"LRC 1"

Address to the Cape Law Society on 9 November 2012

The Rule of Law: The importance of independent courts and legal professions

After years of negotiations a Legal Practice Bill has now been submitted to Parliament and is before the Justice and Constitutional Development Portfolio Committee, which has invited comment on its provisions. It has apparently not been possible for the professions to reach agreement with the government on the provisions of the Bill that affect their existing structures. That is a pity, for these are matters that are best dealt with by consensus and not by dictate. There is still an opportunity to accomplish this, and hopefully this opportunity will not be lost.

In its present form the Bill will have a profound impact on the structure and functioning of the attorneys' and advocates' professions. That is what is intended, for as the preamble to the Bill records, one of its purposes is to

> provide a legislative framework for the transformation and restructuring of the legal profession into a unified profession which is representative of the Republic's demographics.

Later I will draw attention to some of those provisions and say why I consider them to be a matter for concern. But first I want to lay the foundation for the proposition that that the independence of the judiciary and the legal profession are central pillars of our constitutional democracy, and that we should be astute to ensure that there is no erosion of these fundamental principles.

The Charter of the United Nations set as a goal a world order in which the observance of fundamental rights and freedoms would be promoted and respected. This was a reaction to fascism, the holocaust and the horror of the war. Consistently with this the ANC, in its Harare Declaration of 1989, called for a new constitutional order in which all would "enjoy universally recognised human rights, freedoms and civil liberties, protected by an entrenched bill of rights".[1]

Not surprisingly this is what our Constitution does in response to three and half centuries of discrimination and oppression enforced by a system of legislative

[1] Paragraph 16.5 of the Harare Declaration

supremacy. It sets out the values on which our new democratic order has been founded. They are:[2]

> Human dignity, the achievement of equality, and the advancement of human rights and freedoms.
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> non-racialism and non-sexism.
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> Supremacy of the Constitution and the rule of law.
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> Universal adult suffrage, a national common voters roll, regular elections and a multiparty system of government, to ensure accountability, responsiveness and openness.

The Constitution provides a framework to enable us to move away from the old legal order where there were no rights and no protection against the abuse of power. The framework contemplates a transition from apartheid and apartheid law, to a constitutional democracy based on the rule of law, and a legal system in which fundamental human rights and freedoms are entrenched. This is consistent with the Vienna Declaration and Programme of

[2] Section 1 of the Constitution

Action, adopted by the World Conference on Human Rights in 1993,[3] and subsequently endorsed by United Nations General Assembly,[4] which states that "democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing."[5] The same commitment is made in the Millenium Declaration adopted at the 8th plenary meeting of the United Nations held on 8 September 2000, where Heads of State and Government (including South Africa) pledged that

> We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognised human rights and freedoms

Our Constitution entrenches democracy, the rule of law, and internationally recognised human rights as foundational values of a commitment made in the preamble to "lay the foundation of a democratic and open society". The importance of this commitment was affirmed by President Zuma in his address last month to the High Level meeting of the General Assembly of the United

[3] On 25 June 1993

[4] By Resolution 48/121 of 20 December 1993

[5] Paragraph 8 of the Declaration

Nations on *The Rule of Law at the National and International levels.*[6] He called for a global commitment to the promotion of the rule of law and the realization of human rights, and said:

> We feel at home in this discussion because South Africa is a sovereign democratic state founded on specific values, which include the supremacy of the Constitution, the rule of law, human dignity, equality and freedom.

The President went on to say:

> Perhaps nothing reflects adherence to the rule of law like the judicial settlements of disputes.

The supremacy of the Constitution and the rule of law require everybody in our country, including parliament and the executive, to obey the law, and to respect and uphold the provisions of the Constitution. Our Constitution is

[6] Available at the website of the Department of International Relations, http://www.dfa.gov.za/speeches/2012/jzum0924a.html

explicit about this obligation, and courts are mandated to be the guardian of the Constitution – this is the role of courts in a constitutional democracy. This is in line with modern democratic theory which recognises that respect for fundamental rights and the rule of law are essential components of a democratic system of government.

