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Debating the Transformation of the Judiciary: Rhetoric and Substance

Introduction[1]

The transformation of South Africa's judiciary is constitutionally prescribed, necessary and inevitable – what is important about transformation, however, is the form it takes. Since the structure of the courts and composition of the judiciary in South Africa are firmly rooted in apartheid, the question is not whether transformation should occur, but what steps should be taken to ensure that transformation processes are effective, transparent and respect the independence of the judiciary.

The blue-print for the kind of South Africa we want to create lies in the Constitution which calls for non-racialism, non-sexism and inclusiveness to permeate every level of society. The judiciary cannot and should not be divorced from this conversation. A plurality of views is needed if this process is to reflect accurately what the state of transformation is in our justice system, and what recommendations should be made for the future.

The separation of powers remains the framework around which this democracy is crafted, in other words, a not-negotiable. Any discussion of this issue would need to be even more carefully framed. Thus far, not much constructive has come out of the very public debate on the issue. On all sides of the divide there has been a level of recklessness – beginning with comments surrounding the ANC's January 8 statement, Tony Leon's recent comments on the threat to the independence of the judiciary, and the happenings in the Cape High court which has necessitated intervention from the Chief Justice.

The debate is more complex than the un-nuanced assertion by some that the judiciary is being wholly undermined, and it is about more than saying the country needs more black judges. It is also about creating a change in the way in which justice is dispensed and the way in which citizens experience justice.

Dramatic changes in the structure of the courts are underway, combined with a set of laws introducing accountability measures and judicial education for judges. Draft legislation encompassing these measures has been contemplated by Department of Justice for a number of years and is aimed at

[1] Sections of the Introduction and Conclusion have been published in Opinion Editorial form by Judith February in the Sunday Independent.

bringing the structure of the courts, and various other aspects of the judiciary, in line with the Constitution.

This edition of ePoliticsSA will evaluate the draft legislation currently in process which aims to address the issue of transformation in the judiciary. It will assess the potential impact of the Bills in light of the imperative to transform the bench, as well the potential effects for judicial independence and the separation of powers.

Changing the Composition of the Judiciary

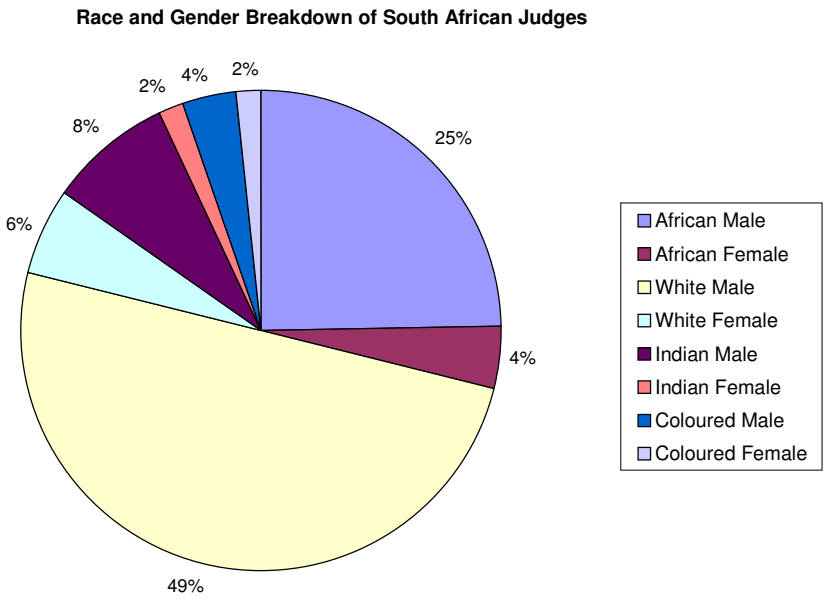
In order to align South Africa's judicial system with the principles of the Constitution, the structure and membership of the courts, as they existed before 1994, needed to be rationalized and reconstituted. The first step in this reform process was the revision of appointment procedures for members of the bench and the establishment of the Judicial Service Commission[2] (JSC), which bears the main responsibility in advising the government on judicial appointment and dismissals.

Fundamental to the process of judicial reform has been the constitution driven initiative to ensure that the courts become more representative of the population. In early 1994, of the 166 judges in the country's superior courts, only three were black (male) and two (white) female. By 2005[3], however, these percentages had changed markedly although white males continue in the lead. Of the 198 judges in the superior courts, white men continue to be in the majority with 96; and there are 50 African, 8 coloured and 16 Indian male judges. In addition 28 are female- 12 white, 8 African, 3 coloured and 5 Indian.

[2] The Commission was devised in order to broaden the responsibility for the administration of justice and to advise the government on the judicial matters as set out in the Constitution specifically with regards to the appointment and dismal of judges. The Commission consists of the Chief Justice who presides, the President of the Constitutional Curt, a Judge President from a provincial division of the High Court, the Minister of Justice, two practising advocates, two practising attorney's, one teacher of law, six Members of the National Assembly (NA), at least three of whom must be Members of opposition parties, four Members of the National Council of Provinces (NCOP), four persons nominated by the President and, when considering a matter relating to a particular division of the High Court, the relevant Judge President (Section 178 [1]).

