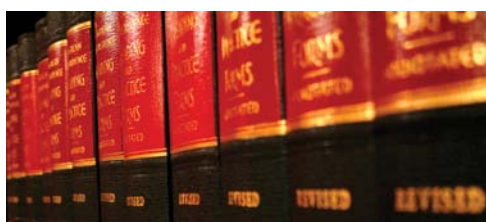


Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State



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the doj & cd


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A DISCUSSION DOCUMENT ON THE TRANSFORMATION OF THE JUDICIAL SYSTEM AND THE ROLE OF THE JUDICIARY IN THE DEVELOPMENTAL SOUTH AFRICAN STATE

PREFACE BY THE MINISTER

On 4 February 1997 the Constitution of the Republic of South Africa, 1996 came into operation, symbolising the birth of the South African democratic state founded on the supremacy of the constitution and the rule of law. It is befitting that we today publish the Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State in remembrance and celebration of the 15th anniversary of this supreme law of the Republic that positively changed the course of the South Africa's history. In the recent State of the Nation Address delivered on 9 February 2012, President Zuma, described our basic law of the land as follows:



"The Constitution is South Africa's vision statement, which guides our policies and action. We reaffirm our commitment to advance the ideals of our country's Constitution at all times"

Therefore, consistent with the above statement by President Zuma, the release of this Document marks (the beginning of the) articulation of policies that would guide the transformation of the judicial system in South Africa.

The Document, which was considered and adopted by Cabinet on 23 November 2011, is an overview of the protracted debate and negotiations within the judicial sector and the legal profession which spans over a period of 14 years. Time is now opportune to initiate a national dialogue on these fundamental principles of judicial reform which have crystallised over time.

The transformation of the judicial system is a constitutional imperative which is entrusted upon Government as a branch of the state that is assigned the responsibility of developing and implementing national policy and of initiating legislation, among others. In particular item 16(6) of Schedule 6 to the Constitution states that:

"(a) As soon as is practical after the new Constitution took effect, all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.

(b) The Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph (a)"

The above constitutional provisions are predicated on Item 16(1) of the Schedule 6 to the Constitution, which provides that:

"(1) Every Court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to –

*Any amendment and repeal of that legislation; and
Consistency with the new Constitution"*

The President's comments relating to the review of the powers of the Constitutional Court is consonant with the rationalisation project mandated by the Constitution. When the Constitution Seventeenth Amendment Bill and its accompanying Superior Courts Bill were published for public comments in May 2010 as required by the Constitution, divergent views were made by various commentators on the powers and the composition of the Constitutional Court. The comments were made as part of the reorganisation of the courts envisaged in the Constitution. For example in its submission on the Bill the Legal Resource Centre argued that the Constitutional Court's power to hear "issues connected with decision on a constitutional matter be retained". On the other hand the General Council of

the Bar acknowledged that there were divergent views within its own ranks on this point, with others in favour, while others were opposed to the changing of the jurisdiction of the Constitutional Court. These divergent views reflect the character of our vibrant public participatory discourse.

This Document reflects on, among others, the following themes and principles which underpin the transformation of the judicial sector:

- The role of the judiciary in transforming the state and society
- Separation of powers, the independence of the judiciary and the rule of law as foundational values that underpin the democratic society
- Significant interventions and steps we have taken to enhance the independence and effectiveness of the judiciary
- The impact of South African jurisprudence on the transformation of society
- The assessment of the impact of the decisions of the Constitutional Court on the reconstruction of society and the state
- How the assessment of the impact of the decisions of the Constitutional Court would unfold.

Before I elaborate on the above themes, it is important to give a brief historical background to the transformation discourse.

Historical Background

It is important to have regard to the history of the country's transition from an apartheid state to a constitutional democracy shaped by the Multi-party negotiations led by the ANC. As part of the political settlement reached during these negotiations the Constitutional Court was to be established as an institution of change entrusted with the mandate of championing the reform of the South African legal landscape including our jurisprudence, which was influenced by the unjust laws of colonialism and apartheid. It is therefore of prime importance, that seventeen years into democracy, a critical assessment of how the Constitution has changed the lives of ordinary citizens be made. The role played by the Constitutional Court is of fundamental importance in this process, hence the necessity to evaluate the impact of our constitutional jurisprudence on society as a whole. I will, later on, provide the details on how this assessment process will unfold.

Throughout the history of the struggle for freedom, the ANC, which celebrates its centenary this year, fought for a free and democratic South Africa. The Bill of Rights adopted by the ANC in 1923, the Africa's Claims of 1943 and the Freedom Charter of 1955 reflect the ANC's deep rooted human rights culture which defined its character and stature as a liberation movement that fought for the emancipation of the disenfranchised majority against the tyranny of the apartheid regime. These fundamental policy documents form the basis on which the Constitution of the Republic of South Africa, 1996 is premised.

The Constitution is the supreme law of the land and provides the basis for the transformation of the state and society. It sets out, as its vision, the establishment of a non-racial, non-sexist, equal and prosperous democratic society, founded on human rights. The Bill of Rights enshrined in the Constitution, entrenches justiciable socio-economic rights which underscore the developmental character of the South African state with an overwhelming commitment to social justice. It is these uniquely transformative features of our Constitution that seek to redress the legacy of inequality and deprivation implanted during the 300 years of colonialism and apartheid. In redressing this legacy, the Constitution, in its Preamble, affirms the peoples' commitment *"to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights"*

The making of the Constitution, which was a culmination of intense negotiations, was quite remarkable, not only because it was open and transparent, but also for its unprecedented levels of popular participation and the breadth of consultation across all sectors of society. The final Constitution was certified by the Constitutional Court, in a move unprecedented world-wide. The Constitution is an embodiment of the values that the ANC stood



and fought for. The ANC-led government will defend these values at all cost, including the independence of the judiciary and the rule of law which are the bedrock of our constitutional democracy. This re-assurance comes against the backdrop of irresponsible commentary that has been published recently, which is intended to instil fear that the ANC is hell bent on revoking the fundamental rights and freedoms that many had fought and some died for in order for all of us to reap the benefits of a free society. We want to allay those fears and reaffirm our commitment to the Constitution and its values in our quest to building a non-racial, non-sexist and prosperous democratic South Africa.

The role of the judiciary and the courts in transforming the state and society

Despite the significant strides we have made in the 17 years of democracy in realising the values in the Constitution, there are still challenges and hurdles that confront the state in its endeavour to transform society. The National Planning Commission, in its Diagnostic Report released in 2010 acknowledged that :

“..Though divisions of race and class remain, with inequality more often than not reflecting these lines of division, law, government policy and broad social consensus are seeking to remove these inequalities, rather than entrench them as was the case in the apartheid era”.

The observations of the National Planning Commission find reflection in the address by Justice O’ Regan, a retired judge of the Constitutional Court during the Helen Suzman Memorial Lecture in 2011, when she painted the realities of the South African society as follows:

“The deep inequalities that persist are visible reminders of the effects of apartheid and colonialism. Until these scars are healed, the vision of our Constitution will not have been achieved. There is a great burden on government, in particular to address this historic legacy”.

The challenge for us as we near the end of our second decade of democracy is to consolidate the advances that we have made in such a way that we begin to make a difference in the lives of all South Africans. This should be upper most in our minds as we forge ahead in consolidating our constitutional democracy.

The judiciary has an important role in safeguarding and protecting the Constitution and its values and in ensuring the consolidation of democracy and the realisation of a better life for all. It does this through its constitutionally entrenched judicial authority. Over the years, many in the Judiciary have shown a profound understanding of the constitutional imperatives and set out to defend the basic law of the land. This includes many judgments, particularly by the Constitutional Court, that have reflected a progressive interpretation of the Constitution and social rights in particular. The landmark decisions in *Government of the RSA and Others v Grootboom* which relates to the provision of housing and the *Treatment Action Campaign* judgment which pertains to right to health, are among the many judgements of the Constitutional Court which form the building blocks of our constitutional jurisprudence admired world-wide.

Government’s response to court judgments has been respectful and has helped to reinforce the legitimacy of the courts and thereby enhance public confidence in the judicial system. As a direct response to and within the context of its overall constitutional mandate, Government has initiated and promoted laws to give effect to the judgments of the courts. The Police Amendment Act which aims to address concerns raised by the Court in the case of *Glenister and the President of the Republic of South Africa* is one recent example. Where Government required additional time beyond the timeframe given by the Constitutional Court to rectify the defects in the impugned laws, it has asked for more time to tackle the complex issues and to give full effect to the decision of the court. The State Liability Act is one such example. Criticism of the decisions of the courts especially where such decisions are against government are usually met with outrage by some commentators and those who purport to act in defence of our Constitution. There is supporting literature that in a Constitutional democracy such as ours criticism of the court’s decision is both permissible and desirable. This finds reflection in the citation by Justice Felix Frankfurter of the US Supreme Court:

“Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Judges must be kept mindful of their limitation and of their ultimate public responsibility by vigorous stream of criticism expressed with condor however blunt”

It is therefore important that the the role of judicial officers is properly understood by those whose fate and livelihood is dependent on the judgments they give through the courts. Judges are not less immune to public

scrutiny than members of the Executive and Legislature.

Separation of Powers and the independence of the judiciary

The Constitution enjoins the three branches and organs of state to strive for the realisation of the democratic values that are enshrined in the Constitution, which include the establishment of an equal society and the eradication of poverty. The Bill of Rights, which is a cornerstone of democracy in South Africa, provides the basis and framework for the attainment of these goals. The Bill of Rights applies to all and binds the legislature, the Executive, the judiciary and all organs of the state. The judicial power of the Constitutional Court in striking down of laws made by the legislature it deems unconstitutional which occurs often in constitutional democracies similar to ours, is a fundamental principle of our constitutional dispensation. It has occurred a number of times where the Constitutional Court had invalidated laws passed by Parliament and the conduct of the President as being inconsistent with the letter and spirit of the Constitution. This is common in constitutional democracies and an affirmation of the vibrancy of our constitutional democracy founded on the supremacy of the Constitution and the rule of law.

President Zuma, when addressing the 2011 Access to Justice Conference reiterated the importance of a clear delineation of responsibilities of the arms of Government and articulated the position as follows:

“ While acknowledging the strides we have made, it is our well considered view that there is a need to distinguish the areas of responsibility between the judiciary and the elected branches of government, especially with regard to government policy formulation. The Executive, as elected officials, has the sole discretion to decide policies for the Government. This challenge is by Justice VR Krishna Lyer of India who observed that: “Legality is the courts’ province to pronounce upon, but canons of political propriety and democratic dharma are polemic issues on which judicial silence is the golden rule”.

Many profound constitutional writers and scholars and the Constitutional Court itself have cautioned of the need for the judiciary to exercise their power of judicial review with great circumspection. The late former Chief Justice Mahomed, the first black Chief Justice of a democratic Republic of South Africa when addressing the International Commission of Jurists in Cape Town in 1998 had this to say on the subject:

“ Judicial power is potentially no more immune from vulnerability to abuse than legislative or executive power but the difference is this: the abuse of legislative or executive power can be policed by an independent judiciary but there is no effective constitutional mechanism to police the abuse of judicial power. It is therefore crucial for all judges to remain vigilantly alive to the truth that the potentially awesome breath of judicial power is matched by the real depth of judicial responsibility. Judicial responsibility becomes all the more onerous upon judges constitutionally protected in a state of jurisprudential solitude where there is no constitutional referee to review their own wrongs”.

The Constitutional Court, in the case of *State v Makwanyane* elaborated on the delicate roles of the branches of government in the context of the separation of powers when it contended that:

“... This court is not to ‘second guess’ the executive or legislative branches of government or interfere with the affairs that are properly their concern... Our task is to give meaning to the Constitution and, where possible, to do so in ways that are consistent with the underlying purposes and are not detrimental to effective government. The issues raised in the present case... concern the powers of Parliament and how it is required to function under the Constitution... Constitutional control over such matters goes to the root of democratic order... It is of crucial importance at this early stage of the development of our new constitutional order to establish respect for the principle that the Constitution is supreme.”

Justice O’Regan, in her address given at the Helen Suzman Memorial Lecture which I have made reference to earlier, contrasted the roles of Government and the courts in the context of socio-economic rights when she states as follows:

“... the approach of the Court has been to require government to explain why its policies in the field of social and economic rights are reasonable. Government must disclose to the Court ‘what it has done to formulate the policy, its investigation and research, the alternatives considered and the reasons why the option underlying the policy was selected. This approach permits citizens to hold the democratic arms of government to account through litigation, but does not require government “to be held to an impossible standard of perfection.”



Justice O'Reagan also reflected on the importance of judicial modesty and restraint when she remarked:

"...Courts need to be modest about the judicial role in addressing the legacy of our history. They must recognise that their responsibility is primarily to ensure that government works within the threefold framework of legality, rationality and compliance with the bill of rights. Outside of this framework, it is not for courts to impede the functioning of government. There are reasons for this: the first is that legislature, and indirectly, the executive are democratically elected arms of government whose office is determined by popular vote."