Section 2 of the Constitution declares that the Constitution is the supreme law, and that law or conduct inconsistent with it, is invalid. Fundamental rights and freedom are entrenched in the Bill of Rights in Chapter 2 of the Constitution, and the courts are explicitly directed to uphold and enforce the constitution. Section 172(1) of the Constitution states, that when deciding constitutional matters within their jurisdiction, courts must declare that any law or conduct which is inconsistent with the constitution is invalid to the extent of its inconsistency.

Parliament and the executive derive their power from the Constitution. In giving power to them, the people of our country said in the Constitution that the bill of rights is the cornerstone of our democracy, that the state must respect, and fulfil the rights in the bill of rights, and that all power must be

exercised in accordance with the provisions of the Constitution. They said also that it was the duty of the judiciary to uphold and enforce the Constitution.

Leaving aside for the moment the question of the jurisdiction of particular courts, judicial review of legislation and executive action is not only sanctioned by the Constitution; courts are told that they **must** declare legislation or conduct that is inconsistent with the Constitution to be invalid. This obligation of courts is in stark contrast to the role of the courts when legislative supremacy prevailed. This can best be described by referring to a passage from a 1934 judgment of the Appellate Division, then our highest court, where the Chief Justice of that time said:

> Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway . . . and it is the function of the courts of law to enforce its will.[7]

[7] Stratford CJ in Sachs v Minister of Justice 1934 AD 11 at 37, referred to by Cora Hoexter in *Administrative Law in South Africa (Juta & Co, 2007)* at 12, and Kate O'Regan, *Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law*, (2004) 121 SALJ 424

This was later done as a matter of course under apartheid. Racially discriminatory laws were enacted by the white parliament to further the social, economic and political interest of the white community. A vast network of draconian security laws, condemned internationally as gross violations of human rights, was enacted in an effort to control dissent. Legislation could not be invalidated and where it was interpreted in a manner which did not meet the satisfaction of the government, the "loophole" could be closed by legislation. Law enforcement provided the means by which apartheid was kept in place and dissent was curtailed.

This has changed. Now, the primary role of the judiciary as guardian of the Constitution, is to ensure that everybody, including the other arms of government, act lawfully. Its task is to judge the legality of conduct, including the making of laws, and to provide appropriate relief in cases where breaches of the law have been established. This is the extent and the limit of its powers which are also derived from the Constitution.

The judiciary cannot be expected to discharge its duty to judge the legality of laws and conduct of other arms of government, if it is subject to control, direct

or indirect, by the legislature, the executive, or other powerful institutions. It is essential and indispensable for the discharge of this duty, and the exercise of the powers vested in it, that the judiciary should be, and should be seen to be, independent.

This is recognised in the Constitution, which provides that courts are independent, subject only to the law and the constitution, which they must apply impartially without fear, favour or prejudice;[8]and that no person or organ of state may interfere with the functioning of the courts.[9] The oath of office of judges[10] requires them to swear or affirm that they will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear favour or prejudice, in accordance with the Constitution and the law.

Judicial independence is a requirement demanded by the Constitution, not in the personal interests of the judiciary, but in the public interest, for without that protection judges may not be, or be seen by the public to be, able to

[8] Section 165(2) of the Constitution

[9] Section 165(3) of the Constitution

[10] Section 6 of Schedule 2 to the Constitution

perform their duties without fear or favour. This is necessary in the best of times, and crucial at times of stress. Professor Dieter Grim, a highly respected commentator on constitutional law, who was formerly a judge of the Federal Constitutional Court in Germany, describes judicial independence:[11]

> as the constitutional safeguard against the threat arising from politicians to the judge' proper exercise of their functions. Politicians tend to interpret the constitution in the light of their political interests and intentions. Even if they originally agreed to judicial review they soon find that its exercise by a court is burdensome for them. They have a general interest in the court not being adverse to their objectives and plans and a specific interest in the outcome of particular litigation on which the implementation of a particular policy may depend.