[3] Data obtained from Melinda Crous, Department of Justice and Constitutional Development, 5 May 2005

	African Male	African Female	White Male	White Female	Indian Male	Indian Female	Coloured Male	Coloured Female	Total
COURT									
Constitutional Court	5	1	3	1	1				**11**
Supreme Court of Appeal	4	-	12	2	2	-	-	-	**20**
Northern Cape High Court	2	-	2	-	-	-	1	1	**6**
Eastern Cape High Court (Grahamstown)	2	-	9	-	-	-	-	-	**11**
(Port Elizabeth)	-	1	3	-	2	-	-	-	**6**
Cape of Good Hope High Court	3	-	14	2	4	-	2	1	**26**
Free State High Court	2	-	9	-	-	1	-	-	**12**
Transvaal High Court (Pretoria)	9	-	17	1	1	-	1	-	**29**
Johannesburg)	5	3	14	3	3	1	-	-	**29**
Natal High Court (Durban)	4	-	4	1	2	1	2	1	**15**
(Pietermaritzburg)	3	-	4	-	-	-	-	-	**7**
Bophuthatswana High Court)	2	2	1	-	-	-	1	-	**6**
Venda High Court	2	-	-	-	-	-	-	-	**2**
Ciskei High Court	2	-	1	-	1	-	-	-	**4**
Transkei High Court	2	1	2	1	-	-	-	-	**6**
Land Claims Court	2	-	1	-	-	1	-	-	**4**
Labour and Labour Appeal Court	1	-	-	1	-	1	1		**4**
TOTAL	**50**	**8**	**96**	**12**	**16**	**5**	**8**	**3**	**198**



There are currently 1871 advocates in the country[4]. The race and gender statistics for the General Council Bar appear as follows:

	White Male	White Female	African Male	African Female	Coloured Male	Coloured Female	Indian Male	Indian Female	TOTAL
Silks	281	10	7	-	7	1	16	2	**324**
5 years and more	670	89	58	8	9	4	37	8	**883**
Under 5 years	215	69	115	27	15	11	33	28	**513**
Non-contributing	68	38	21	5	8	5	4	2	**151**
TOTAL	**1234**	**206**	**201**	**40**	**39**	**21**	**90**	**40**	**1871**

In South Africa, there has been a fair amount of debate on whether the pace of transformation is too slow, whether white candidates have been overlooked for appointments, and whether adequate measures are being taken to facilitate the entry of black and female candidates.

There is a compelling need to comply with the constitutional directive to remove imbalances in race and gender. White judges remain in the majority in most courts and the consideration and appointment of women of any colour is low. Thus, addressing racial and gender imbalances in respect of a particular appointment at a particular court should constitute a powerful factor in the appointment process.

A number of questions need to be tackled in this regard. What sort of access do women have to the profession? If the level of female representation on the

[4] Survey 30 April 2004, General Council of the Bar of South Africa. The Council has said that the figures reflect the current status.

bench is low, why is that so? How is it possible to incentivise successful black lawyers to make themselves available for positions on the bench? What contribution can be made to increase the pool of black candidates at law schools and as young entrants into the profession? Is there a need to support young black advocates who find start-up costs at the bar prohibitive?

The Draft Legislation

At the outset it should be noted that our current system contains a number of constitutional provisions aimed at promoting judicial independence. These include: protection from arbitrary removal of office, security of tenure, and a guarantee against the reduction of salaries and allowances of judges. Security of tenure and remuneration, which otherwise may be used to manipulate judicial officers, are specifically provided for in the Judges' Remuneration and Conditions of Employment Act. Other critical constitutional provisions ensuring independence include the following: "[t]he Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice" (Section 165 [2]), and "[n]o person or organ of state may interfere with the functioning of the courts" (Section 165 [3]).

A) The Judicial Services Amendment Bill and the Judicial Conduct Tribunal Bill

"Judicial independence" and "accountability" are so commonly bandied about that these key Constitutional imperatives run the risk of becoming what Orwell termed "meaningless words." An honest assessment of the Bills requires a clear understanding of what those values involve.

Judicial independence is commonly understood as a judiciary confident to give judgements without threat from or influence by the executive, the legislative branches of government, and private interests. Judicial accountability, however, is more difficult to define. It may describe: (a) a lack of bias or personal interest of the judge in pending cases; (b) abstaining from improper behaviour in an official capacity, such as making discriminatory remarks in court or haranguing litigants; or, consistently late or tardy judgements (c) abstaining from improper behaviour in a personal capacity, such as harassment of one's colleagues; (d) adherence to the values of the Constitution and certain standards of ethical behaviour, or (e) proper exercise of judicial discretion. It is generally understood that (e) cannot be the subject of regulation and is clearly reserved for the internal mechanics of appeal and review procedures.