In an article by EK Quansah and CM Fombad, Professors of Law of University of Botswana titled "Judicial Activism in Africa: Possible Defence Against Authoritarian Resurgence" they wrote:

"The long history of apartheid and the role which the judiciary played in it and the transformatory foundation laid down by the South African 1996 constitution has led to one commentator to rightly suggest that what obtains in South Africa today is judicial activism of a special type. It is worth noting that section 39 merely requires the South African Judge "when interpreting the Constitution to do what judges should normally do when interpreting a Constitution that is to give effect to its values. This is not necessarily synonymous with judicial activism; nevertheless, it makes it much easier than not for a judge to adopt an activist stance"

Former Chief Justice Sandile Ngcobo emphasised the equal status of the branches of the state when he delivered a key note address during the Chief Albert Luthuli Memorial Lecture early this year when he stated:

"Each arm of the government must observe the constitutional limits on its own power and authority – there is no branch that is superior to the others in its service of the constitutional mission of the Republic"

This reaffirms the position that the three branches of the state are co-equal partners entrusted with distinct constitutional powers in their quest to realise the ideals of a democratic South Africa.

Significant interventions and steps geared to affirm the independence and the effectiveness of the judiciary

In relation to the administration of justice in particular, we have completed and taken to Parliament several Bills, including the Constitution Seventeenth Amendment Bill and the Superior Courts Bill. The Legal Practice Bill has been approved by Cabinet and is due to be introduced soon. We are optimistic that these Acts will be passed during 2012. We have turned around the Criminal Justice System and the working of the Justice Cluster and positive results are starting to show. We have established a formidable foundation to advance judicial reform with a view to enhancing the independence of the judiciary. As part of these institutional reforms the President proclaimed the Office of the Chief Justice, in September 2010 as a national department.

Assessment of the impact of the decisions of the Constitutional Court

We have alluded to the fact that the kind of assessment we set to embark upon is not unusual. It occurs all the time and as research will show, the universities undertake form of research to evaluate the social-rights jurisprudence on the lives of peoples. Assessments undertaken by different institutions will be used as resource documents for purposes of our initiative. Ours is an in-depth research focused on implementable solutions and not on academic and curriculum advancement which some of the universities' project mainly seek achieve. However the academic institutions remain an important player in this endeavour.

As the Cabinet statement of 23 November 2011 read, not only did Cabinet consider and approve the assessment of the impact of the decisions of the Constitutional Court, but considered a package of measures geared to fundamentally reform the administration of justice. Therefore the assessment should not be seen as an isolated incident, but as part of a holistic approach to the transformation of the judicial system. These recommendations, including, the assessment of the decisions of the Constitutional Court, are with a view to developing clear and concise recommendations that are necessary to unlock challenges that have the potential to undermine the transformation goals that are intended to nourish our constitutional democracy. The approaches approved by Cabinet are:

- (a) Intensifying institutional reforms that are geared to enhance the capacity of the Constitutional Court to lead the evolution of our constitutional jurisprudence. The desired reforms to be informed by the assessment of the impact of the decisions of the Constitutional Court on social transformation.
- (b) Accelerating institutional reforms in the context of our developmental State; also including the

- optimum use of the Judicial Education Institute to facilitate the development of an appropriate judicial education curriculum that will enhance the skills, competencies and social context attributes of judicial officers.
- (c) Implementing appropriate measures, including legislative amendments, where necessary, to enhance the efficiency and the integrity of the Judicial Service Commission and the Magistrates Commission in the execution of their constitutional mandates of facilitating the transformation of racial, gender and other constitutional attributes in the Judiciary.
 - (d) Establishing a framework for the monitoring of the evaluation of implementation of the court decisions by all state departments and to advance the respect for the rule of law.
 - (e) Building a strong research capacity for the state by re-engineering the South African Law Reform Commission and the Rules Board for Courts of Law, to realise the full potential of the research capacity of the State. The programme to strengthen these institutions should include the revision of their legislative mandates in order to respond to the expanded mandate of government and to look at the broader socio economic context in the country. All branches of state should contribute to the agenda for change that will inform the programmes of these research institutions from time to time.
 - (f) Facilitating the establishment of mechanisms for the three branches of state to engage in regular debates to manage their interface within the context of the separation of powers in pursuit of a common transformative goal that is geared to benefit society at large.

How will the assessment of the impact of the decisions of the Constitutional Court unfold

We seek to engage the services of research institution(s) to conduct the desired assessment. The identified institution(s), will be expected to -

- undertake a comprehensive analysis of the impact of the decisions of the Constitutional Court, since the inception of the court, on the transformation of the state and society and how the socio-economic conditions and lives of people or a category of persons or individuals have been and or are affected by such decisions within the context of a transformative Constitution;
- assess the impact of the decisions of the Constitutional Court, since the inception of the court, on all branches of the law of the Republic and the extent to which any such branch of the law has or should be transformed to give effect to the transformative goals envisaged by the Constitution;
- assess the capacity of the Judiciary and that of the courts in building a South African jurisprudence that is in-line with the Constitution as the supreme law of the Republic.
- assess the capacity of the State in all its spheres to implement measures that seek to give effect to the transformative laws of the Republic and the decisions of the courts.

The assessment is envisaged to be completed within 18 months from the date of commencement thereof. The outcome of the assessment and the accompanying recommendations, analysis, research papers and opinions, will form basis for seminars and a national conference which will take place after the completion of the exercise.

I look forward to constructive views and commentary on the Document in our quest to transform the judicial system that all South Africans are yearning for.

Jeff Radebe
Minister of Justice and Constitutional Development, MP



EXECUTIVE SUMMARY

The Discussion Document on the transformation of the judicial system and the role of the Judiciary in a developmental South African state (the Document) highlights reforms that have taken place and an overview of the transformative initiatives currently underway within the justice environment. It recognises the critical role of the Judiciary as the third arm of the state and emphasises the importance of synergy between the three branches of the state in their common endeavour to realise the country's goals of a developmental state, including the ideal of achieving a better life for all. The judiciary, through the exercise of its judicial authority, plays a critical role in achieving the goal of consolidating democracy and achieving the ideals of a democratic society.

The Document gives a brief overview of the significant milestones that have been achieved in the transformation of the Judiciary and the court system since the onset of democracy. These include the changing racial and gender composition of the Judiciary, reformed appointment and governance arrangements, and aligning the process of laws and policies with the values and ethos of the Constitution. Despite the significant gains that have been made in the 17 years of democracy, there are still hurdles that continue to hamper the attainment of the ideals of an open and democratic society envisaged by the Constitution.

The Constitution is the supreme law of the land and provides the basis for the transformation of the state and society. Its commitment to establish a non-racial, non-sexist, equal and prosperous society, founded on human rights, is revolutionary. Therefore, this Document seeks to reflect on the fundamental principles that guide the transformation of the judicial system and the Judiciary, within the broad context of social transformation. It articulates the constitutional vision of an equal society, based on social justice, and outlines certain approaches that are important for the consolidation and acceleration of the transformation of society for all people in South Africa to enjoy equal benefit and protection of the law.

The Document commences by describing the concept of the transformation of the judicial system, and distinguishes between the transformation of the judicial system and the Judiciary. It explains and locates the role of the courts and the Judiciary at the centre of the transformation agenda of a developmental state, and highlights the national goals that are key to the transformation of the state and society. It further explains, among other things, the entrenchment and realisation of the democratic values that are enshrined in the Constitution, and the eradication of poverty as a priority of government. It places emphasis on, and highlights the necessity for the three branches of the state to act cooperatively to realise the transformative goals of the Constitution.

The Document has eight chapters, which can briefly be summarised as follows:

Chapter 1 sets out the broad context of the transformation of the justice system, with specific focus on the transformation of the judicial and legal systems. It reflects on the policy and legislative framework that underpin the transformation of the judicial sector as a whole.

Chapter 2 gives a background to the judicial reform initiatives. Significant milestones in the transformation discourse are highlighted. These include the establishment of the Constitutional Court, the Judicial Service Commission and the Magistrates Commission, as important institutions that guide the transformation discourse.

Chapter 3 restates the constitutional imperatives that underpin the transformation of the judicial system. It highlights the critical role of the Constitutional Court in the transformation of our legal system and the South African Constitutional jurisprudence.

Chapter 4 explains the doctrines of the separation of powers, the independence of the Judiciary and the rule of law as pillars of our Constitutional democracy. This chapter makes reference to the rich jurisprudence that emanates from the decisions of the Constitutional Court on the definition of the concept of separation of powers. Most importantly, it acknowledges the fact that the courts have, on several occasions, made it clear that the doctrine does not result in absolute separation. The importance of the principle of checks and balances, which ensures that each branch of government checks on the other branches to ensure that no single branch oversteps its constitutional boundary, is explained in this chapter, as is the role of the Judiciary in safeguarding this principle. This chapter also reflects on the

inherent tension that arise between the branches of government and the importance of regular interaction among these branches to manage and address these tensions.

Chapter 5 highlights the importance of jurisprudence, in particular the role of the Constitutional Court in the realisation of social transformation and in improving the lives of all citizens of the country. Emphasis is placed on the importance of the values that underpin the South African constitutional democracy, in particular, equality, social cohesion and nation building, and how these values are reflected in some of the decisions of the Constitutional Court. This chapter recognises these as values that must permeate the South African constitutional jurisprudence and law reform.

Chapter 6 explains the importance of judicial activism, which is a yardstick that can bring about positive change. This chapter also shows how constitutionalism limits judicial activism and, therefore, highlights the power of judicial review, exercised by our Superior Courts.

Chapter 7 recognises the need for the transformation of the South African legal system and highlights the need to infuse the traditional value system in the South African body of law. This chapter calls for deeper reflection on the need for an intensive overhaul of the plural legal system to establish a legal system based on the Constitution as the Supreme law in the Republic.

Chapter 8 gives a brief conclusion to the Document. Most importantly, it recognises the need for the Legislature, the Executive and the Judiciary, as branches of the state, to promote continuous dialogue to ensure cooperation and interaction for the realisation of the vision set out in the Constitution. This chapter contains the following recommendations:

- (a) The impact of the decisions of the Constitutional Court on society should be assessed by a research institution(s) to establish the impact of these decisions on social transformation and the reform of the law broadly. The outcome of the assessment should form the basis for debate and dialogue with a view to enriching our constitutional jurisprudence and consolidating our democracy;
- (b) The Judicial Education Institute should be used as a vehicle for transformation. The institute should not only be tasked with developing and implementing judicial education programmes that will enhance the skills, competencies and social contextual attributes of judicial officers, but should also align the training needs with the goals of a developmental state.
- (c) Legislative and other measures should be undertaken to enhance the efficiency and integrity of the Judicial Service Commission and the Magistrates Commission in the execution of their constitutional mandate of changing the composition of the Judiciary in respect of its racial and gender demographics and other constitutional attributes to reflect the demographics of the South African society;
- (d) A critical assessment of the Executive branch of government in implementing laws and court decisions. A framework should be established and prioritised to monitor and evaluate the implementation of court decisions by all state departments to enhance respect for the rule of law.
- (e) The mandates and composition of the South African Law Reform Commission and the Rules Board for Courts of Law should be reviewed with a view to enhancing the research capacity of the state. The expanded mandate of these research institutions should extend to areas of economic transformation, access to information and land restitution, among others, which are vital for the reconstruction of society.
- (f) Appropriate mechanisms should be developed to promote regular healthy dialogue and engagement among the three arms of the state within the confines of the separation of powers in pursuit of the common transformative goal set out in the Constitution.



1. INTRODUCTION AND BACKGROUND

1.1 Purpose of the Document on the transformation of the judicial system

1.1.1 The Minister of Justice and Constitutional Development has prepared the Document on the transformation of the judicial system and the role of the Judiciary in a developmental state (the Document) with a view to enriching the continuing dialogue on the transformation of the judicial system geared to shape the policy, legislative and jurisprudential landscape to strengthen our constitutional democracy. The Document gives a synopsis of the progress made in relation to the transformation of the judicial system. It reflects on the ongoing major transformation initiatives and gives a critical assessment of the roles of the three branches of state in advancing the transformation agenda set out in the Constitution.

1.1.2 The Document reflects on certain fundamental principles that underpin the transformation of the judicial system and focuses on the following, in particular:

- (a) The broad understanding of transformation of the administration of justice in South Africa and progress made towards the attainment of the goals of transformation since the advent of democracy.
- (b) The major constitutional and legislative initiatives that inform the judicial transformation agenda envisaged by the Constitution.
- (c) The role of the branches of the state in judicial transformation.
- (d) The role of the Constitutional Court and the impact of the evolving constitutional jurisprudence in the transformation of the judicial system in the context of a developmental state.
- (e) The impact of jurisprudence on policy, legislation geared to promote social justice and enhance access to justice for all.

1.1.3 The debate on the above principles enunciated in the Document is geared towards facilitating the development of a holistic programme of action to address challenges that hamper the realisation of the transformative goals as envisaged by the Constitution.

