Speech by Dr Motshekga - Debate On Vote 21: Justice and Constitutional Development

19 May 2015, National Assembly

Honorable Chairperson
Honorable Minister Michael Masuta
Honorable Deputy Minister, John Jeffreys
Director-General, Ms Sibanda and Colleagues
Honoralbe Members, The Media and Fellow South Africans

Introduction

On behalf of the Portfolio Committee Justice and Correctional Services, I would like to thank the Minister, Honourable Michael Masuta, and his Deputy, Honourable John Jeffreys for their political overview.

I also wish to thank the heads of the following entities for their briefings:

Ms Nonkululeko Sindane - Director General of the Department.
Adv. Mxolisi Nxasana - National Director of Public Prosecutions
Adv. Thuli Madonsela - The Public Protector
Adv. Lawrence Mushwana - Chairperson of the Human Rights Commission
Judge Dunston Mlambo - Chairperson of the Board of Legal Aid South Africa
Ms Vidhu Vedalanker - Chief Executive Officer of Legal Aid South Africa
Ms Memme Sejosengwe - Secretary-General of the Office of the Chief Justice
Briefings by the Minister and heads of these entities enabled the committee to consider the Budget from an informed position.

The Portfolio Committee adopted the committee report and recommendations unanimously on the 13 May 2015.

In our 2013/14 budget vote it was highlighted that in the 15-20 years government focused on the institutional transformation of the judiciary, not the transformation of the Legal System as a whole. It was pointed out that we need both an institutional and substantive transformation of the Legal System. The transformation of the judiciary is proceeding relatively well save the fact that the process has not included the traditional (and community) courts.

The transformation of the South African Legal System requires a radical shift from the Eurocentric jurisprudence which makes the courts, not justice, accessible to the people. In South Africa the majority of the people are African and the illiteracy rate amongst them is the highest. The universities that educate lawyers are still rooted in the Western jurisprudence. Indigenous African law and languages are not requirements for the completion of a law degree. Thus the universities produce lawyers who are technically skilled by alienated from the cultures and belief systems of the majority of the people.

A further challenge is that the South African Legal System comprises statutory law, international law, Roman Dutch Law and English Common law. All these laws, except indigenous African law, are taught in our law schools. Although the constitution is the Supreme Law of the country, Roman Dutch Law and English Common Law takes precedence over indigenous African law because our lawyers are not rooted in the indigenous African law, cultures and languages.

The transformation of the South African Legal System cannot be divorced from the cultural discourse. It is generally accepted that South African Society consists of the African, Asian and European streams of history and culture. The European stream was and still is imposed on the whole of society by our educational system. The continued marginalisation of indigenous African law, culture and languages makes only the courts, not justice, accessible to the people. Thus access to justice must be placed at the centre of the transformation of the Legal System.

The current transformation agenda falls far short of the desired radical transformation of the Legal System.

The dominance of Roman Dutch and English legal cultures over African legal culture is a impedes access to justice.. The department has set up the constitutional justice project to assess the impact that the decisions of the Constitutional Court and Supreme Court of Appeal. The project is intended to guide discussion on possible legal and constitutional reforms. This project cannot and will not address the dominance of Roman Dutch and English common law cultures and languages. Besides, the project is more of an academic exercise than an imperical research. The dominance of Roman Dutch Law and English Common Law culture and languages cannot be effectively addressed by the constitutional justice project. This challenge can only be overcome by introducing indigenous African law, culture and languages in the Law school curriculum. There is an urgent need for a course on Law and Society which includes culture and languages. Such a course should also be compulsory for psychology sociology and criminology students. The course should also be compulsory for Law graduates to enable them to have a holistic understanding of the society to which the law applies.

During the debate on the Legal practice bill it was pointed out community service must be made compulsory to assist law graduates to develop a social conscience which is a prerequisite for social justice. The introduction of community service has been made optional.

The question whether or not to introduce indigenous African law and languages has also been made optional

The protracted debate on the Legal practice bill showed that special interest groups dominate the transformation agenda and even have veto powers. These special interest groups themselves are not dominated by progressive forces. This means that parliament must be the final arbiter of the will of the people.

The neglect of the indigenous African Legal Culture and languages was even more pronounced in the traditional courts debate and proposed resolution of the impasse. The traditional (or community) courts system dates back to time immemorial and it is rooted in the cultures, languages and belief systems of the people. The traditional courts. Like the Roman Dutch and English common law courts

evolved over time. The African traditional courts still exists and rural communities rely on these courts for dispute resolution. The traditional court system is rooted in African societies that even the Marx-Leninist Zanu PF and Frelimo adopted this system and incorporated it into the mainstream Legal System. The Zimbabwe parliament passed the primary courts Act for this purpose.

During the 1980s South African urban communities Apartheid modern courts and established community courts modelled on the positive aspects of traditional courts. In African communities there is no watertight separation between criminal and civic jurisdiction.