Code of Conduct, Conflict of Interests and a Register of Financial Interests

A conflict of interest arises when the private interest of a judge clashes or even coincides with the public interest. Such a conflict raises an ethical dilemma when the private interest is sufficient to influence or appear to influence the performance of the judge's official duties.

The current "honour-based" system requires the individual judge to confidentially report to the Minister of Justice any potential conflicts of interest. Without regular and public disclosure, however, critics have argued that it is difficult, if not impossible, to determine whether decisions of the court are divorced from personal considerations. It is for this reason that the draft Judicial Service Commission Amendment Bill proposes both a Judicial Code of Conduct as well as Register of Financial Interests.

The benefits of a formalised code of conduct with stated disciplinary procedure are numerous. Once the judiciary is set standards of conduct and these are made available, public trust in the institution is improved or maintained. Codified standards compel judges to behave in a disciplined way and to deal with a particular topic in a conscious manner. Moreover, the public is aware of what type of conduct to expect and what is acceptable. A further advantage of a formal code is that it can set specific sanctions for failure to comply. Nevertheless, despite these advantages, critics argue that instituting rules of conduct, as opposed to conduct governed by convention and common sense, will afford opponents of the judiciary new weapons with which to attack the independence of its members. It is also argued that the Chief Justice already introduced a code of conduct for judges in 2000; although these are guidelines and have no legal effect.

The draft Bill requires the Judicial Conduct and Ethics Committee to compile a Code of Conduct on Judicial Ethics and to advise judges on ethical issues. Breaches of that Code can be met with disciplinary procedures. The Bill sets forth the composition of the Judicial Conduct and Ethics Committee, including the Chief Justice, the Deputy Chief Justice, the President of the Supreme Court of Appeal, 2 people not ordinarily involved in the administration of justice appointed by the President, 3 judges including one woman, and 2 members of the JSC belonging to the legal profession or academia.

While the actual contents of the code will only be compiled at a later stage, the extent to which non-judicial/legal people, and in fact the public have a say in the code of conduct, is an important, outstanding, matter.

Another important feature of the Judicial Services Conduct Amendment Bill is the provision for the establishment of a register of judges' financial interests. According to the Bill, the actual details of the Register will be determined by the Minister of Justice and enacted through regulations at a later stage. The Bill determines the factors, such as the confidentiality of certain information, to be taken into account when the Register is being complied. Once established, the JSC, as opposed to the Department, is charged with maintaining the Register.

Although there is general consensus in many countries about the need for a register, specifically the need to safeguard the public interest through increased judicial accountability, a number of concerns have been raised about the details of the proposed system. What type of information should be disclosed and what should remain confidential? This is especially significant

considering the right to privacy, career and physical safety. Would judges need to disclose all their assets, particularly if they are disqualified from involvement in a case regardless as a consequence of the register? To whom should they disclose? Should the interests of their partners/spouses be disclosed? How often should they be required to disclosure and what sanctions should there be for failure to comply? Given the significance of these questions, the manner in which they are resolved will go long way to determining the overall utility of the legislation.

Discipline and Conduct

The draft Judicial Services Commission Amendment Bill (JSCA Bill) and the Judicial Conduct Tribunal Bill (JCTB) provide for the establishment of a formal complaints and disciplinary mechanism for judicial officers, largely through a sub-committee of the JSC.[5] The JSC, through its bodies, would be responsible for overseeing potential disciplinary action with regard to judges' behaviour.

The Bills originate in section 180 of the Constitution, which grants Parliament the authority to adopt legislation to deal with complaints against judicial officers. Currently, the Constitution is the primary means for sanctioning judges for improper behaviour — a judge may be removed from the bench upon either a finding of incapacity, gross incompetence or gross misconduct by the Judicial Services Commission (JSC) or if the National Assembly calls for the judge's removal. No judge has been removed in this way since 1897. Apart from the drastic sanction of removal, no lesser means of discipline are available.

The Department of Justice began to develop the draft legislation to address judicial accountability in 2000, long before the uproar engulfed the Cape High Court. The Department of Justice is currently entertaining comments from the judiciary and is due to bring the Bills before Parliament in the coming months.

Critics argue that the Bills will intrude on judicial independence – specifically that the threat of disciplinary action gives government, politicians, or disgruntled litigants an opportunity to influence judicial decisions. Critics claim that existing features of the South African judiciary are sufficient to ensure judicial accountability. For example, it is argued that the requirement for open hearings and reasoned judgments ensure the proper discharge of judicial discretion; that appellate reviews provide a forum for correcting erroneous decisions; that rigorous appointment procedures ensure judges are "without fear or favour"; and that the principle of recusal prevents a judge from hearing a matter in which she or he holds a particular interest.

Proponents of the Bills argue that the judiciary must become more accountable because judges are constitutionally empowered to overturn decisions of elected representatives. They assert that by establishing clear

[5] Analogous procedures are provided for the disciplining of magistrates to be supervised by the Magistrates Services Commission.

standards of conduct for judges, and by establishing a disciplinary procedure to deter corruption and conflicts of interest, the Bills would bolster the dignity of the courts and judges in the eyes of the public.