1.2 Background and scope of the Document

1.2.1 The transformation of the judicial system is championed through a multi-faceted programme that impacts on the different sectors of the judicial system. The programme encapsulates the following transformative initiatives, which are at different stages of development and/or implementation:

- (a) Constitutional amendments geared to establishing a judicial system suited to the requirements of the Constitution and that are necessary for deepening constitutionalism and the rule of law. These include measures to enhance respect for and the promotion of the separation of powers, the independence of the Judiciary and the rule of law as pillars of our Constitutional democracy.
- (b) On-going legislative reforms geared to strengthening the institutional arrangements relating to the Judicial Branch of the state. The reforms relate, in particular, to judicial appointments, the remuneration and conditions of employment of judicial officers, rules and procedures applicable in the superior and lower courts, judicial education programmes, complaints procedures against judicial officers, a judicial governance framework and court administration arrangements.
- (c) Legislative reforms geared to strengthening the institutional arrangements relating to the legal profession. The reforms relate, among others, to the admission, training and regulatory mechanisms concerning legal practitioners (attorneys and advocates), as well as mechanisms relating to the fees structure for obtaining legal and community legal services which are fundamental to access to justice.

- (d) The reform of the State Legal services to improve the management of litigation involving the State.
- (e) A programme on the transformation of the courts, including the rationalisation of the composition, structure and jurisdiction of the courts, and mainstreaming specialist courts into a programme to improve and strengthen the criminal justice system.
- (f) Programmes to reform the civil justice system to provide a speedy, affordable and less complex mechanism to resolve civil disputes.

1.2.2 The Document gives a reflection of the different transformation programmes highlighted above and addresses challenges that confront the various transformation programmes. The respective programmes are handled separately and each is being processed through the relevant governance structures.

1.2.3 The programme of action, which is envisaged to result from the deliberation on this Document, is aimed at unlocking challenges that confront the respective programmes and thereby accelerate the course of transformation.

1.2.4 The Document, in particular, reflects on the role of the Judiciary and the impact of the evolving South African constitutional jurisprudence in aligning constitutional imperatives with the aspirations of a democratic society.



2. THE CONCEPT OF TRANSFORMATION OF THE STATE AND SOCIETY

2.1 Transformation of the state and society as a constitutional imperative

2.1.1 At the centre of the transformation agenda is a need to establish a united, non-racial, non-sexist democratic and prosperous society founded on human dignity, the achievement of equality and the advancement of human rights. The deracialisation of society and the building of a truly non-racial society must be based on a common South African identity, which embraces diverse cultures and is glued together by social cohesion and peaceful co-existence. The transformation agenda seeks to realise the ideals of our Constitution, of an open and democratic society.

2.1.2 The transformation of the judicial system forms part of the broad agenda of the transformation of the state and society. This transformation agenda is aimed at fundamentally changing the institutions of governance and society with a view to aligning all aspects of South African life with the Constitution. Therefore, transformation, including transformation of the Judiciary, is part of the grand project of nation-building that has been ushered in by the new Constitution. At the core of transformation is the restructuring and the re-organization of institutions of governance and the courts that were carved under with a view to serve the colonial and apartheid legacy of inequality, to now serve the interests of all in our new constitutional democracy.

2.1.3 The Constitution lays the basis for institutional and societal transformation which is set out in the *Preamble, which reads, of the Constitution:*

“Lay the foundations for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by law.”

2.1.4 The Preamble to the Constitution and the justiciable socioeconomic rights in the Bill of Rights reflect the characteristics of our developmental society.

2.2 Aligning transformation with international imperatives

2.2.1 South Africa has become an important member of the global community and an active campaigner for human rights, good governance and the improvement of the lives of all in South Africa. This global membership imposes an added responsibility to the country to lead by example, by going beyond the minimum expectations of complying with international norms, standards and state obligations, and to be a driver of social change within the South African Development Community (SADC) and the continent. This task can only be achieved if all arms of the state and constitutional institutions in South African society act in concert with each other in pursuit of the country's constitutional vision and its international obligations.

2.2.2 Some of the critical areas where the Judiciary must play a meaningful role in supporting South Africa's role as a key global player and leader include the following:

- (a) Institutionalising international human rights.
- (b) Providing world-class judicial services that take into account globalization and South Africa's developmental goals.
- (c) Contributing to the evolving constitutional and human rights jurisprudence within the Southern African Development Community (SADC), the continent and globally.

2.2.3 The South African government is determined to overcome obstacles that hinder progress on ensuring a better life for all. Some of the major challenges relate to the economy's insufficient growth and its inability to generate sufficient employment opportunities. The Constitution, in particular, its justiciable

Bill of Rights, is geared to address challenges of inequality and underdevelopment facing the poor and vulnerable citizens of the country. The courts have an important role in ensuring that government develops legislation and implements programmes that address these challenges.

2.3 The transformative role of government in a developmental South African state

- 2.3.1 Transformation is mandated, driven and guided by the Constitution. The quest is to create and ensure a united, non-racial, non-sexist, democratic and prosperous South Africa. The legislative, executive and judicial arms of government have distinct roles to play in transforming society. The Legislature exercises its legislative authority by passing laws which must progressively advance transformation of the State and society; the Executive is responsible for the implementation of laws and the development of policies geared towards the transformation of society; the courts exercise judicial authority by interpreting the laws passed by the legislature in accordance with the values of the Constitution.
- 2.3.2 A developmental state has key features and responsibilities that distinguish it from any other forms of states. In a developmental state, it becomes the responsibility of government to continuously address the challenge of providing a better life for all. It is in this context that the Constitution places the responsibility on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights enshrined in the Bill of Rights. To address this objective, the developmental state must work to ensure that our economy grows and develops, enabling this economy to create wealth, which is required to improve the living standards of all people. These issues are critical to the achievement of the objective stated in our Constitution to improve the quality of life of all citizens, the realisation of the socioeconomic rights contained in the Bill of Rights.
- 2.3.3 The national goals, which are key to the transformation of the state and society, include the following:
- (a) The entrenchment and realization of democratic values enshrined in the Constitution.
 - (b) Eradicating poverty and underdevelopment, within the context of a thriving and growing first economy, and the successful transformation of the second economy.
 - (c) Providing adequate safety and security measures for all people in South Africa to be and feel safe.
 - (d) Building a strong and democratic state that truly serves the interests of all people and promotes social justice
 - (e) Contributing to the achievement of the African renaissance and a better world.
- 2.3.4 The judicial system must be transformed into a judicial system that serves the new democratic order underpinned by the values of the Constitution. The envisaged system must lay the foundations for the development of a society that is based on human dignity, equality and the fair administration of justice.
- 2.3.5 The Judiciary, as a branch of state, must complement the Executive and the Legislature in transforming and developing society. In a constitutional democracy the Judiciary, through the exercise of judicial authority, has more responsibility than its traditional adjudicative role which arises from its power of judicial review. Therefore a strong and independent judiciary is an absolute necessity for the rule of law,
- 2.3.6 Therefore, the Judiciary, as a critical component of the state, needs to be positioned appropriately so that it can contribute positively to the achievement of the national goals. This includes helping to nurture South Africa's growth as a developmental state and a young democracy with limited resources and enormous developmental challenges and expectations.



2.4 Meaning of the transformation of the judicial system

- 2.4.1 The judicial system constitutes an important pillar of democracy through which constitutionally entrenched access to justice may be realized. The Judiciary also has a critical role to play in achieving the goal of consolidating democracy.
- 2.4.2 The transformation of the judicial system is perceived to be slower compared to other branches of the state. For example, seventeen years into democracy, the rationalisation of courts – as directed by Schedule 6 of the Constitution – is yet to be accomplished; and the transformation of the legal system founded on Roman-Dutch Law to reflect the values that underpin the post-apartheid democratic society is yet to be realized. Service delivery in the courts is hampered by challenges that need to be addressed.
- 2.4.3 The values that underpin the Transformation Project in the context of the Judiciary include the following:
- (a) Supremacy of the Constitution and the rule of law
 - (b) Equality, human dignity and an open society based on democratic principles
 - (c) Judicial independence and impartiality
 - (d) Access to justice for all
 - (e) Social justice
 - (f) Social cohesion
- 2.4.4 The transformation of the Judiciary is rooted in the constitutional provisions, particularly in the Bill of Rights and the chapter relating to courts and the administration of justice (Chapter 8 of the Constitution). In its scope, the transformation of the judicial system entails a broader concept of reform, which includes the reorganisation and the rationalisation of the courts to align them with the Constitution, the transformation of the legal profession, the reform of the state legal services and initiatives to improve the criminal and the civil justice systems.
- 2.4.5 The transformation of the judicial system seeks to ensure that courts are well placed to play a meaningful role in the pursuit of the broader transformation goals in pursuit of a democratic society. This means that courts are able to operate complementarily with other parts of the state in transforming South Africa to consolidate democracy and improve the quality of life for all people in South Africa. The rationalisation of the courts is specifically provided for in item 16(6) of Schedule 6 to the Constitution, which states the following:
- “(a) As soon as is practical after the new Constitution took effect, all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution*
- (b) The Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph (a)”*
- 2.4.6 In the South African context, transformation of the Judiciary is not and cannot be limited to achieving equitable balance in terms of demographic representation only. As is explained in the succeeding paragraph, establishing a judiciary that reflects the racial and gender composition of the South African society is a constitutional imperative. However, transformation also seeks to ensure that the Judiciary is appropriately positioned to respond to the diverse needs of society and plays a meaningful role in the realisation of a better life for all.
- 2.4.7 The objectives of transforming the judiciary is to be able to achieve following:
- (a) A single judiciary that can operate as an integrated entity with unified structures, systems, leadership and accountability arrangements

- (b) Uphold the vision and values that underpin the Constitution and must embrace and reflect the lives and aspirations of all South Africans
- (c) Contribute to effective service delivery in the courts, the achievement of quality uniform service standards and access to justice for all
- (d) Be able to collaborate with other components of the state in the quest for transforming South Africa into a society where all are treated with human dignity, regardless of race, gender, socioeconomic status or any other form of human diversity
- (e) Play a constructive role in the consolidation of democracy, the pursuit of sustainable development, and the realisation of the African renaissance and a better world, where basic human rights and freedoms are enjoyed by all.

2.4.8 There certainly have been many other milestones in the transformation of the Judiciary and the court system since the onset of democracy. These milestones include the changing racial and gender composition of the Judiciary, and governance arrangements and the visible progress made towards the alignment of societal values with the Constitution.

2.4.9 Therefore, the transformation of the judicial system entails a process of establishing a judicial system suited to the requirements of the Constitution. The outcome envisaged here is that was outlined by the first Minister of Justice in the democratic South Africa, Mr Dullah Omar, in reporting on the transformation of the Judiciary in Parliament, when he stated the following:
*"...transformation means more than creating representative institutions. It requires developing and understanding the new constitutional order, sensitivity to the structure and ethos of the constitution and its Bill of Rights, developing a culture of service, which is people orientated and friendly to those they serve"*¹

2.5 The history of judicial reform since the advent of democracy

2.5.1 The judicial system inherited by the democratic government in 1994 was designed to enforce the laws and policies of the apartheid regime. Law itself was used as an instrument of apartheid. The doctrine of parliamentary sovereignty that dominated the pre-1994 constitutional system in South Africa meant that the apartheid parliament could make any law it desired and that such a law could not be challenged on substantive grounds (the content of statutes) by any court. A court could only declare an Act invalid if it had not been passed in accordance with the formal procedural steps stipulated for the promulgation of the said legislation. For this reason, the perception existed amongst South Africans that judges and magistrates lacked real or perceived impartiality to protect them against the tyranny of the government policies. The Judiciary was viewed by many to be Executive-sided and this, in turn, impacted on the perceived or real notions regarding the independence of the Judiciary.

2.5.2 Not only were judicial officers seen to be the enforcement agents of oppressive laws, but so was the entire judicial machinery. In documenting the Truth and Reconciliation Commission's legal hearing (held to understand the role that the legal system played during apartheid), Dyzenhaus captured the role of various legal actors in the administration of justice during apartheid, as follows:²

"Judges and magistrates upheld those laws, even interpreted them so as to give maximum effect to their policy. The Attorneys-General – the civil servants in each province who controlled prosecutions – saw to the prosecution of violations of apartheid law. The legal profession, divided between the Bar of advocates, who enjoyed an exclusive right of audience before the Supreme Court, and the side Bar of attorneys, whose extracurricular work included instructing the advocates, by and large participated in sustaining apartheid law or did their best to ignore it. And the legal academy managed for the most part to educate their students and to write about the law as if apartheid did not exist. In other words, the law was not self-executing under apartheid. It required administration, application and interpretation by judges, magistrates, prosecutors,

1 During his Budget Vote Speech on 19 May 1998.

2 Dyzenhaus, D. 1998. *Truth, reconciliation and the apartheid legal order*, p 27.



officials of the departments of Justice and Law and Order, and lawyers, both in the academy and the legal profession.”