The emphasis falls on restorative rather than retributive justice. All participants in the proceedings seek to establish the truth without taking sides with any of the parties. Thus the proceedings are inquisitorial not accusatorial. Where the accused is found guilty the emphasis is on compensation or reparation and reconciliation of the parties. The imprisonment of the guilty parties or payment of fines to the state do not compensate the victim and reconcile the parties. This, therefore, does not meet the popular sense of justice.

The positive aspects of the traditional court system have been ignored. Unlike in Zimbabwe and Mozambique, they were not appreciated and embraced by the post colonial Legal System contrary to the fact that the constitution recognises traditional leadership and indigenous African law. In South Africa legislation to regulate the traditional courts has a long history.

It was first introduced in the third parliament where it lapsed, was revived, withdrawn and then reintroduced in the fourth Parliament where once more it lapsed. The Committee is aware that in the past legislation relating to the traditional courts attracted considerable controversy from people who know nothing about African Societies and their norms and standards. The Department sought to address this by developing a discussion document.

The Discussion Document does not concern itself with whether traditional courts must form part of the South African Legal System or not, as it is acknowledged that these are the bedrock of the indigenous African Legal culture. The focus of the Discussion Document misses the point because it seeks to answer the question whether or not indigenous African law is consistent with the constitution. There was never a need to do this with English Common Law, Roman Dutch law, Islamic and Hindu laws. Why is the Law of the majority of the population subjected to onerous requirements for implementation?

The reintroduction of the traditional courts Bill does not require any policy framework document. The Department must simply reintroduce it and leave the matter in the hands of the National Legislature.

The incorporation of positive aspects of indigenous African Legal culture, languages and value system in the South African Legal System does not require any further policy Discussion Documents. The Department must introduce the necessary bills and leave the matter in the hands of parliament. Any further delays will discredit both parliament and the judiciary.

At a meeting between the Judiciary and the Portfolio Committee the Chief Justice expressed the

concern that the delay in the passage of the traditional courts Bill is already having a negative impact on the administration of justice and has the potential to tarnish the image of the judiciary.

During the debate on the Legal Practice Bill it was agreed to leave the regulation of the paralegal sector out of account as this required a separate legislation. Two subsequent national conferences on paralegal practice highlighted the critical importance of Community-Based paralegal practice. The traditional (or Community) courts, like paralegals operating within community-based Advice Centres would promote access to justice and serve as vehicles for constitutional literacy and human rights education. We would like to call on the Minster to re-introduce the Traditional Courts Bill and to prepare and table the paralegal legislation without delay.

It is a matter of great concern that the transformation of legal aspects pertaining to the majority of South Africans always take the back seat.

There are also perceptions that our progressive constitution has been hijacked by liberal forces who interpret it to justify their partisan interests. For instance, in the current constitutional debate the key issue is the independence of the Chapter 9 Institutions and other entities. This emphasis is not called for because these institutions are creatures of the constitution and their powers are determined by both the constitution and national legislation.

The controversy arises from attempts by some minority parties to interpret independence as immunity from accountability and as a shield from robust oversight. The independence of Chapter 9 Institutions must be circumscribed by their duty "to strengthen and support democracy". This enabling clause does not create adversarial relationships between Chapter 9 Institutions and the three arms of the state. The tensions that existed among Chapter 9 Institutions and some of them and government departments show the lack of a common understanding of the independence and accountability of Chapter 9 Institutions.

A Forum for Institutions Supporting Democracy (FISD) was established to address relationships among Chapter 9 Institutions on the one side and relationships between these institutions and government on the other side. The persistent litigation between some Chapter 9 Institutions and government departments indicate that the Forum has not served any useful purpose. It is suggested that the Forum must be strengthened by including chairpersons of relevant portfolio committees to harmonise relations between these institutions, inter se, and between them and parliament.

Relationships between Chapter 9 Institutions and government could be improved if both sides could take each other`s proposals seriously and endeavour to act on them. For instance, the Legal Aid South Africa (LASA) has heeded the call for support for victims of crime, increased use of paralegals and the need to assist Land Claimants. Such positive responses make constructive and mutually beneficial engagement between LASA and portfolio committees possible.

The Foundation for Human Rights has been doing important work on socio economic rights, e.g. defending victims of farm evictions. Our concern here is that farm evictions and other violations of socio-economic rights are symptoms of a much bigger problem of the loss of land and its natural resources by the African majority. The resources of the Foundation could be better utilised by

funding Land Claimants who are unable to access the Land Claims Court because of poverty. The restitution of Land and its Natural Resources would speed up the eradication of violations of socio-economic rights.

The recent xenophobic attacks also highlighted the need for Constitutional Literacy and Human Rights Education programmes at grassroots level. Such programmes would be more meaningful if the Foundation and relevant Chapter 9 Institutions could implement them through Community-based structures.

THANK YOU