With regard to discipline, the Bills propose a complaints procedure and a set of institutions for reviewing such complaints. Five categories of conduct could be subject to potential disciplinary action: a) incapacity, gross incompetence, or gross misconduct; (b) a wilful or grossly negligent breach of the Code of Conduct on Judicial Ethics or of the regulations pertaining to a financial register for judge's interests (both still to be drafted); (c) accepting, holding or performing any office of profit or receiving fees; (d) wilfully or negligently failing to comply with remedial steps given to correct improper judicial conduct; or (e) any wilful or grossly negligent conduct that is prejudicial to independence and impartiality of the judiciary in its dignity and efficiency.

To preclude attempts to interfere with judicial independence, however, the Bills specifically prohibit disciplinary bodies entertaining complaints that "relate solely to the merits of a judgement, or are frivolous or hypothetical."

A Subcommittee of the JSC is envisaged for hearing complaints against judges. For non-impeachable complaints, the Subcommittee itself investigates the complaint, convenes a hearing and recommends disciplinary steps to the JSC. Those may include an apology, a reprimand, a written warning, appropriate counselling, attendance in a specific training course, or any other corrective measure. Where the complaint relates to an impeachable offence, the Subcommittee is obliged to request that the JSC appoint a Tribunal to investigate the matter.

The Bills also provide for the composition of the Subcommittee and the Tribunal. The Subcommittee is composed of the Deputy Chief Justice and three judges, one of whom must be a woman, designated by the Chief Justice in consultation with the Minister. The Tribunal set up to hear impeachable complaints is composed of two judges and one non-judicial person; one member must be a woman. The one non-judicial officer is appointed by Chief Justice in consultation with the minister.

It is generally understood that judges are not accountable to government or popular opinion but to the principles of the Constitution and certain standards of ethical behaviour. Insofar as the Bills are designed to regulate conduct that falls below those standards through investigative and disciplinary procedures, they should not be regarded as threats to judicial independence. By prohibiting the investigation of frivolous complaints assailing the merits of a judgement, the Bills ensure against the use of the disciplinary procedures as a means for undermining either the sound application of legal principles or the proper use of judicial discretion. While these are important safeguards, two additional issues should be considered to ensure the protection of judicial independence:

First, the Bills must ensure the establishment of a set of clear standards of conduct — not only are ambiguous rules difficult for judges to follow they are

also liable to give rise to fear of abuse and risk manipulation of the courts. It is crucial for the JSC to elaborate upon the definition of "conduct that is prejudicial to independence and impartiality of the judiciary" to provide clear guidelines for judicial behaviour. In no way should judge's accountability extend to having to account to another institution for their judgments, nor should their privacy or dignity be violated in the process.

Second, the procedural aspects of the investigations and the disciplinary proceedings should be designed to simultaneously address the complaint practically and effectively, while at the same time protecting the dignity and privacy rights of the judge. The Bills do make provision for hearings to be held in private, with only the judge, complainants and their legal representatives present. By vesting the authority to investigate and hold hearings in the hands of the JSC, through its subcommittee and tribunals, the Bills rely on independent bodies, in contrast with past practice where the President was in charge of nominating judges.

It could be argued that, by entrusting the investigative and disciplinary proceedings to bodies consisting primarily of other judges, the Bills do not sufficiently promote accountability. The concern is that, by having judges rule on the conduct of other judges, there will not be sufficient scrutiny. Others have argued that it is only judges who have the skills and knowledge to adjudicate cases of discipline. In this regard, the favoured proposal of the judiciary is one which established a Judicial Council of five judges to assess complaints regarding their own members. Some have argued that the possible inclusion of members of the legislature or executive on the Tribunal (or committee) and their role in the appointment process is an interference with the separation of powers principle and the independence of the judiciary.

B) <u>SA National Justice Training College Draft Bill</u>

Judicial training of newly appointed judges, and programmes for continued training, are applied in many countries, although there is significant variation in terms of curriculum and implementation. Where the concept of continuing legal education for judges is present, the debate concentrates on oversight of the programme and the design of the systems. Naturally, judges should play an active role in designing training systems, but whether they should assume sole control has been the subject of debate. It is argued that if the goal goes beyond education in new laws to actively changing attitudes and exposing judges to new concepts and approaches, a certain degree of external management may be useful.

Section 180 of the South African Constitution envisages the training of judicial officers and provides that training programs may be regulated in terms of national legislation. Nevertheless, questions have arisen over which institution should be responsible for such training. The proposal by Government, encapsulated in the Justice Training College Draft Bill, is that judges should be trained at a state-managed institution, namely the Justice College based at University of South Africa in Pretoria. At present the College is managed by a Chief Directorate within the Department of Justice and is mandated to provide

practical legal training primarily to Court Officials in the employ of the Department.