- 2.5.3 In 1994, the interim Constitution came into force, replacing the doctrine of parliamentary sovereignty with the doctrine of constitutional supremacy. The final Constitution (the Constitution of the Republic of South Africa, 1996), which replaced the Interim Constitution, enshrines the doctrine of constitutional supremacy and specifically provides for the judicial review of any law or conduct.³ The Constitution expressly enshrines the doctrine of separation of powers and vests the judicial authority of the Republic of South Africa in the courts. Chapter 8 of the Constitution deals with the courts and the administration of justice and sets out, in particular, the procedure for the appointment of judicial officers, specifically emphasising the need for the Judiciary to broadly reflect the racial and gender composition of South Africa. It stipulates the tenure of judges, sets out the grounds for their removal and deals with the composition and establishment of the Judicial Service Commission (JSC) and the National Prosecuting Authority (NPA). Item 16 to Schedule 6 to the Constitution provides for transitional arrangements affecting the courts. In particular, subsection 16(1) provides that not only do courts, which existed when the Constitution took effect, continue to function and exercise jurisdiction in terms of the legislation applicable to them, but every judicial officer holding office as such continues to hold such office subject to the amendment or repeal of the relevant legislation and consistency with the Constitution.
- 2.5.4 Legislation has been implemented to delink magistrates from the Public Service. This has included the removal of salaries and the determination of service benefits from the Public Service and dealing with these by the Independent Commission on the Remuneration of Public Office Bearers. The Constitutional Court, in *State v Van Rooyen*, has shed light on the concept of judicial independence and the doctrine of separation of powers within the context of an independent magistracy.
- 2.5.5 The structural problems of the South African economy perpetuate inequalities. The adoption of the Interim Constitution, which ushered a new constitutional order, was followed by the adoption of a government’s transformative policy in the form of the Reconstruction and Development Programme (RDP). The RDP an integrated, coherent and socioeconomic policy framework, aimed at the eradication of apartheid and the building of a democratic, non-racial and non-sexist state. In the area of the administration of justice, it provided for the following transformative goal:
- “The system of justice should be made more accessible and affordable to all people. It must be credible and legitimate. The legal processes and institution should be reformed by simplifying the language and procedures used in the court, recognising and regulating community and customary courts, and professionalising the Attorney-General’s office. The public defence system must be promoted and the prosecution system reformed. The pool of judicial officers should be increased through the promotion of lay officials, scrapping the divided Bar and giving the right of appearance to paralegals.”⁴*
- 2.5.6 In the next decade following the adoption of the RDP and the Constitution, several statutes were implemented to establish constitutional structures such as the JSC, the NPA, the Truth and Reconciliation Commission (TRC), the Public Protector, the South African Human Rights Commission (SAHRC) and the Commission on Gender Equality (CGE). Setting up these constitutional structures and the rationalisation of the 11 erstwhile administrations of justice, which were based on the defunct homelands and independent states dispensation into the current single national administration of justice, are the major achievements of the first decade of constitutional democracy in the area of the administration of justice.⁵ It is therefore evident that the major focus in the early years of democracy has been placed squarely on the reshaping of the policies and legislation to give effect to the new constitutional dispensation.

3 Section 2 provides that any law or conduct that is inconsistent with the Constitution is invalid.

4 See Part 5, paragraph 5.7.1 of the Reconstruction and Development Programme

5 Established through the following acts: Judicial Service Commission Act, 1994 (Act No 9 of 1994), the National Prosecuting Authority Act, 1998 (Act No 32 of 1998), the Promotion of National Unity and Reconciliation Act, 1995 (Act No 35 of 1995), the Public Protector Act, 1994 (Act No 23 of 1994), the Human Rights Commission Act, 1994 (Act No 54 of 1994) and the Commission on Gender Equality Act, 1996 (Act No 39 of 1996).

- 2.5.7 The foundation for a transformed justice system was laid down in the work done by Theme Committee 5 of the Constitutional Assembly, which dealt with the judiciary and legal systems during the drafting of the final Constitution in 1995. The aspects covered in this policy document have been the subject of extensive debate within the branches of the state over the past 12 years. Several conferences and colloquia to debate principles that underpin the transformation of the Judiciary have been held. In particular, the Centurion Lake Justice Colloquium, held in 2000 and followed by the Justice Colloquium held at Emperors Palace, Kempton Park, in April 2005, crystallised certain policy preferences on aspects relating to the rationalisation of the courts, including the integration of the different high courts into a single High Court, the creation of divisions of the High Court in each province, the harmonisation of the Constitutional Court and the Supreme Court of Appeal and the institutionalisation of judicial education. The 2005 colloquium culminated in the judicial bills, which sought to give effect to some of the policies that were crafted over a period of time.⁶ Following the concerns that were raised in respect of certain provisions of the bills, it became necessary for the Department of Justice and Constitutional Development to withdraw the bills and initiate a broader consultative process regarding the policy imperatives that were contained in the bills. These Bills were reintroduced into Parliament by the current administration after there were reviewed extensively to address the concerns.
- 2.5.8 In September 1997, the department adopted a five-year national strategy for transforming the administration of justice and state legal affairs, through *Justice Vision 2000*, which laid the basis for a strategic approach to the transformation of the justice system.⁷ The development of *Justice Vision 2000* was a concerted effort to change the administration of justice in order to create a system that is effective and accessible. While *Justice Vision 2000* was largely focused on the period from 1997 to 2000, it was intended to lay the basis for the transformation of the judicial system into the future, that is, beyond 2000.
- 2.5.9 The challenges in relation to the transformation of the administration of justice that were inherited by the new democratic government and that were to be addressed by *Justice Vision 2000*, were succinctly described in 1997 by the late Mr Dullah Omar, then Minister of Justice, when he stated the following:
- “One of the biggest challenges facing the democratic government has been to transform the administration of justice in South Africa. During the time of apartheid, the Department of Justice was effectively used to implement it. Opponents were frequently brought before the courts and invariably convicted and sentenced to long prison sentences or execution. Not infrequently, the Department of Justice was responsible for ensuring that apartheid and repressive laws were drafted, enacted and enforced. Courts were virtually segregated with one part serving the so-called homelands, while the other served the former Republic of South Africa. The difference was not only in the kind and quality of services given, but also in the very infrastructure to dispense justice. While courts and other structures administering justice in the Republic were in many respects near first-world standards, the homelands were left virtually on their own and forced to operate with inadequate and often outdated resources and technology”⁸*
- 2.5.10 The outcomes envisioned in *Justice Vision 2000* largely remain unaccomplished, and this Document outlines programmes geared to ensure the achievement of these long outstanding transformative goals.

2.6 Significant milestones achieved since 1994

- 2.6.1 During the first decade of democracy, several fundamental changes were effected to reform the judicial system, in particular the setting up of appropriate judicial and legal structures and replacing the apartheid laws that institutionalised and enforced the segregation policy of the erstwhile apartheid government. The establishment of the Constitutional Court and other constitutional commissions strengthening democracy such as the South African Human Rights Commission, the Commission on Gender Equality,

⁶ The colloquium discussed draft justice bills (the Superior Courts Bill, 2005, the Constitution Amendment, 2005, and the Bill of Judicial Education, 2005).

⁷ See *Justice Vision 2000*, September 1997.

⁸ When he delivered the Edward A Smith Lecture at the Harvard Law School on 9 April 1997.



the Public Protector, the Independent Electoral Commission and the Auditor-General became one of the fundamental transformation outcomes brought about by the post-apartheid democratic government.

- 2.6.2 The establishment of the Constitutional Court was not a coincidence. It was calculated to place responsibility on this highest court of championing and leading the transformation of the judicial system. In doing so, the Judiciary derives its power from the Constitution. All other transformation attributes were put on the back burner with the hope that the transformed state and the Constitutional Court would – through the transformative laws – accelerate the pace of change that South Africans had been yearning for.
- 2.6.3 Prior to the advent of democracy, judges were appointed from a restricted pool of advocates who had attained the status of senior counsel. The pool has now been broadened from which judicial appointments are made to include advocates who are not senior counsel, attorneys, academics or magistrates. The Constitution requires “an appropriately qualified person who is a fit and proper person” (section 174(1) of the Constitution) for appointment to judicial office.
- 2.6.4 Major changes in the structure of the courts are underway. These include the enactment of laws introducing accountability measures and establishing a judicial education institute for the training of judges and magistrates. The Constitution Seventeenth Amendment Bill and the Superior Courts Bill aim at bringing the structure of the courts, and various other aspects of the Judiciary, in line with the Constitution.

3. CONSTITUTIONAL IMPERATIVES UNDERPINNING JUDICIAL REFORM


3.1 The judicial system suited to the new constitutional order

- 3.1.1 It was part of the negotiation during the Multi-party negotiations that, apart from certain fundamental changes relating to, among others, the establishment of the Constitutional Court and the establishment of a new judicial appointment mechanism through the Judicial Service Commission, other reform initiatives would evolve over time.
- 3.1.2 It would have been an impossible task to transform the judicial system at the same time as the transformation of the political landscape. What was idealistic at the time was the creation of legitimate and democratic structures and institutions that would assist government to undertake the magnanimous transformation programme to reconstruct the judicial system to suit the constitutional order.
- 3.1.3 The Constitution set out both the mechanisms and the principles that should guide the transformation of the judicial system. In relation to the courts, the Constitution enjoins organs of state, through legislation and other measures, to assist the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness⁹. Chapter 8 of the Constitution further sets out the different courts in their hierarchical order and determines the composition and jurisdiction of the Constitutional Court¹⁰, the Supreme Court of Appeal¹¹ and the high courts¹². It prescribes the mechanisms for the appointment of the Chief Justice, the Deputy Chief Justice, judges of the Constitutional Court and other judges¹³. The Constitution further establishes the National Prosecuting Authority and set out the principles that are applicable to it, which must be elaborated upon in national legislation. The Constitution provides for the enactment of national legislation to regulate aspects relating to the magistrate's courts, including the jurisdictions to be conferred on, and the appointment of judicial officers to these courts.
- 3.1.4 The power of the Constitutional Court to decide on the constitutionality of any amendment to the Constitution, an Act of Parliament or provincial act, a bill, and whether Parliament or the President has failed to fulfil a constitutional obligation is not only revolutionary, but defines the critical role and the delicate position the Constitutional Court occupies in the South African constitutional framework. Inherent to this constitutional framework is the contestation between public policy and law.

3.2 Separation of powers, the independence of the Judiciary and the rule of law as foundational values for the judicial system suited to the Constitution

- 3.2.1 The importance of the legislative, executive and judicial branches of the state to cooperate and act interdependently in exercising their distinctive constitutional obligations for the common good of the country cannot be over-emphasised. Government must function as an integrated, singular unit in pursuit of the vision set out in the Constitution. Formidable state machinery, acting in unison, is a requisite to overcome the colonial and apartheid legacy of inequality, and the deprivation of the majority of our people. The principle of separation of powers envisages a system of mutual co-existence and interdependence by all three branches of the state.
- 3.2.2 The notions of the independence of the Judiciary, separation of powers and the rule of law are inextricably interconnected and interrelated. Neither concept can be understood in isolation of the other two.
- 3.2.3 The United Nations' *Basic Principles on the Independence of the Judiciary* is the internationally accepted instrument that sets the scope for the independence of the Judiciary and the responsibility of judicial

9 Section 165(4) of the Constitution
10 In section 167
11 In section 168
12 In section 169
13 Section 174



officers. In the main, it covers the following key elements that are critical to the current debate about the independence of the Judiciary in the context of the imperatives of the transformation of the justice system:

- (a) The duty of all governmental and other institutions to respect and observe the independence of the Judiciary
- (b) The Judiciary is to decide matters impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason
- (c) Prohibition against inappropriate and unwarranted interference with the judicial process and no revision of judicial decisions, except through judicial review
- (d) The Judiciary must ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected
- (e) The state has a duty to provide adequate resources to enable the Judiciary to properly perform its functions
- (f) Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law
- (g) The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law
- (h) The Judiciary shall be bound by professional secrecy with regard to its deliberations and confidential information acquired in the course of its duties
- (i) A charge or complaint made against a judge in his or her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure.

3.2.4 The Constitution underscores all of the above international principles. The transformation initiatives underway seek to enhance and consolidate the principles in the Constitution and international instruments to which South Africa is a signatory. Therefore it is without doubt that South Africa boasts a strong constitutional foundation that firmly anchors the independence of the Judiciary, the separation of powers and the rule of law.

3.2.5 The Constitution entrenches the doctrine of separation of powers by vesting judicial authority in the Judiciary¹⁴, legislative authority in legislatures in at national, provincial and local spheres of government¹⁵ and executive authority at the national, provincial and local government in executive spheres.¹⁶ Within the ambit of the separation of powers, the Legislature, the Executive and the Judiciary have distinct but interdependent roles and responsibilities. Thus, the Constitution imposes a measure of control on one arm of government by another. For example, section 89 of the Constitution grants Parliament the constitutional power to remove the President on specified grounds in the Constitution. Similarly, although section 165(2) grants the Judiciary independence, the Constitution reserves for the President the power to appoint members of the bench. Section 92 makes the President and members of Cabinet accountable to Parliament for the exercising of their powers and performance of their functions. In exercising their distinctive powers, these three branches of state need to display restraint and deference. It is within these checks and balances that the Judiciary holds power of judicial review. Through its power of judicial review, the Constitutional Court may strike down laws passed by a legislature constituted by the representatives of the electorate if such law is deemed to be unconstitutional.

3.2.6 The rich jurisprudence emanating from the decisions of our Constitutional Court has been a guiding yardstick in policing the Constitution-drawn boundary of each branch of the state. The courts have, on several occasions, made it clear that the doctrine of separation of powers does not result in absolute

14 Section 165 of the Constitution

15 Sections 43, 104, 152 and 156

16 Sections 85, 125, 152 and 156

separation. The Constitutional Court has held, in the First Certification judgment¹⁷, that:

"[t]here is . . . no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute."

