

**Comments by the Centre for Applied Legal Studies on:**

**The discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State published by the Department of Justice and Constitutional Development on 28 February 2012**

**1 June 2012**

Introduction

The Centre for Applied Legal Studies (CALs) is a civil society organisation based at the University of the Witwatersrand. CALs is committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALs' vision is a country where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice.

CALs' mission is:

- to challenge and reform systems within South Africa which perpetuate harm, inequality and human rights violations;
- to provide professional legal representation to victims and survivors of human rights abuses;
- to actualise a politically, socially and economically just society;
- through a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable; and
- to act with courage against impunity for non-compliance with human rights standards.

At the outset CALs would like to commend the Department of Justice and Constitutional Development (DoJ&CD) for their transparency and commitment to public participation in the preparation of the discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State (the Discussion Document). It is appropriate and important that a national conversation is facilitated on issues of this significance. In this regard, the Deputy Minister of Justice, Mr Andries Nel, ought to be particularly commended for his willingness to talk in public fora about the Discussion Document and the constructive way in which he has brought the issues contained in it into the public domain.

We have engaged with the Discussion Document. At this time CALs is submitting brief comments around five particular issues. We will continue to engage the document in depth as the process continues. Generally our view is that it does well to outline the fundamental principles of our constitutional democracy pertaining to separation of powers and judicial independence. As a starting point it is important to acknowledge that we are now 18 years into our constitutional dispensation in South Africa – democracy has come of age. Taking stock of our judicial system is therefore appropriate at this time.

Our Constitution is a transformative instrument and transformation is, and remains, a process. Our transformation project in South Africa is therefore a work in progress. Evaluating such progress is a constructive and necessary task to undertake. The true success of this project however, lies in the form that evaluation takes and how and in what spirit its results are actioned.

### Public Engagement with the Review

There has been much public debate concerning the motivation for the review of the Constitutional Court and Supreme Court of Appeal released by the DoJ&CD on 26 March 2012 (the Review) and particularly the use to which its product will be used. At a public seminar organised by Section27 and NADEL held on 17 April 2012, in response to a question about what the executive might do should the reviewers find the jurisprudence of the Constitutional Court and Supreme Court of Appeal wanting, the Deputy Minister replied that this might:

- a) influence the curriculum of the Judicial Education Institute; or
- b) change law school practice.

Aside from the serious question about whether the executive should have any influence over the operation of law schools, this response, which was admittedly an off-the-cuff answer, is out of kilter with the Minister's statement in the introduction to the Discussion Document where he says that:

“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' projects mainly seek to achieve.”

We invite the DoJ&CD to lay to rest the concerns expressed by many and indicate what exactly it does intend to do with the product of the Review. We note that at least some indication is given in the Discussion Document where the Minister indicates that the outcome of the Review will form the basis of seminars and a national conference.<sup>1</sup> We trust that in the spirit of the Review, which lists transparency and openness as one of its guiding principles,<sup>2</sup> these debates will be open to civil society.

### Structure of this Document

There are a number of specific issues contained in the Discussion Document to which we would like to respond. These are:

- The responsibility for legislative reform;
- Government's response to court judgments;
- Checks on judicial power;
- Progressive realisation of rights; and
- Gender representivity.

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<sup>1</sup> Discussion Document at pVI.

<sup>2</sup> See para 5(f) of the Terms of Reference of the Review.

## The responsibility for legislative reform

The Discussion Document describes the Constitutional Court as an institution of change entrusted with ensuring the reform of South African jurisprudence thereby ensuring that all law, including all legislation and common law, is aligned to the Constitution.<sup>3</sup> While the Constitutional Court is charged to ensure that South Africa's jurisprudence is in line with the Constitution, *legislative* reform is also the function of the legislature and the executive. We refer in this regard to section 43 of the Constitution which vests legislative authority in the legislature and section 85(2)(d) which provides that the executive is responsible for preparing and initiating legislation.

## Government's response to court judgments

The Discussion Document adopts the blanket view that the "[g]overnment's response to court judgments has been respectful and has helped to reinforce the legitimacy of the courts".<sup>4</sup> Unfortunately, while this should indeed be the case, it is not entirely accurate. The example which immediately springs to mind is the *Nyathi* case<sup>5</sup> which was heard by the Constitutional Court in 2007, and the rather dismal state of affairs it exposed.

Whilst undergoing treatment for severe burns, Mr Nyathi suffered a stroke as a result of an incorrect surgical procedure and was rendered severely disabled. He instituted action against the MEC for Health in Gauteng. Despite having conceded negligence, the state failed to comply with an interim order of court requiring it to pay Mr Nyathi an amount of R317 700 to cover his medical and legal expenses. This failure to comply with the interim court order sparked a successful challenge to section 3 of the State Liability Act. In its judgment confirming the unconstitutionality of this provision (which prohibited attachment of state assets), the Constitutional Court, per Madala J, criticised the failure of the state to settle an astonishing 200 judgment debts outstanding at the time of the judgment.