Although not specifically mentioned in the Constitution, the judiciary depends on an independent legal profession to enable it to perform its constitutional duty. This is an incident of the rule of law which is entrenched in our Constitution. This link is affirmed in the Commonwealth Latimer House

[11] Dieter Grim, *Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics, NUJS Law Journal, (2011) at page 18*

Principles [12]adopted by Commonwealth Ministers of Justice at Abuja in 2003. The guidelines were adopted after extensive consultation over a number of years including meetings of Commonwealth Chief Justices. South Africa was a member of the drafting committee and was party to the adoption of the guidelines, which provide:

> An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.

The link between independence of the legal profession and the rule of law is also spelt out by the International Bar Association in its *Standards for Independence of the Legal Profession* adopted in 1990.[13] The standards declare that an independent legal profession is an essential guarantee for the promotion and protection of human rights and the establishment and maintenance of the rule of law.

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[12] *Commonwealth (Latimer House) Principles on the Three Branches of Government, (Nov 2003)* IV Independence of the Judiciary, available at www.cmja.org/downloads/latmerhouse/commprinthreearms.pdf

[13] Preamble to *IBA Standards For the Independence of the Legal Profession* (adopted 1990) available at www.ibanet.org/Document/Default.aspx?

The need for this in a constitutional democracy is clear. Taking our Constitution as a model, this is essential to give substance to the right to have access to courts,[14]the right to a fair trial,[15]the right to just administrative action,[16]and generally to the right of the public to enforce the obligation on the state to respect, promote and fulfil all the rights in the bill of rights.[17]

It is lawyers who advise members of the public of their rights and who bring cases to the court on their behalf. Courts depend on the lawyers discharging this duty honestly and competently, and advancing the interest of their clients to the best of their ability. Without the assistance of lawyers judges would not be able to discharge their constitutional duty to uphold the law without fear or favour. It is in the public interest, and the interest of clients, that the culture of the legal profession should be rooted in the independence of the profession, and that lawyers should not be subject to outside influences or be concerned that if they take on a case for a particular client they will incur the hostility of

[14] Section 34 of the Constitution,

[15] Section 35(3) of the Constitution.

[16] Section33 of the Constitution,

[17] Section 7(2) of the Constitution.

the government or other powerful instances. The Chief Justice of New Zealand, Dame Sean Elias, puts this succinctly:[18]

> Effective judicial process cannot be obtained from independent judges without independent lawyers

The independence of the legal profession, like that of the judiciary, is required in the public interest. But there is a corresponding obligation that flows from this, and that is, that the profession must conduct its affairs in a manner consistent with the public interest. The duties owed to clients to act without fear or favour, to the court to act honourably, and generally to observe high professional standards, are important parts of the profession's responsibility to the public. However that is not all. The public must have access to the profession, which would have no right to assert that it serves the public interest, if it were to serve only the elite in our society. What is important is that legal services should be available to all who need them, and in particular, to those who look to the profession as an institution that will uphold and protect the rights of everyone, and not only the rich.

[18] Address given at the 50th Anniversary of e Fiji Law Society

This is not a burden that can be carried by the profession on its own. It has to be done in cooperation with government and civil society. Legal aid is crucial to ensure that the constitutional rights to a fair trial and access to courts are rights in substance and not merely rights on paper that are beyond the reach of those who need their protection. It is also important that organs of civil society should cooperate with the legal profession to facilitate the provision of legal services, where a need for such services has been identified in order to advance or protect the public interest, or the interests of poor and marginalised communities. The legal infrastructure for the governance of the profession, and the profession's own rules, should be designed to encourage and not frustrate such activities. The focus of the profession's rules should be the public interest, not self-interest. Much has been done by the profession in this regard, but the assertion is made in the Legal Practice Bill that access to legal services is limited; access to affordable legal services is not a reality for most South Africans; entry into the legal profession is, in some respects, dependent on compliance with outdated, unnecessary and overly restrictive prescripts; and the legal profession is not representative of the demographics of South Africa.