3.2.7 Limitations of judicial authority were spelt out in the judgment of the Constitutional Court in *State v Makwanyane* as follows:¹⁸

"... This court is not to 'second guess' the executive or legislative branches of government or interfere with the affairs that are properly their concern... Our task is to give meaning to the Constitution and, where possible, to do so in ways that are consistent with the underlying purposes and are not detrimental to effective government. The issues raised in the present case... concern the powers of Parliament and how it is required to function under the Constitution... Constitutional control over such matters goes to the root of democratic order... It is of crucial importance at this early stage of the development of our new constitutional order to establish respect for the principle that the Constitution is supreme."

3.2.8 The importance of the separation of powers principle lies in its checks and balances' element. The idea of checks and balances entails that each branch of government checks on the others to ensure that none oversteps its constitutional boundary. The Judiciary has an important role to play in safeguarding this principle. In the case of *De Lange vs Smuts NO*¹⁹, J Ackerman described the role of the court as follows:

"I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."

3.2.9 The doctrine of the rule of law entails that the Judiciary must resolve disputes in accordance with pre-determined rules in an objective and fair manner. The rule of law also demands that those who hold public power are subject to the law and are appropriately trained and accountable for use of their power.

3.2.10 The separation of powers is one of the pillars of South African constitutional order. Those who exercise executive authority at national, provincial and local levels of government have not interfered with legislative or judicial authority. In a few instances where the law inadvertently placed a matter of a legislative nature in the hands of the executive, the courts intervened and corrected the mistake. Such are the checks and balances that the separation of powers is expected to provide for purposes of good governance.

3.2.11 The principles of the separation of powers, the independence of the Judiciary and the rule of law have largely shaped the jurisprudence of the courts towards the attainment of the transformative outcomes in the Constitution. It is thus important that the role of the Judiciary and the courts in the realisation of these transformation outcomes is understood in its proper context.

3.3 The role of the Judiciary and the courts in the pursuit of the transformation goals

3.3.1 Traditionally, the role of the courts has been its preserved power to resolve disputes among citizens, and between citizens and the state and any of its organs on the basis of facts and the law. The Judiciary, through its civil adjudicative role, ensures compliance by citizens of their contractual and other forms of civil obligations. This, in turn, contributes to stability and predictability of law, which, in turn, is vital for

17 In re: Certification of the Constitution of the Republic of South Africa (CCT 23/96 par.123).

18 (1) *S v Makwanyane and Another* 1995; (2) SACR 1 (CC); *S v Makwanyane and Another* 1995; (3) SA 391 (CC) at par 108.

19 1998(3) SA 784 CC.



promoting economic development.

- 3.3.2 In constitutional democracies, the Judiciary has the significant task of safeguarding and protecting the Constitution and its values. The most important function, which is explained in detail later in the Document, relates to the courts' power of judicial review. It is through exercising their judicial power that judges are perceived as agents of change through their judicial activism.
- 3.3.3 Over the past few years, many in the Judiciary have shown a profound understanding of constitutional imperatives and set out to defend the basic law of the land. This includes many judgments, particularly by the Constitutional Court, that have reflected progressive interpretation of the Constitution and social rights in particular. Government's response to court judgments has been respectful and has helped to reinforce the legitimacy of the courts. Notwithstanding these achievements, in an evolving polity, the issue of appropriate balance among the three centres – the Judiciary, the Executive and Parliament – is one that will continually be contested.
- 3.3.4 There have been some instances where certain court decisions are perceived not to fully advance the transformative purpose of the Constitution. There is therefore a need for open and constructive debate on the decisions of the courts and how they seek to advance the vision of non-racial, non –sexist and prosperous democratic society.
- 3.3.5 While the Constitution defines in detail the roles and responsibilities of the legislative and executive branches of the state in relation to matters that relate to the exercise of their legislative and executive authority, it does not do so in relation to the Judiciary and the courts. Of cardinal importance is that despite the fact that the Constitution does not define judicial independence, it sets the parameters for its exercise.
- 3.3.6 The constitutional requirement that courts, in exercising their judicial authority, are subject only to the Constitution and the law strengthens the independent character of the Judiciary and affirms the importance of jurisprudence in the exercise of judicial authority. It is important, therefore, that judicial independence is exercised within the confines of the Constitution.
- 3.3.7 The core elements of judicial independence have been articulated in various international instruments, including *Basic Principles on the Independence of the Judiciary* endorsed by the United Nations General Assembly in 1985 which has been referred to elsewhere in the Document. These principles, which have found endorsement in our local court decisions, including *De Lange v Smuts*, are the following:
- (a) Security of tenure
 - (b) Basic degree of financial security
 - (c) Institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function
- 3.3.8 The essence of judicial independence, accordingly, lies in the real and perceived space that judicial officers enjoy to decide cases independently without interference from any person, be it other arms of government, civil society or fellow judicial officers.
- 3.3.9 In other words, the complete liberty to decide cases that come before judges without external influence of pressure is universally seen as the core of judicial independence. Justice CJ Chaskalson endorses this view in *Van Rooyen* where he quotes with approval CJ Dickson's summary on judicial independence in *The Queen in Right of Canada v Bearegard* (1986 30 DLR (4th) 481 (SCC), which states that:

"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases that come before them; no outsider, be it government, pressure group, individual or even another judge, should interfere in fact, or attempt to interfere, with the way

in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.”

3.3.10 It is also generally accepted that to achieve the liberty to decide cases without interference, there should be separation of judicial power from the other powers of government, that is, the Executive and the Legislature. It is universally accepted that the degree of separation of powers that is contemplated should not and cannot be absolute. Different democracies choose what is appropriate for themselves, depending on the relevant constitutional provisions and realities in that democracy. Even in the same country, things may change as democracy matures and resources permit.

3.3.11 The Constitutional Court decision in *Van Rooyen* supports the fluid nature of judicial independence and states that judicial independence is an evolving concept that takes the historical, economic, cultural and policy context into account. Clearly then, the starting point for giving content to the concept of judicial independence in any country must be the specific provisions of that country’s Constitution. The understanding must also be shaped by universal norms and considerations of the social, political and economic realities of that country.

3.3.12 In his article “Interdependence not independence: Institutional and administrative dimensions of judicial independence”²⁰, Richard Simeon argues for the need for interdependence and the collegiality of effort for the effective coordination and consolidation of programmes of the state towards a common vision. With reference to the American Constitution, he states that no clear lines can be drawn between the branches of government:

“The doctrine of separation of powers is often invoked to justify the institutional independence of the Judiciary. But sometimes forgotten is the other core of the principle of the US Constitution, checks and balances. The American constitutional design does not envision the three branches as existing in splendid isolation from each other. Rather, tyranny is avoided by having each branch check and balance each other – in other words to be interdependent. The relationship among them is indeed ‘indelibly political’. A blend, as a US judge puts it, of ‘separateness, but interdependence, autonomy, but reciprocity’. At any time there is a dialogue, or negotiation with the other branches about... budget, jurisdiction, size, procedures, administration”.

3.3.13 The courts have a duty to ensure that the limits to the exercising of public power are not transgressed. A failure to uphold the separation required by the Constitution between the Legislature and the Executive, on the one hand, and the Judiciary, on the other hand, would undermine the role of the courts as the independent arbiter of disputes involving the division of powers between the various spheres of government.

3.3.14 The principle of the independence of the Judiciary has evolved and the concept has been broadened to include decisional and institutional independence. As J O’ Regan points out in *De Lange v Smuts*, the courts in which they hold office must exhibit institutional independence. That involves independence in the relationship between the courts and other arms of government. In *City of Cape Town v Premier, Western Cape, and Others*²¹, the court quoted the following:


“A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the Judiciary is unable to ‘claim any legitimacy or command the respect and acceptance that are essential to it”.

3.3.15 The Document on the ten-year review on the performance of the democratic government emphasises the need for a balanced relationship and co-existence between the three arms of government. It states as follows:²²

20 Law Commission of Canada, p 84

21 2008 (6) SA 345 (C)

22 Government of South Africa. 2003: *Towards a ten-year Review*, pp 46–47. The Presidency: Pretoria.



“Over the past few years, many in the Judiciary have shown a profound understanding of constitutional imperatives and set out to defend the basic law of the land. These include many judgments, particularly by the Constitutional Court, which have reflected progressive interpretation of the Constitution and social rights in particular. Government’s response to judgments has been respectful and helped reinforce the legitimacy of the courts. Yet, in an evolving polity, the issue of appropriate balance among the three centres – the Judiciary, the Executive and Parliament – is one that will continually be contested. At the extreme end of the scale, there have been few instances where individual judges have sought to make patent political statements contesting details of government’s policy. On the other hand, there have been debates about judgments that are perceived to reflect racial stereotypes of the past, as well as about the tendency among some to show the fixed positions against government. Overall, the debate about balance among the three centres of the state rises in part from the question whether the Judiciary may be tempted to position itself as a ‘meta-state,’ above the other centres – a contestation that has arisen in other polities around the issue of ‘judicial activism’. This does raise fundamental questions about the value of the democratic mandate and electoral process within the parameters of the Constitution, and the policy choices and trade-offs in the details of policy making.”

3.4 Court administration and rule-making within the context of the separation of powers

- 3.4.1 Court administration and the authority to make rules for courts remain the mostly contested functions within the context of a separation of powers.
- 3.4.2 Discussions are underway to determine an alternative court administration and rule-making dispensation that is consistent with the South African model of separation of powers is underway. The aim is to establish separate judicial governance in which the Judiciary will assume responsibility for the administration of aspects that are connected with judicial functions. It is anticipated that placing the administration of the courts within the realm of the Judiciary will increase both administrative and financial efficiency, judicial accountability and independence.
- 3.4.3 It is important to distinguish between the administrations of justice, which in terms of the Constitution is the responsibility of the member of Cabinet responsible for the administration of justice. Judicial functions that are the preserve of the Judiciary and the administration of courts relate to the non-judicial functions that are necessary for the smooth functioning of the courts. The court administration functions entail mainly the following:
- (a) *Court establishment:* The determination of the need for the establishment of courts of any hierarchy, the acquisition of land, the plans for the construction and the construction, reconstruction, rehabilitation, improvement of infrastructure, furnishing and equipping of the courts.
 - (b) *Maintenance of court infrastructure:* The maintenance and upkeep of the court facilities.
 - (c) *Budget determination and budget control:* The determination of the budget needs for all courts and control of the expenditure of the courts.
 - (d) *Human resources:* The determination of the human resources capacity (except the determination of judicial capacity), the determination of administrative posts, the appointment of administrative court personnel, including their discipline, promotion, transfer and discharge.
 - (e) *Information management:* Collect, compile and analyse court statistics and other data in respect of the functioning of the courts.
 - (f) *Court management:* Managing the personnel and resources of the courts.
 - (g) *Case flow management:* The management of the different stages of the cases, including the oversight over activities under the control of other role players involved in the value chain.
 - (h) *Communication and liaison with other stakeholders involved in court administration:* Liaison with the role-players involved in court administration, such as the Police, the legal profession and the NPA to manage inter- dependencies and other matters of common interest.
- 3.4.4 Other than functions that relate to the establishment of courts under paragraph (a), all other functions listed above in relation to court administration may be perceived as being functions that bear directly

to the performance of judicial functions in respect of which the Judiciary ought to play a larger role. Institutionally, these functions may be placed within the proximity of the Judiciary to bolster court efficiency and accountability.

- 3.4.5 The ongoing research also seeks to distinguish between the rules of the courts that are relevant to the functioning of the courts such as the rules relating to case management and the rules that impact on public policy. The Judiciary will have a larger say in the making of rules that relate to the functioning of the courts, while policy-related rules are within the preserve of the Executive and the Legislature.
- 3.4.6 Judges must enjoy and be seen to enjoy institutional and decisional independence as basic guarantor that they would remain impartial and not be influenced by internal and external factors. Hence, the institutional reforms to assert the independence of the Judiciary are so fundamental.



4. LEGISLATIVE AND INSTITUTIONAL REFORMS GIVING EFFECT TO THE CONSTITUTIONAL IMPERATIVES

4.1 Constitutional basis for legislative reforms and transformation programmes

4.1.1 The Constitution entrusts upon the organs of state to enact national legislation and implement measures to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.²³ The Constitution further requires legislation to provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including the following:

- (a) Training programmes for judicial officers
- (b) Procedures for dealing with complaints about judicial officers
- (c) The participation of people other than judicial officers in court decisions²⁴

4.1.2 The supremacy of the Constitution requires that all the laws of the Republic must meet the constitutional muster. Since the dawn of democracy in 1994, the new post-apartheid administrations have gone about repealing all unjust laws mostly enacted during the tenure of the apartheid government, and replacing these with laws consistent with our democratic constitution. The process of replacing old-order legislation is still on-going and the South Africa Law Reform Commission has an important role to play in this regard. Any law that is inconsistent with the Constitution has no legal effect and may be challenged in court.

4.1.3 Similarly, some legislation applicable to the administration of justice has been, or is in the process of being overhauled. Other than national legislation enacted to advance the transformation of the Judiciary, several other programmes have been, or are being implemented to realize the transformation outcomes. Some of these acts, bills and programmes are explained in the succeeding paragraphs.