The Court held that:

"In more recent years, and in particular the period from 2002 onwards, courts have been inundated with situations where court orders have been flouted by state functionaries, who, on being handed such court orders, have given very flimsy excuses which in the end only point to their dilatoriness. The public officials seem not to understand the integral role that they play in our constitutional state, as the right of access to courts entails a duty not only on the courts to ensure access but on the state to bring about the enforceability of court orders."<sup>6</sup>

And further that:

"we now have some officials who have become a law unto themselves and openly violate people's rights in a manner that shows disdain for the law, in the belief that as

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<sup>3</sup> Discussion Document at p11.

<sup>4</sup> Discussion Document at p111.

<sup>5</sup> *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC).

<sup>6</sup> *Nyathi* at para 60.

state officials they cannot be held responsible for their actions or inaction. Courts have had to spend too much time in trying to ensure that court orders are enforceable against the state”.<sup>7</sup>

This certainly does not ring true with the picture painted by the Discussion Document of executive respect for judgments. The other obvious context in which government response to court judgments has been woefully less than respectful, has been in social welfare cases, particularly in the Eastern Cape (see Hoexter’s discussion of non-compliance with court orders in this context).<sup>8</sup>

The Discussion Document makes repeated reference to section 165 of the Constitution. It is particularly in light of section 165(4), which requires organs of state to assist the courts in ensuring their effectiveness, that executive disrespect for court judgments of the kind exposed in the *Nyathi* story is so worrying. Any meaningful assessment of the judicial *system* needs to look not just at the judiciary (which is only one part of the picture) but also at those tasked with ensuring that judicial orders are implemented, which is a task which often falls on the other branches of government.

In the words of Jafta J:

“The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and the resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order.”<sup>9</sup>

The need for the various arms of the state to work together to ensure the realisation of human rights is something CALS encounters often in our work. Most recently, the dire consequences of a court order not implemented by another branch of government was thrown starkly into relief by the *Blue Moonlight* case. *Blue Moonlight* is a housing rights case in which CALS represented an inner city community resident at Saratoga Avenue in Berea.<sup>10</sup> To prevent this community being thrown on to the streets due to the City of Johannesburg’s failure to comply with a Constitutional Court order that it provide them with alternative accommodation upon eviction by a private landowner, CALS was forced to launch urgent court proceedings twice, including contempt of court proceedings against various City officials. The bottom line is that the people of South Africa, particularly poor and vulnerable

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<sup>7</sup> *Nyathi* at para 63.

<sup>8</sup> C Hoexter *Administrative Law in South Africa* (2<sup>nd</sup> ed) at 577 – 580. See further *Magidimisi v Premier of the Eastern Cape* unreported case 2180/04 of 25 April 2006 per Froneman J where the complaint related to the provincial government’s failure to give effect to money judgments against it in social welfare cases. Hoexter at 563.

<sup>9</sup> *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 453C-D.

<sup>10</sup> See further *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Others* (SGHC 13253/12) heard on 13 April 2012; *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* (CCT12/12) heard on 30 March 2012 (reasons given on 24 May 2012); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

communities, should not have to institute contempt of court proceedings to ensure that their right of access to court is not the illusion to which Jafta J refers.

The Terms of Reference of the Review include a request for a study on the implementation of the decisions of these Courts focusing, among other things, on state capacity. To the extent that the executive is concerned about its capacity to enforce judgments, which is the implication of the inclusion of this part of the Review, the *Nyathi* and Eastern Cape social welfare examples, as well as our own experiences in cases like *Blue Moonlight*, would suggest that such concern is well placed.

### Checks on judicial power

In his introduction, the Minister of Justice outlines the fundamentally important constitutional principle of separation of powers. In so doing, he quotes the late former Chief Justice Mahomed saying the following:

“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...”<sup>11</sup>

Abuse of power by any arm of the state is something against which we must vehemently guard in our constitutional democracy. This is a principle for which a civil society organisation like CALS fought and which it now works to defend and define.

If it seems from reading this quote that Justice Mahomed was suggesting that the judiciary somehow reigns unchecked, it may perhaps be only that the quote is taken a little out of context. The speech of which it forms part is an endorsement of the fundamental need for an independent judiciary.<sup>12</sup> In any event, constitutionally entrenched mechanisms capable of addressing judicial abuse of power do indeed exist. For example, Chapter 8 of the Constitution establishes a system of courts which function in a hierarchy. This is an important control on the actions of judges as those dissatisfied with judicial conduct are free to take the decision of a lower court on appeal or review to a higher court. In addition, section 177 of the Constitution provides for the removal of judges in certain circumstances including gross misconduct which would cover instances of an abuse of judicial power.