The Justice College Draft Bill attempts both to 'reinforce' the current set-up – to keep the College administration under the control of the Department – as well as introduce a separate faculty in order to "provide proper and appropriate education and training for judicial officers." The Department argues that the proposed legislation provides not only for a degree of financial accountability – by making the Director-General of the Justice Department responsible for the financial management of the College – but also ensures independence through "ring-fencing" the College budget and by establishing a separate faculty to deal with judicial education. In this regard, the faculty board will consist of six members. The composition of the faculty board is set forth in clause 10 and includes the Deputy Chief Justice as chairperson; the head of the faculty (described as a judge not currently performing service or a fit and proper person, appointed by the Chief Justice after consultation with the Minister); one judge and one magistrate (similarly appointed); one non-judicial officer and a law professor (both appointed by the Minister in consultation with the Chief Justice).

These proposals, however, have been met with two distinct but interrelated objections:

The first objection relates to the fact that, despite the general consensus around the need to train judicial officers, such schooling should not occur at a government-administered institution. In this respect it is noted that, although the draft bill states that all curriculum matters are to be the exclusive responsibility of the faculty board , the board will still fall under the Department and will therefore be subject, not only to the Public Service Regulations, but also ultimately to the authority of the executive. Apart from this it could be argued that a situation could arise where the faculty board does not have a majority of judicial appointments. Indeed, a negative application of Clause 10 – the provision regulating the composition of the faculty board – could result in judges being in the minority of faculty members. This could be at odds with the preamble of the Bill which states that "education and training of judicial officers should, as far as possible, be directed and controlled by the judiciary".

Secondly, members of the judiciary and opposition groups are concerned by the fact that the proposed legislation represents a rather sudden shift in policy as the previous Ministers and those involved in the administration were in the process of finalizing proposals including possible statutory mechanisms designed to secure the complete independence of the College. Deputy Chief Justice Pius Langa has publicly stated that the College must be run and managed by judges, and that a state-controlled College would create the perception that the judiciary lacks independence. Of course the point cannot be ignored that if it is unacceptable to train judges at a state institution then surely it is equally unacceptable to train magistrates (if not prosecutors) at such an institution.

The draft bill does attempt to distinguish between administration of the College (in the hands of the department) and the content of judicial education (determined by the faculty board). However, there needs to be sufficient checks and balances in place to ensure against the possibility of intrusion by the executive or other parties in the content of curriculum and in the provision of training. To be a truly successful and effective, the justice college should be controlled by judges and the South African judiciary should feel that it owns the college, even if administrative functions are carried out by the department. Skills training, conferences on judicial administration, continuing judicial education in substantive law, courses designed to keep judges abreast of the legal developments, social context programs – are found in curricula in various other countries, and could be an important function for the college. In addition, the college would need to have sufficient resources and skilled administrators in order to work effectively.

C) Superior Courts Bill and the Constitution of the Republic of South Africa Amendment Bill – working draft 5 A ("constitutional amendments")

Since 1994 very little has been done to consolidate the courts and their laws - in fact the 1959 Supreme Court Act still applies[6]. The new Superior Court Bill (SCB), aimed at rationalizing the courts and creating a single judiciary, was introduced into Parliament in 2003. It was subsequently withdrawn by the Minister to engage further with the judiciary before re-tabling into Parliament. The Bill first emerged in 1995 and has been the subject of consultation with the judiciary at various stages in its development.

The Bill mostly deals with arrangements for a new set-up for the courts: the appointment of staff of the superior courts, establishing new seats for the High Court in order to increase access to the courts; merging the Labour Courts into the High Courts; creating ten general divisions for the High Court, and four special divisions including the Electoral and Land Claims Court; and consolidating the laws of the Constitutional Supreme Court of Appeal and High courts into a single piece of legislation. The Bill proposes to alter the procedure with regards to appeals which would no longer lie with the High Court to a full bench of the High Court, but instead would be lodged with the SCA. The Department states that this amendment should address the backlog and lighten the workload of the High Courts. For the SCA to deal with the appeals, three circuit districts will be established. The Bill also extinguishes

[6] Some important changes have been made, however the consolidation of the courts and their laws into a single act is still outstanding: The new constitutional order instituted the Constitutional Court as the highest court in the land with ultimate jurisdiction to determine constitutional matters. The former Supreme Courts were renamed as High Courts. The former Appellate Division of the Supreme Court was renamed the Supreme Court of Appeal and is the highest court for all other matters. Jurisdiction to hear constitutional matters was granted to the SCA in 1997. The High Courts in South Africa also have constitutional jurisdiction, though certain of its actions, for instance, striking down a legislative provision as being in conflict with the Constitution, goes automatically to the Constitutional Court for confirmation. Appeals lie from the High Court either to a Full Bench of the Court or to the Supreme Court of Appeal. Specialist courts, such as the Land Claims Court and Labour Courts have also been established since 1994.

the Labour and Labour Appeal Courts – a special panel of High Court judges would hear labour matters instead.