4.2 Legislative reforms and programmes geared to transform the judicial system

4.2.1 Key legislation enacted to advance institutional reforms

4.2.1.1 Several acts that have been enacted to enhance access to justice include the following:

- (a) The Promotion of Equality and the Prevention of Unfair Discrimination Act²⁵
- (b) The Promotion of Administrative Justice Act²⁶
- (c) The Child Justice Act²⁷
- (d) The Jurisdiction of Regional Courts Amendment Act²⁸, which abolished the divorce courts that were established for Africans during the apartheid era. These courts continued to exercise their original territorial jurisdiction, which perpetuated the legacy of inequality and further fragmented the court system. The Jurisdiction of Regional Courts Amendment Act extended civil jurisdiction to regional courts and the services of the defunct divorce courts are now provided by these courts.
- (e) The Child Justice Act²⁹ and the Children's Act³⁰, which provide adequate measures for children in

23 Section 165(4) of the Constitution

24 Section 180 of the Constitution

25 Act of 2000

26 Act of 2000

27 Act of 2008

28 Act No 20 of 2008

29 Act No 75 of 2008

30 Act No 38 of 2005

conflict with the law and children in need of care respectively.

- (f) South African Judicial Education Institute.

4.2.1.2 The following acts have been enacted to strengthen judicial governance and accountability:

- (a) The Judicial Service Commission Act³¹ and the subsequent Judicial Service Commission Amendment Act³², which establishes the Judicial Service Commission to regulate aspects relating to the appointment of and complaints involving judges.
- (b) The Magistrates Act³³, which establishes the Magistrates Commission to regulate aspects relating to the appointment of and complaints involving magistrates.
- (c) The Judges Remuneration and Conditions of Service Act³⁴, which provides for the remuneration and conditions of service of judges consistent with the constitutional and international principles of the independence of the Judiciary.
- (d) The Independent Commission for the Remuneration of Public Office Bearers Act³⁵, which establishes a transparent mechanism for the determination of salaries and allowances of judicial officers to further strengthen judicial independence.

4.2.1.3 The above legislation continues to generate debate on the fundamental principles that guide the transformation discourse, some of which has led and may still lead to reconsideration of the policy positions taken with regard thereto.

4.2.1.4 Challenges still remain in the implementation of some of the acts passed to enhance judicial accountability and access to justice. There are on-going discussions between the branches of the State to resolve these challenges. The recent recess to Justice Conference hosted by former Chief Justice Ngcobo and heads of Courts in July 2011 agreed on certain practical steps to remove these obstacles.

4.2.2 Judicial bills

4.2.2.1 Other than the acts that have been passed and are currently being implemented, there are several fundamental bills at different stages of processing that seek to transform the Judiciary. Important among these are the Constitution Seventeenth Amendment Bill and the Superior Courts Bill, which Cabinet approved in May 2010 and are currently before Parliament.

4.2.2.2 Parliamentary hearings on both the Constitution Seventeenth Amendment Bill and the Superior Courts Bill commenced in July 2011. These hearings signal the beginning of the process of transforming the superior courts and the entire superior court system. Divergent views have been expressed on the different provisions of the bills, largely on the provisions that relate to the following:

- (a) The affirmation of the Constitutional Court as the apex court in the Republic and the implications thereof in relation to, among others, the capacity of the Constitutional Court and the legislative requirement that it sits *en bank* (as a panel made up of at least eight of its 11 judges), the composition of the Constitutional Court in relation to its intended general jurisdiction, and the proposed integration of the Judicial Service Commission and the Magistrates Commission.
- (b) The rationalisation of the composition and jurisdiction of the high courts into a single High Court.
- (c) The desirability for the integration of the specialist high courts, the Labour and Labour Appeal

31 Act No 9 of 1994

32 Judicial Service Commission Amendment Act No 20 of 2008

33 Act No 90 of 1993

34 Act No 47 of 2001

35 Act No 92 of 1997



courts, the Land Claims Court and the Competition Appeal Court into a single high court.

- (d) The dispensation of the Office of the Chief Justice, and the authority of the Chief Justice in relation to judicial governance.
- (e) The rule-making dispensation.

4.2.2.3 The Judiciary has expressed divergent views on the several provisions of the above bills, in particular on the provisions relating to judicial governance. It is important that the debate is extended to other constituencies within the justice sector and the community at large in view of the role of the courts and the impact of law on different facets of life.

4.2.3 Programmes aimed at the consolidation of the transformation goals

4.2.3.1 Important programmes geared to advance the transformation of the judicial system include the Review of the Criminal Justice System, the Civil Justice Reform Programme and initiatives to advance a single and unified judiciary.

4.2.4 The Review of the Criminal Justice System

4.2.4.1 The transformation of the criminal justice system (CJS) is an initiative of the Justice, Crime Prevention and Security (JCPS) Cluster, through which government aims to improve the efficiency of the criminal justice system and intensify the fight against crime and corruption. The blockages identified by the CJS review led to the implementation of a comprehensive plan of action to renew the CJS through the implementation of a seven-point plan approved by Cabinet. The plan was mandated by Cabinet through approved terms of reference, which are being implemented by the JCPS Cluster. It involves large-scale improvements to the CJS continuum from the beginning when a crime is committed to the end of the CJS cycle. The Seven-point has been operationalised and now forms part of the JCPS Cluster delivery agreement interventions and activities.

4.2.4.2 The CJS review process is now guided by the JCPS Delivery Agreement and the priorities of Outcome 3 (*All people in South Africa are and feel safe*). In this regard, the JCPS Cluster adopted the following eight outputs to achieve its objectives:

- (a) Reducing the overall levels of serious crime. In this respect, the number of serious crimes, particularly trio crimes, has dropped considerably.
- (b) Establishing an effective criminal justice system. Particular emphasis is paid to the operation and efficiency of courts at all levels, increasing case finalisation and reducing case backlogs.
- (c) Combatting corruption in the JCPS Cluster to ensure its effectiveness and ability to serve as a deterrent against crime. A corruption baseline Document has been compiled and verified, which contains information on cases of corruption within the JCPS. Investigations into these cases are being prioritised.
- (d) Managing and improving perceptions of crime among the population. In this regard, the JCPS Cluster conducted a victim survey during 2010/11. This will be repeated annually.
- (e) Reducing levels of corruption, thus improving investor perception, trust and willingness to invest in South Africa. The Asset Forfeiture Unit (AFU) has seized a substantial number of assets, the value of which exceeds hundreds of millions of rand. This impacts negatively on criminal activity and demonstrates government's determination to fight corruption.
- (f) Effectively safeguarding and securing South Africa's borders. Through the Cluster's management of borders' strategy and an inter-agency clearing forum, the deployment of the South African National Defence Force (SANDF) has been phased in at South Africa's borders with its neighbouring

countries.

- (g) Securing the integrity of citizens' identity and status, as well as their residence. The National Population Register (NPR) Campaign for early registration is bearing fruit.
- (h) Integrating information and communication technology (ICT) systems, addressing cyber security and combatting cybercrime. In this respect, the Integrated Justice System (IJS) Board has been restructured and the integration of ICT systems has been reprioritised to increase the pace of system development, fast-track system integration across the criminal justice system continuum, and deal with the turnaround interventions the State Information Technology Agency (SITA). A draft Cyber security Policy Framework has been developed.

4.2.4.3 The integrated JCPS Delivery Agreement and the Seven-point Implementation Plan for the review of the CJS have contributed to significant progress in meeting the targets of the JCPS Cluster. The Judiciary has effective prominent role in realizing the fight against crime and corruption. It contributes through the speedy adjudication of cases and meeting out sentences that have a deterrent effect. The Executive and the Judiciary jointly can restore confidence in the justice system.

4.2.5 The Civil Justice Reform Programme

4.2.5.1 The Civil Justice Reform Programme (CJRP) constitutes one of the flagship programmes of the Department of Justice and Constitutional Development, which seeks to overhaul the civil justice system in order to bring it in line with the Constitution. The primary aim of the review is the alignment of the civil justice system with the constitutional values, and the simplification and harmonisation of rules to make justice easily and equally accessible to all, particularly the vulnerable and the poor members of society. An effective and efficient justice system is indispensable for upholding the rule of law in the country. The existence of adequate measures for the enforcement of civil obligations has the effect of increasing investor confidence, which is essential for the growth and development of our society and state.


4.2.5.2 The object of the CJRP is to review all laws, processes and procedures that are applicable to the civil justice system in its entire value chain. Its aim is to bring the adequacy, appropriateness and compatibility of such laws, processes and procedures in line with the constitutional value of access to justice. The reform initiatives are focused on ensuring that the civil justice system is speedy, efficient and affordable.

4.2.5.3 The terms of reference for the CJRP were approved by Cabinet in May 2010. The review includes the following action steps, among others:

- (a) the review the existing acts related to rule-making with a view to rationalising the current rule-making structures, systems and procedures;
- (b) the review the rules of all the courts, including the current practices and procedures, to consider the adequacy and appropriateness of such rules to promote access to justice;
- (c) the Design and implement an effective and efficient case management system, including the role of information technology and the methodologies related to data collection;
- (d) the Assessment of the impact and effectiveness of the alternative dispute resolution (ADR) methods in the civil justice system, including the effective use of court-based mediation; and
- (e) the harmonisation of the rules applied in all the courts in accordance with their hierarchy with a view to establishing uniform rules for all courts.

4.2.5.4 The terms of reference provide for the establishment of a multidisciplinary Civil Justice Reform Advisory Committee (CJRAC) – to be co-chaired by the Minister of Justice and Constitutional Development and the Chief Justice – who jointly lead and guide this significant reform programme.

4.2.5.5 The recent development of rules to facilitate court-based mediation by the Rules Board is one of the



important milestones. The rules are to be promulgated in 2012 and will be piloted in selected courts at the beginning of 2012/13 financial year.

4.2.6 The concept of a single judiciary and its relevance to the transformation of the Judiciary

- 4.2.6.1 The Constitution does not refer to expressly a “single judiciary” as a concept, and it has not been explained in case law or written about. “Single judiciary” commonly refers to a process through which the magistrate’s courts and magistrates are integrated to form part of a court system, as envisaged by the Constitution. This unification is informed by the history of the judicial system which provided a hybrid system in terms which judges enjoyed a large degree of independence, compared to the magistrates.
- 4.2.6.2 There are divergent views between judges and the Magistracy on the meaning of the concept of a “single judiciary” and need to be further explored as part of the on-going debate on the subject.
- 4.2.6.3 Freeing the Magistracy from executive control has been a gradual process. The Magistrates Court Act of 1944, which is the bedrock of the lower court Judiciary, is based on the pre-1993 judicial dispensation. A complete overhaul of the act is necessary to establish a fully integrated judicial system comprising the superior court and the lower court Judiciary.
- 4.2.6.4 The Constitution envisages a single unified judicial system, with a hierarchical court system. Broadly, the concept of a single judiciary denotes the implementation of policy and legislative measures that are necessary, on the one hand, to establish a unitary court system that consists of courts with appropriate jurisdiction conferred by law in accordance with the national, provincial and local constitutional dispensation to enhance territorial access to justice. On the other hand, this notion denotes the measures that are put in place to unify the Judiciary, in particular, to bring the Magistracy, who was historically part of the civil service, under a single unified Judiciary.
- 4.2.6.5 A single judiciary is broadly a mechanism through which judges and magistrates, as judicial officers, are appointed and regulated in a manner that is consistent with the independence of the Judiciary.
- 4.2.6.6 The following are the main features of a single judiciary:
- (a) The establishment of a single governance framework for judicial officers of the superior courts and the lower court under the Chief Justice as head of the Judiciary.
 - (b) The application of a uniform complaint handling mechanism.
 - (c) Streamlining the courts to establish a unitary court system, which consists of superior and lower courts, in accordance with the hierarchy of the courts envisaged by the Constitution.
- 4.2.6.7 The debate of the concept of a single judiciary must seek to achieve desirability for the harmonisation of the Magistrates Commission and the Judicial Service Commission with a view to establishing a unified regulatory framework for the entire Judiciary. Any model of harmonisation must have regard for the scope and mandate of the Judicial Service Commission and the Magistrates Commission respectively, and the peculiarities attached to each.
- 4.2.6.8 Prior to 1993, the Magistracy was part of the civil service and magistrates were senior civil servants, who performed both administrative and judicial functions. They were appointed by the Executive (the Minister of Justice) and exercised their powers and functions under the direction and control of the Director-General. The Magistrates Commission was established in 1993. This signalled the beginning of the delinkage of the Magistracy from the Executive.³⁶ The removal of magistrates from the Public Service resulted in the outcomes that are necessary for the independence of the Judiciary:

- (a) The removal of magistrates from the collective bargaining process, which applies to public servants, with the result that the salaries, benefits and allowances of magistrates, like the salaries, benefits and allowances of judges, are determined by the President on the advice of the Independent Commission for the Remuneration of Public Office Bearers.
- (b) The removal of magistrates from the department's governing structures. This means that magistrates are no longer accountable to the Minister of Justice and Constitutional Development and Director-General for the exercising of their judicial functions.

4.3 Institutional framework to advance the transformation of the judicial system

4.3.1 The Judicial Service Commission and its transformative role

4.3.1.1 The establishment of the Judicial Service Commission and the Magistrates Commission heralds significant milestones in the evolution of the South African judicial system. Both these institutions have made significant strides in ensuring the acceptance and legitimacy of the courts and the restoration of public confidence in the justice system.

