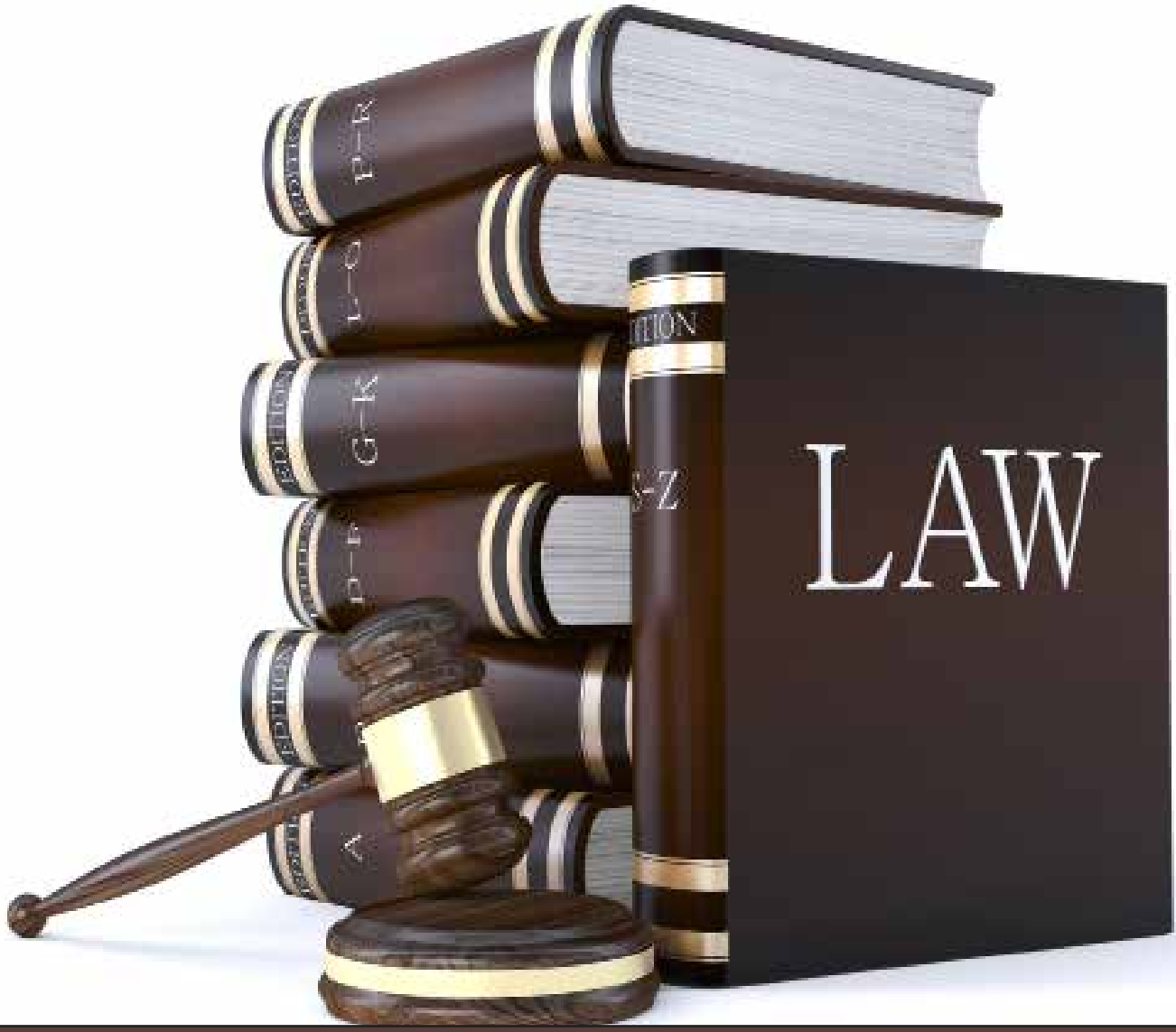

2030

VISION FOR THE JUDICIARY

(A CONTRIBUTION TO THE NATIONAL DEVELOPMENT PLAN)

BY MOGOENG MOGOENG - CHIEF JUSTICE OF SOUTH AFRICA

Table of Contents

1. 2030 VISION FOR THE JUDICIARY (A CONTRIBUTION TO THE NATIONAL DEVEL OPMENT PLAN)
BY MOGOENG WA MOGOENG - CHIEF JUSTICE OF SOUTH AFRICA

1.1 Introduction
1.2 Building Safer Communities
1.3 The Appointment Of Judicial Officers
1.4 Judicial Education
1.5 Perfomance Measurement
1.6 Judicial Case Management
1.7 An Integrated Approach to the Criminal Justice System and to the Justice System as a Whole
1.8 The State of the Court System
1.9 2030 Vision for the Judiciary
1.10 Conclusion