While most of these proposals are necessary for reconstituting the court system, judges raised important concerns at the colloquium about various rule-making, administrative and managerial features of the bill and the constitutional amendments. The key concern is that these proposals could have the effect of transferring important powers from the judiciary to the executive branch of government. The concern was compounded by the notion that government seeks to introduce constitutional amendments in order to implement some of the changes contained in the SCB.

Administration

Clause 8 of the Bill, dealing with finances and accountability, gives the power to allocate the budget of the courts to the Minister, subject to the Public Finance Management Act. The relevant section enlists the following procedure before the Minister allocates the budgets to the courts: "The Minister must address requests for the funds needed for the administration and functioning of the Superior Courts, as determined by the Chief Justice after consultation with the President of the Supreme Court of Appeal and the Judges President of Divisions, in the manner prescribed for the budgetary processes of departments of state".

Further, the constitutional amendment seeks to add two new subsections to section 165 of the Constitution dealing with judicial authority. The amendment stipulates that the "Chief Justice exercises authority over the judicial functions of all courts" and "the cabinet member responsible for the administration of justice exercises final responsibility over the administration functions, including the budget of the courts".

The Department argues that placing the administration of the courts under the Department will provide judges with more time to perform their core work, and that in any event, the budget is currently administered by the department. As consultation between judges and the Department continues, the practical, political and legal implications of judicial administration need to be carefully explored. In other countries, there is no uniform practice, although budgetary independence remains an ideal.

Despite the existence of clear examples of independent judicial decision–making under executive branch administration, the recent international trend away from this approach demonstrates the concern that power over the budget and administration of the courts, especially when coupled with executive control over appointments, promotions and discipline, may allow for inappropriate influence by the executive.

It is for these kinds of reasons that a number of European countries including Spain, Italy and France have created independent judicial structures to take over the management functions of the judicial system from government, reinforcing the separation of powers. Judicial leaders in several

Commonwealth countries, notably Britain and Canada, assert that administrative policy and budgetary functions should belong to the judiciary rather than the executive and in most Latin American countries, administrative oversight has been transferred to either judicial councils or supreme courts.

An important consequence of executive control over judicial administration is that, if final decisions about budget allocation and administration are taken by the department, judges have less capacity to make decisions about expenditure priorities and needs, and this could be counter-productive**.**

Although the argument for complete judicial independence in South Africa, as it relates to administration, is a compelling one, the imperatives of rationalization and transformation and the role that the executive has to play in these processes needs to be recognized and evaluated.

The powers of the Chief Justice

One of the proposed constitutional amendments is to add a sub-section to the current constitutional provision dealing with judicial authority (section 165), to state that "the chief justice is the head of the judicial authority and exercises final responsibility over the judicial functions of the courts". Commentators have raised the concern that the Bill itself does not go on to enumerate the roles and responsibilities of the office of Chief Justice, and that this may have the effect of vesting unchecked powers in the position of Chief Justice. Compounding the concern, in this view, is that the executive has a greater role to play in the appointment of a Chief Justice.

Rule Making

With regard to rule-making, judges emphasized that section 173 of the Constitution gives the judiciary the inherent power to "protect and regulate their own process". Judges have argued that their rule-making powers were being curtailed in the SCB, and that the executive and/or legislature should not have a role in rule-making for courts. The Department, on the other hand, points to the constitutional provision that rules be articulated in national legislation.

The precise changes envisaged by the Department in this regard seem unclear. Rule-making, however, should remain within the sphere of the courts as judges are best suited to making such rules. Further, to have confidence in the judiciary as an institution, judges must feel they are in control of the processes regulating their courts.

Conclusion

How does one frame a discussion on transformation of the judiciary which is constructive and gives meaning to Constitutional values? The debate needs to go further than the transformation of the Bench and changing its composition – important as that is. What sort of access do women have to the profession? If the level of female representation on the bench is low, why is

that so? How is it possible to incentivise successful black lawyers to make themselves available for positions on the Bench? What contribution can be made to increase the pool of black candidates at law schools and as young entrants into the profession? Is there a need to support young black advocates who find start-up costs at the Bar prohibitive?

In addition, what should be informing our conversation regarding the accountability of judicial officers without compromising their robustness and independence?

Any discussion of transformation of the judicial system should encompass a study of the levels of access which the indigent have to justice, and how accessible courts are to ordinary citizens. In the magistrate' s courts in particular, where delays in trials are frequent, what is being done to improve the service to citizens? The use of language is also often a barrier to the efficient dispensing of justice.

For the turn-around to be one which deepens democratic development, there needs to be wise and measured leadership – not only the bench, the bar and legal academics – but especially from political parties despite the temptation to score political points. The conversation is too important to be hijacked by alternative agendas.

The carelessness of words on the part of politicians and law practitioners, and not the act of transformation itself threatens to undermine the confidence which ordinary citizens have in the judiciary and the system as a whole. While this should be an open, truthful conversation, the cause of transformation will not be assisted by accusations and counter-accusations in the media by lawyers and judges – or politicians.

