RECONCILIATION - AND/OR - TRANSFORMATION?
FW de Klerk Foundation Editorial

Judge Jody Kollapen is one of eight candidates who are being interviewed this week by the Judicial Service Commission to fill two vacancies on the Constitutional Court. In the course of his interview he is reported to have said that "in the transition to democracy, South Africans had perhaps focused too much on reconciliation and not enough on transformation." He added that "reconciliation could not be achieved without transformation - without all South Africans accessing the economy."

What did he mean by this? Reconciliation is a constitutionally mandated process that, according to the Preamble to the Constitution, is intended to "heal the divisions of the past". It involves the difficult business of trying to resolve the painful historic divisions between black and white South Africans - a process that Nelson Mandela managed with such sensitivity. Its goal is the promotion of national unity on the basis of the rights and values in the Constitution.

Does Judge Kollapen think that we have now had enough reconciliation - that we should permit already frayed race relations to deteriorate further? And can he perhaps point to instances during the past fourteen years when the government of the day has actually continued with the process of reconciliation - when it has made South Africans from all our minorities feel at all welcome in the country of their birth?

He also seems to think that there is a contradiction between transformation and reconciliation - that South Africa cannot have both at the same time. That, of course, depends on what one understands by 'transformation'. If transformation means the establishment of "a society based on democratic values, social justice and fundamental human rights" - as indicated in the Preamble - and the improvement of "the quality of life of all citizens and the freeing of the potential of every person" then everyone should enthusiastically support it. Transformation of this kind can and must be achieved without limiting anyone's rights and freedoms and without violating the foundational values of non-racialism, equality and human dignity.

However, if 'transformation' means that the judiciary should support the ideological program of the ruling party then there is a very serious problem. The ANC has been calling for precisely such support since 8 January 2005 when it insisted that *"the collective mind-set of the judiciary"* should be transformed *"to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination."*

The latest iteration of the ANC's ideological program is Radical Economic Transformation which is defined as a *"fundamental change in the structure, systems, institutions and patterns of ownership, management and control of the economy in favour of all South Africans, especially the poor, the majority of whom are African and female, as defined by the governing party, which makes policy for the democratic government."* What the ANC envisages is a massive redistribution of property, jobs and land on the basis of demographic representivity - with far-reaching implications for the constitutional rights of minorities. Is this, perhaps, what Judge Kollapen means by "all South Africans accessing the economy…?"

The impression is also created that those who are the "beneficiaries" of reconciliation - to be blunt, white South Africans - are somehow also responsible for the unacceptable plight of many of their black compatriots? Is this really so?

Judge Kollapen was, perhaps, preaching to the choir during his interview since the JSC has long been an ardent champion of transformation based on a continuing black/white struggle. Although the courts have an admirable record on governance issues they have increasingly tended to be transformation-minded on issues involving language, culture and affirmative action - indeed on many of the provisions that were included in the Constitution at the insistence of non-ANC parties: Examples include the following:

- the language provisions in Section 6 are for all practical purposes simply being ignored;
- protection against unfair racial discrimination in Sections 9(3) and (5) has for the most part been rescinded in matters relating to the promotion of equality in terms of Section 9(2);
- the right to education in the language of choice in terms of Section 29(2) has been whittled away to such an extent that Afrikaans is unlikely to survive as a university language;
- the right to culture in Section 30 has been eroded to the point where two judges of the Constitutional Court felt it necessary to comment, in 2016, in *City of Tshwane Metropolitan Municipality v AfriForum*, that *"the implication that may be drawn from the first judgment is that any reliance by white South Africans, particularly white Afrikaner people, on a cultural tradition founded in history, finds no recognition in the Constitution, because that history is inevitably rooted in oppression";*
- any notion that South Africa's languages enjoy 'parity of esteem' was ended in December 2017 when the Constitutional Court, in its appeal hearing of *University of the Free State v Afriforum and Solidarity,* declared that Afrikaans would forever be blighted by its *"associations of discrimination, oppression and systematic humiliation of others" - (*despite the fact that a majority of its speakers were also victims of apartheid)*;* and
- last year the North Gauteng High Court ruled that the Department of Tourism could include BBBEE criteria in its allocation of tourism COVID-19 relief - thus effectively cutting off struggling white-owned companies from assistance regardless of the fact that most of their employees were not white.

These developments have very serious implications for our "multiparty system of democratic government" that is a foundational requirement in Section 1 of the Constitution. Democracy depends absolutely on the recognition by the majority and by the courts of the rights of minorities - including their right to equal protection and benefit of the law. The courts have a special duty to protect the rights of minorities because minorities - by definition - are excluded from legislative and executive power. The courts are, indeed, the only guarantor of their rights - but what happens if the courts choose not to play - or to dilute - this role?

The only factor that the JSC should consider when it comes to the mindset of candidate judges is the clear injunction in Section 165(2) of the Constitution that: "The courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice." This means that judges cannot adhere to any extraneous ideology when playing their crucially important role in upholding the rights of all South Africans from all our communities. They must leave their personal political preferences and ideologies at the courtroom door - particularly ideologies based on the false, manufactured and dangerous premise of a continuing struggle between black and white South Africans.

Strict adherence to the rule of law and the rights and values in the Constitution would also be one of the best ways to promote both reconciliation and genuine transformation.