2. 2013 ANNUAL HUMAN RIGHTS LECTURE OF THE STELLENBOSCH LAW FACULTY "THE IMPLICATIONS OF THE OFFICE OF THE CHIEF JUSTICE FOR CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA"UNIVERSITY OF STELLENBOSCH, CAPE TOWN (Thursday, 25 April 2013)
CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

2.1 Introduction
2.2 The History of Court Administration
2.3 The Nature of our Constitutional Democracy
2.4 The Role of the Chief Justice
2.5 The Establishment of the Office of the Chief Justice
2.6 Norms and Standards
2.7 Judicial Case Management
2.8 Judicial Education
2.9 Modernisation
2.10 Access to Justice
2.11 Media Relations
2.12 Provincial Leadership
2.13 Role-Player Coordination
2.14 Memorandum of Understanding
2.15 Our Preferred Court Administration Model
2.16 Conclusion


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2030 VISION FOR THE JUDICIARY
(A CONTRIBUTION TO THE NATIONAL DEVELOPMENT PLAN)

(BY MOGOENG WA MOGOENG – CHIEF JUSTICE OF SOUTH AFRICA)

1.1 INTRODUCTION

The Judiciary notes with humility the extensive work by the National Planning Commission ("the Commission") in the drafting of the National Development Plan and has noted with great interest the extent to which South Africans have thus far participated in the crafting of our nation's plan.

We are humbled by the opportunity presented to us to share our views on the proposals contained in the National Plan and we would like to focus particularly on some of the issues impacting on society in general and in particular on the issues that speak to the Judiciary as an independent arm of the State.

The Judiciary notes and can reconcile itself with the identification of the 9 key challenges of our country identified and reported on in both the diagnostic report and the National Development plan (in its current form).

The Commission has raised several issues that affect the Judiciary and related law enforcement agencies which cry out for comment.

Those issues entail the reinforcement of the independence of those institutions, capacity building, the deployment of more resources to facilitate efficiencies and effectiveness, the need to clarify the appointment procedures and criteria of bodies like the Judicial Service Commission ("the JSC"), the urgency to train Judicial Officers, the effectiveness of the Case Management structures at all Court levels, the role of strategic leadership, automation and the need to strengthen self-governance of Courts, to mention but some.

Released in June 2011.

1.2 BUILDING SAFER COMMUNITIES

We believe that the Judiciary plays an important role in ensuring that communities are safe. Yet, the significance of that role is not always properly appreciated. An unintended and unfortunate impression is often created that the South African Police Service ("the SAPS") and the National Prosecuting Authority ("the NPA") somehow have the capacity to bring down crime and to ensure that there is a high conviction rate respectively or together, to the exclusion of the Judiciary. The trend is to commend the SAPS and the NPA as the Plan does "for the decline in murder rates" and "higher conviction rates".

The problem that this gives rise to is that when resources are deployed, the role that these two entities are apparently understood to play in ensuring community safety often seems to contribute significantly in the determination of budget allocation, while Courts are largely left out. We shall return to this point later.

It suffices to say at this stage that the SAPS, the NPA and the Judiciary all have a very important role to play in arresting the scourge of crime and none can deal effectively with this matter without the others.

In line with the former Chief Justice of the Republic, Justice Chaskalson, we believe that "[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat the lawlessness." The late Chief Justice Mohamed made remarks in a similar vein. This would, by the way, be what the Russians and Germans say is largely responsible for the low levels of crime in their countries.

1.3 THE APPOINTMENT OF JUDICIAL OFFICERS

The Judiciary noted that the National Plan refers to the selection of Judges and the structure of the JSC. Although not commonly known, there exists a "Judicial Services Commission Handbook for Commissioners" published by LexisNexis which serves as a guide to Commissioners (and containing a summary of the criteria used by the JSC) when considering candidates for judicial appointment.

The "foreword" of the Handbook reads:
"At its Special Sitting held in Johannesburg on 10 September 2010, the Judicial Service Commission resolved, after a lengthy debate and a review of the Guidelines that had been adopted in 1998, to publish the criteria used when considering candidates for judicial appointments. This decision is in line with the JSC's principle that the process of judicial appointments should be open and transparent to the public so as to enhance public trust in the Judiciary."

The Handbook uses the criteria as stated in the Constitution4 and also contains supplementary criteria5 when candidates are evaluated and during the deliberations by the members of the Commission. The supplementary criteria interestingly focuses on issues of technical competence, integrity etc. Any amendment of the criteria for appointment to the bench will necessitate an amendment of the Constitution.

The JSC and the President of the Republic of South Africa, in particular, are enjoined by section 174 of the Constitution to ensure that Judicial Officers are fit and proper persons for appointment. But, the transformation imperatives imposed by section 174(2) of the Constitution require that such appointments be made with due regard to the need to build a Judiciary that is representative both in terms of race and gender. In order to ensure that Commissioners have the same understanding in relation to what ought to inform their decision-making processes, the JSC developed the appointment criteria set out below.