4.3.1.2 The Judicial Service Commission comprises diverse representatives of the three branches of the state, and social partners who represent other structures within the administration of justice sector. The Commission consists of the following members:


- (a) The Chief Justice, who is the Chairperson of the Commission
- (b) The President of the Supreme Court of Appeal
- (c) One Judge President designated by the Judges President
- (d) The Cabinet member responsible for the administration of justice, or an alternate designated by the Cabinet member
- (e) Two practicing advocates nominated from within the advocates profession to represent the profession as a whole, and appointed by the President
- (f) Two practicing attorneys, nominated from within the attorneys profession to represent the profession as a whole, and appointed by the President
- (g) One law teacher designated by teachers of law at South African universities
- (h) Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly
- (i) Four permanent delegates to the National Council of Provinces, designated by the Council with a supporting vote of at least six provinces
- (j) Four persons designated by the President as head of the national executive, after consulting with the leaders of all parties in the National Assembly.³⁷

4.3.1.3 The Judicial Service Commission may advise national government on any matter relating to the administration of justice and the Constitution requires the Judicial Service Commission to sit without the members of Parliament when it considers any matter other than the appointment of judges.³⁸ The exclusion of members of Parliament from the Commission when it discusses any matter other than the appointment of judges appears to have been necessitated by ensuring that members of Parliament are not placed in a conflicting situation when a matter that requires the decision of Parliament, such as the impeachment of a judge, arises.

4.3.1.4 The Judicial Service Commission has made significant inroads in relation to racial and gender

37 Section 178 of the Constitution

38 Section 178 of the Constitution



transformation. From only three black judges and nine female judges in 1994, as at the end of September 2011 and from an establishment of 225 judges, there were 136 black judges (generic) and 61 female judges.

4.3.2 The Magistrates Commission and its impact on the racial and gender transformation of the Magistracy

4.3.2.1 Just like the Judicial Service Commission, the Magistrates Commission is made up of multisectoral constituencies, and comprises the following members:

- (a) A judge of the Supreme Court of South Africa, as chairperson, designated by the President in consultation with the Chief Justice
- (b) The Minister, or his or her nominee, who must be an officer of the Department of Justice
- (c) Two regional magistrates, one to be designated by the respective regional magistrates and the other by the President, after consultation with the respective regional magistrates
- (d) Two magistrates with the rank of chief magistrate, one to be designated by the respective chief magistrates and the other by the President after consultation with the respective chief magistrates
- (e) Two magistrates who do not hold the rank of regional magistrate or chief magistrate, one to be designated by the magistrate's profession and the other by the President after consultation with the magistrate's profession
- (f) Two practising advocates designated by the Minister after consultation with the advocate's profession
- (g) Two practising attorneys designated by the Minister after consultation with the attorney's profession
- (h) One teacher of law designated by the Minister after consultation with the teachers of law at South African universities
- (i) The Head: Justice College
- (j) Four persons designated by the National Assembly from among its members, at least two of whom must be members of opposition parties represented in the Assembly
- (k) Four permanent delegates to the National Council of Provinces and their alternates designated together by the Council with a supporting vote of at least six provinces
- (l) Five fit and proper persons appointed by the President in consultation with the Cabinet, at least two of whom shall not be involved in the administration of justice or the practice of law in the ordinary course of their business.³⁹

4.3.2.2 The Magistrates Commission may advise the Minister on any matter relating to the efficiency of the administration of justice.

4.3.2.3 Just like the Judicial Service Commission, the Magistrates Commission has made significant progress in the transformation of the Magistracy towards satisfying the constitutional requirement in terms of which the composition of the Magistracy must reflect the racial demographics of South African society. Of the establishment of 1 683 magistrates, 964 (57%) are black (generic) and there are 634 (38%) female magistrates.

4.3.2.4 The Magistrates Commission has, in contrast to the Judicial Service Commission, dealt with many complaints and acts of misconduct involving magistrates. Since the establishment of the Magistrates Commission in 1993, the Commission has dealt with 1 309 complains about magistrates. In the same

39 Section 3 of the Magistrates Commission Act, 1993 (Act No 90 of 1993)

period, nine magistrates were removed from judicial office (impeached) by Parliament, while 16 magistrates resigned before the impeachment proceedings could be finalised. No judge has ever been impeached by Parliament. The legislative framework to establish the complaints handling mechanism for judges was enacted recently (in November 2010) and the necessary infrastructure is being put in place for the effective implementation of the complaint mechanism for judges.⁴⁰

4.3.2.5 In respect of the Magistracy, there are several legal challenges that are instituted by magistrates who have not been successful in their application for senior judicial posts. Applicants would bring court applications against the Magistrates Commission, and the Minister contesting the appointment processes followed by the Commission or their non-appointment respectively. This leads to an untenable situation where judges are called upon to adjudicate on matters of a policy nature and in respect of which they have indirect interest.

4.3.2.6 The Constitution Seventeenth Amendment Bill envisages the integration of the Judicial Service Commission and the Magistrates Commission. The submissions made in this regard will guide the desirable model of integration to address the peculiarity of the appointment processes at the different hierarchies of the courts.

4.3.3 The South African Judicial Education Institute

4.3.3.1 The promulgation of the South African Judicial Education Institute Act⁴¹ which establishes a judicial education institute for the training of judges and magistrates is watershed. Not only will the institute become a reservoir of judicial knowledge and jurisprudence in Southern Africa and the continent, but it will also facilitate an exchange of knowledge with the comparable jurisdictions across of the world.

4.3.3.2 The institute is governed by a Council chaired by the Chief Justice. It reflects South Africa's commitment to the independence of the Judiciary. The Institute is an important vehicle to promote the transformation of the Judiciary. It provides an opportunity to enhance and hone the skills and competencies of those who individual office and who aspire to pursue a career in the judiciary. The Institute is an epic centre for the development and advancement of constitutional jurisprudence.

4.3.4 The South African Law Reform Commission

4.3.4.1 The South African Law Reform Commission (SALRC), together with the Rules Board for the Courts of Law explained below, are important statutory bodies entrusted with the task of reforming the laws and legal rules to align them with the values underpinning our Constitution.


4.3.4.2 The SALRC comprises of a judge of the Constitutional Court, the Supreme Court of Appeal or a high court, as chairperson, and not more than eight persons who appear to the President to be fit for appointment on account of the tenure of a judicial office or on account of experience as an advocate or as an attorney or as a professor of law at any university, or on account of any other qualification. Not more than three members of the Commission designated by the President shall hold their office as members of the Commission, and shall perform their functions under this act in a full-time capacity.

4.3.4.3 The legislation establishing the SALRC was enacted in 1973. Therefore, the composition of the SALRC is not suited to the needs of the modern South African state, which has an expanded mandate deriving from the Constitution. The number and profile of the membership of the SALRC must meet the requirements and expectations of the post-1994 democratic state.

4.3.4.4 In terms of the act establishing the SALRC, the objects of the Commission are to conduct research in

⁴⁰ The Code of Judicial Conduct and the Regulations on Judges Registrable Interests, which are discussed under paragraph are essential for the implementation of the complaints handling mechanisms

⁴¹ Act No. 14 of 2008



respect of all the branches of the Republic and to study and investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof. The mandate of the SALRC, therefore, extends beyond the legal and judicial system and relates to law reform programmes across all government departments. This does not only require the composition of the Commission to reflect its broad mandate (from the historical legalistic character), but it must have the capacity to guide law reform in the various sectors assigned to the different government's portfolios. This should include, among others, law reform in areas of speciality, such as mining, the environment, aviation, competition law, economic transformation, and media and information laws.

4.3.4.5 The law reform programme of the SALRC, which in terms of the act must be approved by the Minister, must respond to the transformation challenges facing the state as a whole. For this purpose, it is important that the composition of the SALRC and the research capacity created to provide research support to the Commission takes the transformation challenges confronting the state into consideration. This will ensure that the SALRC is not biased towards matters relating to the administration of justice, but that it also focuses on the broad legislative reform assignment of the state, consistent with the broad mandate of the Commission. It is important that the strategical focus of the Commission shifts to its broader mandate than its traditional narrow focus.

4.3.5 The Rules Board for Courts of Law

4.3.5.1 In contrast to the SALRC, the role of the Rules Board for Courts of Law is limited to what is termed procedural law. The rules of court are fundamental to access to justice as they prescribe the procedure and processes to be followed in civil and criminal court proceedings.

4.3.5.2 The Rules Board consists of the following members:

- (a) A judge of the Constitutional Court, the Supreme Court of Appeal or a high court, whom the Minister designates as the chairperson
- (b) A judge or retired judge of the Constitutional Court, the Supreme Court of Appeal or a high court, whom the Minister designates as the vice-chairperson
- (c) A magistrate appointed under section 9 (1)(a) of the Magistrates' Courts Act, 1944 (Act No 32 of 1944)
- (d) Two practising advocates, after consultation with the General Council of the Bar of South Africa
- (e) Two practising attorneys, after consultation with the Association of Law Societies of the Republic of South Africa
- (f) A lecturer in law at a university in the Republic
- (g) An officer of the Department of Justice
- (h) Not more than three persons who, in the opinion of the Minister, have the necessary expertise to serve as members of the Board.

4.3.5.3 Just like the SALRC, the statute establishing the Rules Board was enacted prior to the advent of democracy in 1985. There is, therefore, a need for the alignment of the mandate, the composition and functioning of the Rules Board with the needs of the post 1994 South African constitutional democracy.

4.3.5.4 Some of the rules are perceived as impediments to access to the justice. Among these are those rules that impact on the cost of litigation, turnaround time, complexity, fragmentation and overly adversarial justice system. The Civil Justice Review Programme seeks to address these shortcomings. The programme is pioneered jointly by the Minister and the Chief Justice, while the Rules Board and the SALRC provide the research capacity in accordance with their legislative mandates.

4.3.6 Office of the Chief Justice

- 4.3.6.1 The necessity to provide dedicated capacity to the Chief Justice is part of the institutional reforms that are geared to strengthen the organisational and governance arrangements relating to the Judiciary, in particular, to give effect to the distinct characteristics and position of the Judiciary as a branch of the state.
- 4.3.6.2 The establishment of the Office of the Chief Justice as a national department under the Public Service is an interim measure, pending the completion of the broader reform processes, which will be guided by the on-going feasibility study on the appropriate model of court administration that is suited to the South African constitutional democracy. The location of the Office of the Chief Justice under the public administration framework, which is directly accountable to Cabinet, appears incompatible with the independent character of the Judiciary. The intention is with a view to enable the Office of the Chief Justice to obtain resources and appropriately skilled personnel at an appropriate level to facilitate the participation and contribution of the Judiciary in the ongoing reforms.
- 4.3.6.3 The mandate and objective of the Office of the Chief Justice as a national department is listed in the proclamation as follows:
- (a) Ensure that the Chief Justice can properly execute his or her mandate as both head of the Constitutional Court and head of the Judiciary.
 - (b) Enhance the institutional, administrative and financial independence of the Office of the Chief Justice.
 - (c) Improve organisational governance and accountability, and the effective and efficient use of resources.
- 4.3.6.4 The Office of the Chief Justice has specifically been tasked with the following functions:
- (a) Provide and coordinate legal and administrative support to the Chief Justice.
 - (b) Provide communication and relationship management services and inter-governmental and international coordination.
 - (c) Develop court administration policy, norms and standards.
 - (d) Support the development of judicial policy, norms and standards.
 - (e) Support the judicial function of the Constitutional Court.
 - (f) Support the Judicial Service Commission in the execution of its mandate.
- 4.3.6.5 The Department of Justice and Constitutional Development, which is responsible for the bulk of the functions relating to judicial services and the administration of the Constitutional Court, has, through appropriate protocols, transferred certain administrative functions, which are within the proximity of the Office of the Chief Justice on agency basis, pending the completion of the reforms envisaged above.



5. THE EFFECT OF THE SOUTH AFRICAN JURISPRUDENCE ON THE TRANSFORMATION OF SOCIETY

5.1 The role of the Constitutional Court in advancing social and judicial transformation

- 5.1.1 The concept of justice is a complex philosophical matter, for which there are continuous improvements on its conception and articulation by leading minds in society. The evolving South African jurisprudence, based on the Constitution as the supreme law of the land continues to make an indelible mark in the transformation of society. . The courts continue to make a positive impact on the racial and gender landscape of the South African society.
- 5.1.2 The Constitutional Court was established with a view to championing the reform of the South African law and jurisprudence, which was influenced by the unjust laws of the erstwhile apartheid regime. It is thus important to assess the extent to which it has succeeded in this task that is fundamental to the transformation of the state and society. This assessment will be done jointly with research institutions through which the judgments of the decision of the Constitutional Court will be evaluated against the desired transformation landscape. While it may be desirable to assess the impact of the decisions of the Supreme Court of Appeal and the High Courts in relation to the transformation of society, it is desirable to limit the focus on the Constitutional Court, which is at the apex of the transformation agenda in relation to our evolving constitutional jurisprudence.
- 5.1.3 It is anticipated that the Document on the outcome of the assessment will generate a healthy debate that will assist in identifying areas that require attention in order for society to benefit optimally from the transformation outcomes. The debate that will be structured, based on the finding of the assessment, will assist in developing a comprehensive programme of action to enable each branch of the state to overcome the hurdles that confront the transformation of the legal sector and society in general.
- 5.1.4 The extent to which the decisions of the court are implemented by government will be part of this assessment. It will be important to assess the impact of such decisions on society as well on social cohesion and to the extent to which these values have been realised.
- 5.1.5 The above assessment on the impact of the decisions of the Constitutional Court on social transformation will enrich the on-going debate on the desirability to affirm the Constitutional Court as the apex court in the Republic with general jurisdiction.