The judiciary in South Africa has an essential role to play in defining and promoting human rights and good governance. In order to effectively exercise their review function over the other divisions of government, the judiciary must be able to act independently[7]. It is crucial that whatever mechanisms are proposed are done so transparently, and examined carefully to see that they do not intrude upon the judicial independence. The legislative process is still underway and it is important that the various concerns raised by the bills are addressed by parliament in a thorough and open manner.

[7] This critical principle is provided for in Section 165 of the Constitution of South Africa, which states. "The Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice" (Section 165 [2]). The independence of the courts is determined, firstly, by the procedures for their appointment, their terms of office and their conditions of service, and, secondly, by the extent to which they are able to exercise their powers without interference. The Constitution asserts, "No person or organ of state may interfere with the functioning of the courts" (Section 165 [3]). Security of tenure and remuneration, decisive factors for autonomy, are provided for in Judges' Remuneration and Conditions of Employment Act.

Who's Who?

Brigitte Mabandla – (b. 1948) was appointed Minister of Justice and Constitutional Development in April 2004. From 1995 to 2002 served as the Deputy Minister of Arts, Culture, Science, and Technology. In February 2003 she was appointed Minister of Housing. After working for the South African Institute of Race Relations in the mid-seventies in Durban she left the country for exile where she received her LLB from the University of Zambia (1979) before teaching law in Botswana. From 1986 until 1990 she worked full time for the ANC's Legal and Constitutional Affairs Department in Lusaka. Between 1990 and 1994 she served on both the ANC's negotiating team, and as a member of their Constitutional Committee. In 1997 Mabandla was elected to the ANC's National Executive Committee (NEC); she was re-elected to the NEC in 2002. She currently also served on the National Working Committee (NWC) of the ANC.

Johnny De Lange – (b. 1958) was appointed Deputy Minister of Justice and Constitutional Development in April 2004. From 1994-2004 De Lange served as an ANC MP, and chaired the Justice Portfolio Committee. De Lange studied for a BA degree at the University of Stellenbosch (1978) and received his LLB from the University of Cape Town (1983). He was admitted to the Cape Bar as an Advocate in 1985. During this time he defended a number of high profile activists including Ashley Forbes and Tony Yengeni. He also served on the Goldstone Commission of enquiry into Violence in Crossroads. De Lange terminated his registration with the Bar in 1993 to work full-time for the National Association of Democratic Lawyers (NADEL). A major player in the construction of South Africa's new Constitution, De Lange was part of the ANC's negotiating team during the final months of the finalisation and adoption of the Interim Constitution of 1993. He also served as a member of the ANC's team that negotiated the final Constitution through the Constitutional Assembly from 1994-96.

Arthur Chaskalson – (b. 1931) was appointed in June 1994 by President Mandela to be the first President of South Africa' s new Constitutional Court, and on 22 November 2001 he became the Chief Justice of South Africa. In 2004 Chief Justice Chaskalson announced his intention to resign, effective 1 June. He graduated from the University of the Witwatersrand with a B.Com (1952), and obtained his LLB Cum Laude (1954). He was admitted as an advocate to the Johannesburg Bar in 1956. Chaskalson acted as defence counsel in a number of important political trials during the apartheid era, including the Rivonia trial in 1963-1964. In 1978 he helped establish , and was appointed director of, the Legal Resources Centre, a non-profit organisation, which sought to use law to pursue justice and human rights in South Africa. Between 1989 and 1990 he served as a consultant to the Namibian Constituent Assembly regarding the drafting of the Constitution of Namibia, and from 1990-1994 he consulted the ANC on constitutional matters. He was a key advisor to the Multi Party Negotiating Forum in the drafting and adoption

of the Interim Constitution in 1993. Since 1994 he has served on the Judicial Services Committee, which he currently chairs.

Pius Langa – (b. 1939) was appointed as a Justice of the Constitutional Court of South Africa in October 1994; he became Deputy President of the Court in August 1997 and was appointed Deputy Chief Justice of South Africa in November 2001. Subsequent to the announcement of Chief Justice Chaskalson's resignation, President Mbeki has announced that Langa is Chief Justice designate (effective 1 June). Langa obtained his BJuris (1973) and LLB (1976) at the University of South Africa (UNISA). Langa worked at a shirt factory from 1957 to 1960, before finding employment with the Department of Justice as an interpreter/messenger. He rose through various grades and later served as prosecutor and magistrate respectively. He resigned from the department in April 1977 and was admitted as an Advocate of the Supreme Court of South Africa in Natal in June 1977 and attained the rank of Senior Counsel in January 1994. As an Advocate, Langa acted as defence counsel in a number of political and criminal trials. He has served in the structures of the United Democratic Front (UDF), was involved in the work of the Convention for a Democratic South Africa (CODESA) and of its successor, the Multi-Party Negotiations Forum. He was also a member of the Constitutional Committee of the African National Congress and was in the advisory group during the Groote Schuur and Pretoria "Talks-about-Talks". Langa was a founder member of NADEL and served as President of the organisation from 1988 until his appointment to the Court in 1994.