These are serious contentions that must be addressed and responded to by the profession. This can best be done by dialogue, public debate, and by looking for solutions to problems that exist which do not erode the independence essential for the functioning of a legal profession in a democracy.

With those remarks, I return to the Legal Practice Bill. The Bill contains detailed provisions dealing with the structure and functioning of the controlling bodies of the advocates' and attorneys' professions. It is not inappropriate for the legislature and the professions to consider whether the present structures of the professions are consistent with our constitutional democracy. Both professions have taken steps since the new constitutional order came into force to change rules and practices in order to move the professions into the 21st century, and there may well be, and I understand that there are, provisions of the Bill that the professions support. There will also be details of the Bill to which either or both the professions may object. My concern is not with the detail of particular provisions, but with the impact that the Bill in its present form is likely to have on the independence of the legal profession. It is to that concern that I will address my comments.

The Bill contemplates the establishment of a new Council, The South African Legal Practice Council,[19] and Regional Councils, which after a transition to be regulated in terms of the provisions of the Bill, will exercise control over all legal practitoners, and take the place of existing Law Societies and Bar Councils. The area of jurisdiction of the Regional Councils is to be determined by the Minister.[20] The Council will become the controlling body for both the attorneys and advocates professions, and the assets and liabilities of exiting Law Societies and Bar Councils will be transferred to the Council and Regional Councils in terms of agreements to be negotiated, or failing that, as determined by arbitration.[21] It is far from clear as to how the assets and liabilities of existing professional councils, with different boundaries, will be made to fit into the Council and Regional Councils, or how the rights of existing employees will be accommodated within the new structures, but that falls beyond the scope of my comments today.

The Council will have extensive regulatory powers, including the setting of ethical and professional standards, the development of a common code of conduct for both professions, disciplinary powers, the education of law

[19] Section 4 of the Bill

[20] Section 23(2) of the Bill

[21] Section 97(2) of the Bill.

graduates aspiring to be admitted as legal practitioners, compulsory post-qualification professional development of all practitioners, ensuring that fees charged are reasonable, and the setting of norms and standards for the two professions.[22] The Council will consist of 21 members, of whom 10 will be elected by attorneys, and 6 by advocates. The remaining 5 will be made up of 3 nominees of the Minister, one Professor of Law and one nominee of the Legal Aid Board. [23]

I understand that the advocates' profession and the attorneys' profession, through their elected representatives, reached agreement on how the relationship between the two professions should be dealt with in the Bill, but that this has not been given effect to by the drafters of the Bill. The advocates' profession will now become a junior partner of the combined profession, and it is not clear what effect this will have on it as a profession. Although attorneys have had the right of audience in superior courts for many years, advocates still handle an overwhelming proportion of the constitutional litigation and other cases in those courts. Access to advocates enables smaller firms to compete with larger firms when their clients are involved in such

[22] Sections 5 and 6 of the Bill

[23] Section 7(1) of the Bill

litigation, and a weakening of the advocates' profession could have serious consequences not only for the legal profession, but for the public as well. That is a matter of great public importance that needs to be debated as a separate issue, and though relevant to the independence of the legal profession as a whole, falls beyond the scope of my comments today.

The United Nations Basic Principles on the Role of Lawyers provides:[24]

> Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training, and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external influence

According to the preamble to the Basic Principles their provisions,

> Should be respected and taken into account by governments within the framework of national legislation and practice.

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[24] Para.24, *United Nations Basic Principles of the Role of Lawyers, available at www2.ochr.org.english/law/lawyers/htm*

The drafters of the Bill have not done this. The Bill does not respect the freedom of lawyers to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. These functions are now to be dealt with in terms of the Bill, and the assets, liabilities and staff of existing associations dealing with such matters, are to be transferred to new bodies to be established in terms of the Bill.