### Progressive realisation of rights

In its outline of the transformative role of government in a developmental South African state, the Discussion Document makes the following statement:

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<sup>11</sup> Discussion Document at pIV.

<sup>12</sup> See further *The Independence of the Judiciary: Address by the Hon Mr Justice I Mahomed, Chief Justice of the Supreme Court of Appeal, to the International Commission of Jurists in Cape Town on 21 July 1998 SALJ 1998 639 at 660.*

“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”.<sup>13</sup>

This statement requires correction. Not *all* of the rights in the Bill of Rights are constructed in the same manner. There are indeed some which are subject to the internal limitations of “available resources” and “progressive realisation” – typically these kinds of concepts are applicable to socio-economic rights. However many constitutional rights are more absolute than this, including for example, the rights to equality,<sup>14</sup> dignity,<sup>15</sup> life,<sup>16</sup> freedom and security of the person,<sup>17</sup> privacy,<sup>18</sup> freedom of association,<sup>19</sup> fair labour practices<sup>20</sup> and an environment that is not harmful to health or wellbeing.<sup>21</sup>

A proper understanding of the nature of the different type of rights in the Constitution is important as it impacts directly on what we understand the extent of the obligations on the state in relation to the realisation of these rights to be. In this context it is also important to acknowledge the interrelated nature of the rights in our Bill of Rights. This understanding permeates the jurisprudence of the Constitutional Court. Upholding one right to the detriment of the other will obviate or weaken all rights protection.

### Gender transformation

Much progress has been made since the advent of democracy on the gender transformation front but representivity is still woefully inadequate, and there is still clearly a long way to go before the judiciary is accurately representing society at large.

The Discussion Document highlights that in 1994 there were only 9 female judges, while as at end September 2011 this number had increased to 61. However this 61 is out of a total of 225 judges which equates to 27%. The magistrates’ statistics are slightly better, although still insufficiently representative, with 38% of magistrates being female.

Increased representivity is a constitutional imperative as section 174(2) of the Constitution provides that the need for the judiciary to reflect the gender composition of South Africa must be considered when judicial offers are appointed. Furthermore, inadequate representivity on the bench is a problem because if the judiciary is not adequately transformed then one of the arms of government tasked with transforming the country is impeded in this task.

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<sup>13</sup> Discussion Document at para 2.3.2, p4.

<sup>14</sup> Section 9 of the Constitution.

<sup>15</sup> Section 10 of the Constitution.

<sup>16</sup> Section 11 of the Constitution.

<sup>17</sup> Section 12 of the Constitution.

<sup>18</sup> Section 14 of the Constitution.

<sup>19</sup> Section 18 of the Constitution.

<sup>20</sup> Section 23 of the Constitution.

<sup>21</sup> Section 24 of the Constitution.

The understanding of transformation as a process is particularly relevant in the context of gender (and racial) representivity. Below is a snapshot of the statistics of law school graduates coming out of the University of the Witwatersrand, delineated by gender.

| Year | No of female Wits Law School graduates | Total no of Wits Law School graduates | Percentage of female Wits Law School graduates |
|------|--|---------------------------------------|--|
| 2008 | 167                                    | 296                                   | 56%  |
| 2009 | 150                                    | 235                                   | 64%  |
| 2010 | 143                                    | 236                                   | 61%  |
| 2011 | 170                                    | 284                                   | 60%  |

This table indicates that the majority of Wits Law School graduates, at least for the last four years, have been women. The challenge then is to ensure that these women, and their colleagues across the country, ultimately take up judicial appointment in equal proportions. To do so, the state and the legal profession will need to be aware of, and responsive to, the barriers that may exist in this regard.

In addition to law school graduates, another relevant component of the 'feeding pool' for the judiciary is the advocates' profession and the dynamics of gender representation in that context. South Africa's most senior counsel are where judicial appointments are commonly drawn from, and transformation of the judiciary is therefore inextricably linked to transformation of other aspects of the profession such as the Bar. Any discussion of transformation of the judiciary therefore needs to be holistic in this sense.

Of course, transformation is also about more than just representivity - it is also about transformation in mindset, culture and practice. However representivity sends a powerful message and is often itself a reflection of this deeper kind of transformation. Representivity also speaks to the credibility associated with the judiciary. The Discussion Document itself acknowledges elsewhere that "[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."<sup>22</sup>

### Conclusion

We thank you for this opportunity to comment on the Discussion Document and look forward to participating further in this national dialogue. For queries or further information please contact Prof Bonita Meyersfeld (Director) at [bonita.meyersfeld@wits.ac.za](mailto:bonita.meyersfeld@wits.ac.za) or 011 717 8622 or Lisa Chamberlain (Acting Head of Programmes) at [lisa.chamberlain@wits.ac.za](mailto:lisa.chamberlain@wits.ac.za) or 011 717 8624.

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<sup>22</sup> Discussion Document at para 6.2.5, p31.