5.2 Access to justice as a fundamental value for the attainment of social transformation

- 5.2.1 As indicated earlier, the court system inherited by the post 1994 democratic government did not place access to justice and responsive service delivery at the core of its values. To achieve this, there is a need to transform court processes, procedures and management arrangements to re-orientate the courts towards a service culture, accompanied by a sound performance management system.
- 5.2.2 Any discussion of transformation of the judicial system should encompass a study of the levels of access the indigent have to justice, and how accessible courts are to ordinary citizens. Special attention must be given to the magistrate's courts in particular, where delays in trials are frequent.
- 5.2.3 The resolutions of the Access to Justice Conference, held in July 2011, articulate practical solutions to enhance access to justice, and Chief Justice Mogoeng has made a firm commitment to put appropriate mechanism in place to monitor the implementation of these resolutions. The resolutions include the acknowledgement to reform the civil justice system, which is based on archaic rules and procedures that are an obstacle to the speedy resolution of civil disputes. It is part of the envisaged transformed rule-making dispensation that the Judiciary will have a larger role in the making of rules that are close to the operations of the court.

5.3. The importance of constitutional values in interpreting the Constitution and the Bill of Rights

- 5.3.1 The need to build an equal society, and harness social cohesion and nation building are some of the fundamental values that must permeate the South African constitutional jurisprudence. For this to be achieved, it is important that the court applies a value-based approach in its interpretation of the Constitution and the Bill of Rights, including statute and common law. In *Makwanyane*⁴², the court laid down the fundamental guidelines for constitutional interpretation. It approved of an approach that, while paying due regard to the language that has been used, is “generous” and “purposive” and gives expression to the underlying values of the Constitution.
- 5.3.2 The Constitutional Court adopted a purposive approach to interpretation in a number of significant judgments. In October 2000, the South African Constitutional Court handed down *Government of the Republic of South Africa and Others v. Grootboom and Others*, a decision that has been heralded by academics, lawyers and activists internationally as the landmark case signifying the undeniable justiciability of economic and social rights. In *State versus Williams and others*⁴³, the Constitutional Court adopted a similar approach when it found that corporal punishment violates the right not to be treated or punished in a cruel, inhumane or degrading way. It found that juvenile whipping violated the dignity of the juvenile, as well as that of the person administering the whipping.
- 5.3.3 As a descriptive term, “social cohesion” refers to the extent to which a society is coherent, united and functional, providing an environment within which its citizens can flourish.⁴⁴ As an explanatory term, “social capital” refers to the assets accumulated through various social networks and relationships, based on trust, which enable people to work together to achieve common goals. Social capital is a resource created by participating in social networks; it is found in both horizontal or bonding relationships, within social units, and vertical or bridging relationships between social units.⁴⁵ As a normative term, “social justice” refers to the extension of principles, enshrined in our Constitution, of human dignity, equity and freedom to participate in all of the political, socioeconomic and cultural spheres of society.⁴⁶ Nation-building can be understood as a state-led process of evoking national identity to promote unity and social cohesion within the state. Most often this is done with the aim of enhancing the legitimacy, stability and capacity of state institutions.

42 above.

43 1995(2) 251CC

44 <http://www.thepresidency.gov.za/docs/pcsa/social/social/part1.pdf> Date last accessed 22 September 2011

45 *Ibid*

46 *Ibid*



6. THE EXERCISE OF JUDICIAL RESTRAINT AS AN IMPORTANT ELEMENT OF CONSTITUTIONALISM

6.1 Constitutionalism in the context of the transformation of the Judiciary

6.1.1 Constitutionalism encompasses the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule, but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions. The modern concept therefore rests on two main pillars. First, the existence of certain limitations imposed on the state, particularly in its relations with citizens, based on certain clearly defined sets of core values. Secondly, the existence of a clearly defined mechanism for ensuring that limitations on the government are legally enforceable. In this broad sense, constitutionalism has a certain core, irreducible and possible minimum content of values with a well-defined process and procedural mechanisms to hold government accountable.

6.1.2 The most recent literature on the topic suggests that the following can be identified as the core elements of constitutionalism:⁴⁷

- (a) The recognition and protection of fundamental rights and freedoms
- (b) The separation of powers
- (c) An independent judiciary
- (d) The review of the constitutionality of laws
- (e) The control of the amendment of the constitution

6.1.3 The central principle in constitutionalism is the respect for human value and dignity. It is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens.¹⁴ It is the institutionalism of these core elements that matter. The philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic, shams or ornamental documents that could be easily manipulated by politicians, but rather documents that could promote respect for the rule of law and democracy.

6.2 Judicial activism as a yardstick for change

6.2.1 The Judiciary has evolved and established itself as the foremost arbiter of forms of disputes, hence its role (particularly its independence) is often a matter of public debate. There is no doubt that for justice to be seen to be done in resolving the multi-faceted disputes and conflicts brought before our courts, the environment within which the Judiciary and the courts operate must also be seen to be fair and, therefore, must conform to certain basic requirements that reinforce the rule of law. Principal among such concerns is whether or not judges would preside over a matter fairly and impartially, without any motive for gain or prejudice other than the motive for justice to be seen to be done.

6.2.2 Striking a balance between policy and law becomes necessary in the current times where courts are increasingly placed in a situation where they have to pronounce on matters of public policy. The interface between the courts' power of judicial review and the policy terrain that is the purview of the Executive and the Legislature becomes even more delicate in the South African situation where the Constitution enshrines a justiciable Bill of Rights. It is in this context, in particular in the interpretation

⁴⁷ *Constitutional democracy and constitutionalism in Africa*. 2006. African Centre for the Constructive Resolution of Disputes. Available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications> (accessed on 8 September 2011). This article clarifies notions of constitutionalism and democracy in Africa. In so doing, it explores the distinction between constitutions and constitutionalism, and democracy and multi-partyism. It also considers the best possible features of democracy and elections in Africa.

of the socioeconomic rights in the Bill of Rights, that judicial power should, by necessity, be vested in a mechanism independent of the legislative and executive powers of the government, with adequate guarantees to insulate it from political and other influences.⁴⁸ It is mostly in relation to the socio-economic rights that the courts are seldom required to pronounce on matters of public policy. In his judgment in *Prince v President of the Cape Law Society and Others*,⁴⁹ Justice Albie Sachs reflected as follows:

"In achieving this balance, this court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere that the Constitution allocates to the Legislature and the Executive, and what falls squarely to be determined by the Judiciary. The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity."

6.2.3 In 1998, the first black Chief Justice in the democratic South Africa, Justice Mahomed, alluded to the difficulty that would face the courts in dealing with socio-economic rights, such as the right to health care, education, work and shelter when he stated as follows:⁵⁰

"This difficulty arises firstly because the enforcement of the relevant right might not only involve a negative protection against its invasion, but also a positive duty to deliver the right to the aggrieved citizen to whom it is denied; and secondly because the effect of judicial orders in this kind of area might be to compel the Legislature and the Executive to restructure their priorities, their budgetary resources or the methods they might have chosen to secure different constitutional rights. An order, for example, that primary education at state expense be accorded to all children under the age of sixteen, might compel the state to prioritise that right over the right to deliver nutrition to dying infants at hospitals who are entitled to primary health care. The objection to that kind of constitutional objectivism is that it might give to a court, which does not have the burden of political accountability, the power to make orders in areas in which it has no greater expertise than the Legislature or the Executive and that it invades the guarantee inherent in the separation of powers upon which a legitimate constitutional democracy is premised."

"What should be the proper approach of the Judiciary to these difficulties?...depending on the exact formula favoured by the relevant Constitutional provision, the court might still have a duty to enquire whether the necessary resources did in fact exist to enable delivery of the right sought to be asserted or whether the relevant state agency did in fact make a proper endeavour to effect such delivery, or whether it had in fact "progressively" sought to extend the benefits of the right to members of the relevant community."

6.2.4 In describing the crucial responsibility played by judges, the Chief Justice of Tanzania remarked as follows:

"Through judicial activism and the delivery of equitable justice, judges fulfil the expectations of the poor, the ignorant and the illiterate. We judges cannot escape from addressing the question that confronts the people in their quest for justice and freedom. They are demanding freedom from want, independence from poverty and destitution, from ignorance and illiteracy. The judges, in interpreting fundamental rights, cannot forget these quests for freedom, the demands of the people for social and economic advancement, which in reality constitutes "social justice"."⁵¹

48 Dato' Param Kumaraswamy "Measures for strengthening judicial infrastructure and related training, teaching and education". A paper delivered at the United Nations Office of the High Commissioner for Human Rights Expert Seminar on Democracy and the Rule of Law, March 2005.

49 *Prince v President, Cape Law Society and Others* 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823; *Prince v President of the Law Society of the Cape of Good Hope* 2002 (1) SACR 431 (CC).

50 Welcoming address at the first orientation course for new judges delivered by Hon Ishmael Mahomed, held on 21 July 1997.

51 "The Judiciary in Africa", *supra*, at 198–199



6.2.5 The expectation is therefore that the collective mindset of those who function within the whole justice system must be qualitatively different from what prevailed under colonialism and apartheid. A Judiciary whose composition does not broadly represent society's demographical profile in terms of race and gender would normally not be perceived to be in a position to contribute meaningfully to pushing the frontiers of change towards inclusiveness and substantive equality.

7. THE CONTINUING DEBATE ON THE LEGAL SYSTEM

7.1 Plural legal system and the problem of legal imperialism

- 7.1.1 Plural legal system still remains a challenge for South Africa. The complex body of indigenous laws, traditions, customs and systems within the Constitution and the South African common law require debate. Implicitly, the dominant legal culture denigrates indigenous laws, traditions, customs and systems and elevates Roman-Dutch common law to a higher level.
- 7.1.2 Legitimate questions continue to be raised about the continued adherence to Roman-Dutch Law as the “common law” in independent African countries⁵² and it may be time to open it up for informed public debate with a view to developing a truly South African common law that takes the best from indigenous laws, traditions, customs and systems, and the existing Roman-Dutch common law. The indigenous laws, traditions, customs and systems in South Africa are not unproblematic, and they require harmonisation with the supreme Constitution. It is trite that colonialism and apartheid distorted most of indigenous institutions and values. These are matters that require debate for the proper articulation of the South African value system that must inform our legal system.
- 7.1.3 The Constitution as the supreme law of the Republic, must form the basis for all laws in the Republic.

52 See generally, Spruit, JE, Kamba, WJ and Hinz, MO (eds.) 2000. *Roman law at crossroads*. Juta and Company: Cape Town



8. CONCLUSION AND RECOMMENDATIONS

This Document seeks to highlight the policy environment in which the transformation of the judicial system takes place and highlights critical risks and challenges that have the potential to delay or obstruct the finalisation and implementation of the transformation programmes.

While ongoing dialogue on judicial independence and separation of powers is a necessary and inevitable universal phenomenon, the disturbing part is when the debate is hysterical, uninformed and destructive. This often tends to be the case in relation to policy choices where there is an inherent contestation about the powers of the arms of government. It is therefore important that the Legislature, the Executive and the Judiciary, as branches of the state, constantly engage in dialogue to discuss mechanisms to promote continuous cooperation and interaction to address areas of contestation.

Clear and concise recommendations are necessary to unlock challenges that have the potential to undermine the transformation goals that are intended to nourish our constitutional democracy. Therefore, the following approaches – already alluded to in the Document – provide opportunities to accelerate the transformation of the judicial system that many South Africans are yearning for:

- (a) Intensifying institutional reforms that are geared to enhance the capacity of the Constitutional Court to lead the evolution of our constitutional jurisprudence. The desired reforms to be informed by the assessment of the impact of the decisions of the Constitutional Court on social transformation.
- (b) Accelerate institutional reforms in the context of our developmental State; also including the optimum use of the Judicial Education Institute to facilitate the development of an appropriate judicial education curriculum that will enhance the skills, competencies and social context attributes of judicial officers.
- (c) Implementing appropriate measures, including legislative amendments, where necessary, to enhance the efficiency and the integrity of the Judicial Service Commission and the Magistrates Commission in the execution of their constitutional mandates of facilitating the transformation of racial, gender and other constitutional attributes in the Judiciary.
- (d) Establishing a framework for the monitoring of the evaluation of the implementation of the court decisions by all state departments to advance respect for the rule of law.
- (e) Building a strong research capacity for the state by re-engineering the South African Law Reform Commission and the Rules Board for Courts of Law, to realise the full potential of the research capacity of the State. The programme to strengthen these institutions should include the revision of their legislative mandates in order to respond to the expanded mandate of government and to look at the broader socio economic context in the country. All branches of state should contribute to the agenda for change that will inform the programmes of these research institutions from time to time.
- (f) Facilitating the establishment of mechanisms for the three branches of state to engage in regular debates to manage their interface within the context of the separation of powers in pursuit of a common transformative goal that is geared to benefit society at large.

Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State

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