Although the preamble to the Bill says that it is intended to ensure that the values underpinning the Constitution are embraced, that the rule of law is upheld, and that the independence of the profession is strengthened, the Bill interferes with the freedom of association of existing associations, contemplates the expropriation of their assets and the vesting of them in a new Council or Regional Councils, and vests residuary power to control essential aspects of these Councils and the legal profession in the Minister of Justice and Constitutional Development.

The Bill makes provision for the Council and Regional Councils to control the day to day functioning of the profession. However, the Minister is given the

power to dissolve the council, if "on good cause shown he loses confidence in the ability of the council to perform its functions effectively and efficiently, or on any reasonable grounds". [25] If he exercises this power he is then given the authority to appoint an interim council of at least seven persons, and to designate the chairperson of that council, which can hold office for up to six months before new elections are held.[26] Before exercising the power to dissolve the Council the Minister must appoint a retired judge to conduct an investigation into the council and make recommendations to him. He is not bound by the recommendations, but even if he were to follow them, the mere fact that he can order an investigation and has the power to dissolve the council and to appoint an interim council, is a potential threat hanging over the heads of the council, is inconsistent with the independence of the profession, and is calculated to secure compliance rather than resistance from it should differences on important issues ever surface between them.

The Bill also empowers the Minister to prescribe the vocational training requirements for candidate legal practitioners,[27] and to prescribe the requirements for community service to be undertaken by legal practitioners.[28]

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[25] Section 14 (1) of the Bill

[26] Sections 14(4) and (5) of the Bill.

[27] Section 26 (1) (b) of the Bill

[28] Section29 (1) of the Bill

The requirements for community service are to be prescribed after consultation with the Council,[29]which means that though consultation must take place the Minister has the final say, and that the requirements do not need the consent of the Council.

The Bill provides that fees charged by legal practitioners must be in accordance with its provisions.[30] Although the Bill provides that the fee structure must take into account matters such as the importance, significance, and complexity of the issues, the volume of work and time spent on it, and the financial implications of the matter,[31] the Minister is given the power to make regulations for the fee structure. Once again this must be done after consultation with the Council, which means that the Minister has the final say on the fee structure, and the consent of the council is not required.[32]

The regulation making power vested in the Minister, also after consultation, includes the making of regulations relating to the practical and vocational

[29] Id.

[30] Section 35 of the Bill.

[31] Id.

[32] Section 94 (1) of the Bill

training of candidate legal practitioners,[33] the compulsory post-qualification professional development of legal practitioners,[34]and the establishment of a mechanism to provide transformational legal educational training for legal practitioners.[35]

The Bill makes provision for an Ombud, whose office is established as a juristic person, [36] to be appointed by the President[37] to ensure the fairness of the investigation of complaints of misconduct against practitioners.[38] An independent institution to review and make recommendations to governing bodies of the profession in relation to disputed claims is a reasonable measure. It offers a check against self-regulation being driven by self-interest, or a perception that this is what has happened.

The Bill provides that the Ombud should be independent and exercise his or her powers without fear, favour or prejudice.[39] So far, so good. However, the Bill goes beyond this and provides that the objects of the Ombud include the

[33] Section 94(1)(b) of the Bill

[34] Section 94(1)(c)

[35] Section 94(1)(g)

[36] Section 46 (1) of the Bill

[37] Section 48(1) of the Bill

[38] Section 47 of the Bill

[39] Section 47(3) of the Bill

protection and promotion of the public interest in relation to the rendering of legal services, the promotion of high standards of integrity in the legal profession, and the promotion of the independence of the legal profession.[40] The Ombud, whose appointment and term of office are determined by the President,[41] may make recommendations to the Council and the Minister on any matter which he or she considers may affect the integrity and independence of the legal profession and public perceptions of the integrity and independence of the legal profession,[42]and as to steps that ought to be taken to promote such standards.[43] The Ombud is vested with extensive powers to deal with such matters. They include a power to review a decision of an investigation by the council, a regional council, or a disciplinary committee. The Ombud must report what he or she considers to be failures by disciplinary committees to the Council, and the Council has to report to the Ombud on steps taken to remedy the default.[44] If the Ombud is not satisfied with the way a Council or Regional Council has dealt with complaints he or she may make recommendations and report the Council or Regional Council to the Minister.[45] The Bill contemplates that the Fidelity Fund remains in existence

[40] Section 47(a),(c) and (d) of the Bill.

