Groups may become what the Societies of Advocates are now.

From a practical point of view groups have to be careful about who it would want as future members and these persons should preferably be identified as pupils. As pupillage will in future be a contractual matter, the persons eligible to be mentors should enter into the requisite contracts with aspirant pupils who the chambers would be willing to accept as members upon their enrolment as advocates. In other words, a group ought to run a mini pupillage program whereby it invites pupils to apply for pupillage with a member in the chambers whereafter the applicants are screened and only those who fit into the mould of the chambers should be accepted as pupils and allocated to available mentors. This would mean that the group will be able to ensure

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[6] See s 34(6): "Advocates may only practice – (a) for their own account and as such may not make over, share or divide any portion of their professional fee whether by way of partnership, commission, allowance, or otherwise."

that it gets the best possible fit and will allow it to take a meaningful and leading role in the transformation of the profession. This would, however, place a heavy obligation on the existing members of the group because by accepting a person as a Thulamela pupil, expectations will be raised that he or she will be accepted as a member of the group.

The LPA has rendered the JSA and the other voluntary associations largely redundant. The groups that have been established at Johannesburg, such as Thulamela, will become more important in the future and the groups should develop strategies to attract the appropriate members. The groups have to know that they will have to fulfil many of the functions that were previously performed by the voluntary associations.

Although the LPA defines advocates as sole practitioners, it seems to be inevitable that groups will become more corporatized over time.

It is possible that a number of different associations may develop outside the traditional Bar to cater for specialist interests of individual advocates in various groups. It is, for example, not beyond the pale that a "construction bar", a "public interest bar", an "intellectual property law bar" and a "criminal bar" may develop. Individual members of a group could probably belong to different outside bars. But, it seems that the prospects are slim that purely geographically located bars will survive, especially in a place like Johannesburg.

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