Dikgang Moseneke – (b. 1947) was appointed by Thabo Mbeki to the Constitutional Court in 2002. He will assume the duties of Deputy Judge President of the Constitutional Court on 10 June when the incumbent, Pius Langa, is appointed Judge President. At the age of fifteen, Moseneke was arrested for political activity, and at sixteen was sentenced to ten years imprisonment on Robben Island. While interned on the island Moseneke matriculated and obtained BA and BJuris degrees through UNISA. Subsequent to his release he obtained his LLB (1977) also through UNISA. He was a founder member of the Black Lawyers' Association and of the National Association of Democratic Lawyers of South Africa. In 1983 Moseneke was admitted as the first black Advocate to the Pretoria Bar, where in 1993 he was elevated to the status of senior counsel. In 1993 Moseneke served on the technical committee that drafted the Interim Constitution of 1993. In 1994 he was appointed Deputy Chairperson of the Independent Electoral Commission. In September 1994 Moseneke was appointed as an acting judge to the Transvaal Provincial Division of the Supreme Court. Between 1995 and his appointment to the Constitutional Court in 2002, Moseneke left the bar to pursue a career in business. During this time he worked interalia at: Telkom (Chair), African Merchant Bank (Chair), Metropolitan Life (Chair), and NAIL (Chief Executive). He resigned from all of his corporate appointments on his appointment to the bench.

Shadrack Gutto – was appointed Special Advisor on Transformation to the Minister of Justice by Brigitte Mabandla. Gutto was born in Kenya. He obtained his LLB from the University of Nairobi (1975) and an MA in Law and

Diplomacy at Tufts University, USA (1978). From 1978-82 he worked as a lecturer in the Faculty of Law at the University of Nairobi. Due to his criticism of the Moi regime, Gutto went into exile in Zimbabwe where, in 1983, he was appointed to the University of Zimbabwe's Law Faculty. In 1988, due to criticism of government policy, Gutto was declared a "persona non grata" for unspecified "national security risk" reasons, and given 48 hours to leave the country. After eight months in a refugee camp, Gutto received political asylum in Sweden where he found employment at Lund University. In 1994 Gutto was appointed Associate Professor of Law at the University of the Witwatersrand (Wits). In 2000 he became Director of the Centre for Applied Law Studies at Wits. In 2003 he accepted the position of Director of the Centre for African Renaissance Studies (CARS) at UNISA. Gutto has served as special advisor and as one of the drafters of the Equality Act (2000) and the Communal Land Act (2004). He has also participated in legislative drafting for several ministries of the South African government, including land affairs, health, and education.

Jacqueline Ngeva – currently serves as acting Director General in the Department of Justice and Constitutional Development. Ngeva was appointed to the position of Deputy Director-General of Justice in 2000. She has assumed the responsibilities of acting DG since the resignation of Adv. Vusi Pikoli who was appointed Director of the National Prosecuting Authority on 21 January 2005. Ngeva received both her Bachelors and Masters degrees in Applied Psychology (1994) from the University of the Witwatersrand. She also holds a Masters in Human Resource Management from Wits (1996) and has participated in executive training courses at the Harvard and Wits Business Schools. In 1996, she led a research project on public sector human resource planning for the Presidential Review Commission.

Fatima Chohan[8] – (b.1968) has been a Member of Parliament for the ANC since 1996. Chohan has served on the Portfolio Committee for Justice and Constitutional Development since 1996 and was appointed Chairperson of the Committee when Johnny De Lange moved into cabinet after the 2004 elections. Chohan has also served on the Provincial Local Government Committee. Chohan is an Attorney by profession.

Sheila Camerer – (b. 1941) currently serves as DA spokesperson for Justice. Camerer holds an LLB from the University of Cape Town (1964) and was admitted to the Bar in 1978. Prior to entering politics, she worked as a journalist for the Financial Mail and an attorney. In 1987, she was elected as the National Party Member of Parliament for Rosettenville. During the Constitutional Negotiations, Camerer served as a member of the NP component of the Constitutional Principles Working Group at CODESA. In April 1993 she was appointed Deputy Minister of Justice by FW De Klerk. Camerer has served on the Portfolio Committee of Justice from 1994 to the present. In 1996 she was reappointed Deputy Minister of Justice for 3 months

[8]This information was provided by Ms. Chohan's office. Further biographical details were unavailable prior to publication.

in the Government of National Unity prior to the NPs decision to exit the GNU for opposition. In 1999 she was appointed as a member of the Judicial Service Commission. She served on the NNP team that negotiated with the Democratic Party to form the Democratic Alliance in 2000. Following the NNP's withdrawal from the DA in 2002, Camerer defected to the DA in 2003 through floor-crossing.

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CORRECTION

We regret the following error: In edition 02, 2005 of ePoliticsSA, Reserve Bank Governor Tito Mboweni was erroneously identified as having been active as a member of COSATU prior to the unbanning of liberation movements in 1990. In the 1980's Mr. Mboweni was active in ANC structures in exile.