[41] Section 48 and 50(4) of the Bill

[42] Section 49(1)(a) of the Bill

[43] Section 49(1)(g) of the Bill

[44] Section 49(1)(e) of the Bill

[45] Section 49(1)(d) of the Bill

but its affairs are to be controlled by a board appointed in terms of Bill. The Ombud is give the power to review decisions of the Board in respect of a rejection, in whole or in part, of a claim arising out of the theft of trust money.[46]

The Ombud is required to report annually to the Minister on his or her activities, including the progress made towards achieving the objects for which the office of the Ombud was established.[47] For the purpose of his powers of investigation the Ombud may compel persons to appear before him or her to be questioned and to produce documents.[48]

The Bill therefore empowers the Minister to dissolve the Council, and appoint an interim council in its place, to exercise control over important aspects of legal education and continuing education for legal professionals, to require legal professionals to render community service, and to prescribe what that should be, and to control the fees that can be charged for legal services. It also makes provision for the establishment of the office of an Ombud, which can conduct investigations into the legal profession and report to the Minister thereon, and have the last word on disputes between members of the legal profession and the public on complaints over fees and other matters, and to review decisions of the Board of the Fidelity Fund relating to the theft of money.

[46] Section 49(1)(f) of the Bill

[47] Section 53(2) of the Bill.

[48] Section 49 (2) of the Bill

Funds for the operation of the Ombud's office form an earmarked part of the budget of the Department of Justice and Constitutional Development.[49] The remuneration of each member of the Ombud's staff is to be determined by the Minister,[50]and the director of the Ombud's office has to report quarterly to the Director General of the Department.[51] The Ombud therefore does not have financial independence.

The Ombud and the Minister are both appointed by the President which means that members of the executive have significant powers to control important aspects of the functioning of the legal profession. There is no reason to believe that these powers will be abused. But that is not the point. We do not know what might happen in the future. A structure is being proposed which opens the door to important aspects of the profession being controlled by the executive, and that is inconsistent with an independent legal profession.

Constitutions are written for the future. One of the lessons of history is that rights are vulnerable, and when governments come under stress there is a temptation for them to brush rights aside, in order to secure their goals and

[49] Section 52(6) of he Bill

[50] Section 52(5)(a)

[51] Section 52(40© of the Bill.

entrench their power. That is why democratic legal orders have checks and balances to guard against this. We cannot foresee the future. It is important that we should protect the checks and balances we have, so that they are there should they be needed in the future to protect our democracy. An independent judiciary and an independent legal profession are vital parts of these checks and balances.

On other occasions I have warned against the erosion of rights and checks and balances. The first steps to that end, even if they may seem at the time not to pose immediate threats, are particularly dangerous, for if allowed to pass without objection, they open the way for a political culture in which this is treated as acceptable. There are signs that this is what is happening in our country. The proposal initially made, but since revised, for a review of the powers of the Constitutional Court's, the proposal once advanced, but subsequently put on hold, that there be a media tribunal to exercise some form of control over the media, the recent opposition by the Minister of State Security to proposed changes to the Protection of Information Bill presently before Parliament, show that this possibility cannot be excluded.

The legal profession has a duty to itself and to the people of our country to do all that it can to protect its independence. That involves ensuring that its rules and practices are in the public interest and facilitate access to courts by the public and in particular by those whose need is the greatest, by promoting the culture of independence and professionalism in practitioners, by explaining to the general public the role of an independent legal profession in protecting democracy, and by raising its voice against measures calculated to erode that independence. The Legal Practice Bill in its present form is such a measure.

Arthur Chaskalson

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