This criteria deals with just about everything that is necessary to help any well-meaning person understand, in broad terms, what informs the decision of the JSC Commissioners to decide one way or another about candi-

dates. I do not think it was meant to be an exhaustive list of issues to consider. But, all the fundamentals are there and any transcript or record of the proceedings bears testimony to the efforts made to identify people who are suitable for appointment. We believe that the framers of the Constitution did a sterling job in settling for the wide representation that the Commissioners reflect. The following are represented: the ruling party; the opposition parties; the Bar; the Attorneys Profession; the Black Lawyers Association; Nadel; Academics; the Minister of Justice and Constitutional Development; the President; the Judges President; the President of the Supreme Court of Appeal; and the Chief Justice.

This has always been how the JSC is constituted. There have been no concerns raised about its composition until recently. Some have suggested that senior Advocates should be in the majority in the JSC and others have suggested that retired Judges should have a bigger say. We are not persuaded that this composition of the JSC requires any improvement. But, it is always open to South Africans to amend their Constitution to meet new challenges that have been anticipated.

A point that must be made, in view of some of the observations, made in the plan relating to the meaning of a progressive Judicial Officer and the role of political interests. My sense is that a progressive Judge bears different meanings to different South Africans. At some point, it may be necessary to attempt a plain meaning of this term because it is fast becoming fashionable to brand Judges progressive, conservative or executive-minded these days, sometimes to the detriment of the Judiciary.

As Chairperson of the JSC, I am interested to know the factual basis for the Commissioner's remark that the JSC is at times "hamstrung by political interests". All institutions must be criticised when they objectively deserve to be. It is, however, a dangerous practice for South Africans to arrogate to themselves the right to elevate their suspicions to fact and publicise those suspicions or rumours to the detriment of entities which do not operate in line with their personal or sectoral preferences.

Whatever we say about institutions that are pivotal to under-guarding our constitutional democracy should be driven by what is in the best interests of the nation. It should also be said after a proper reflection on its potential impact on the well-being of the institution concerned. We would appreciate it if substance could be given to some of these remarks that appear at page 9 of Chapter 14 of the Plan.

The JSC is exploring the possibility of arranging a Press Conference, at which it will explain its operations and afford members of the media the opportunity to pose whatever questions they have.

S v Makwanyane and Another 1995 (3) SA 391 CC at para 122.

Id at para 290:

"It appears to me to be an inherent probability that the more successful the police are in solving serious crimes and the more successful they are in apprehending the criminals concerned and securing their convictions, the greater will be the perception of risk for those contemplating such offences. That increase in the perception of risk, contemplated by the offender, would bear a relationship to the rate at which serious offences are committed. Successful arrest and conviction must operate as a deterrent and the State should, within the limits of its undoubtedly constrained resources, seek to deter serious crime by adequate remuneration for the police force; by incentives to improve their training and skill; by augmenting their numbers in key areas; and by facilitating their legitimacy in the perception of the communities in which they work."

See section 174 of Constitution. Criteria stated in the Constitution: (1)Is the particular applicant an appropriately qualified person? (2) Is he or she a fit and proper person? (3) Would his or her appointment help to reflect the racial and gender composition of South Africa? Supplementary Criteria: (1) Is the proposed appointee a person of integrity? (2) Is the proposed appointee a person with the necessary energy and motivation? (3) Is the proposed appointee a competent person? (a) Technically competent; (b) Capacity to give expression to the values of the Constitution. (4) Is the proposed appointee an experienced person? (a) Technically experienced; (b) Experienced in regard to values and needs of the community. (5) Does the proposed appointee possess appropriate potential? (6) Symbolism. What message is given to the community at large by a particular appointment?

1.4 JUDICIAL EDUCATION

The South African Judiciary would never be transformed in terms of race and gender if only the best lawyers were appointed to judicial office. White males would virtually monopolise the appointment opportunities. Not only would the Divisions of the High Court and equivalent specialist Courts be populated with predominantly white male South Africans, but the Supreme Court of Appeal and the Constitutional Court would be their preserve. And this would undermine the constitutional imperative to transform the South African Judiciary.

I want to believe that the Commission's proposal that "the JSC should lead a process to establish clear criteria for appointment of judges, with emphasis on the candidates' Progressive credentials and expertise", does not seek to place "expertise" and "progressive credentials" above the transformation imperatives set out above, which the JSC has upheld over the years. Facts about the need to address "judicial appointments that call into question the impartiality of selection processes" would be appreciated.

The apartheid briefing patterns which fast tracked the development of practices of our white compatriots by reason of the economic muscle of that race still continue. Big business, parastatal organisations and many Government Departments and Parliament brief white lawyers as a matter of practice. They hardly ever brief black practitioners or female practitioners.

The South African Judicial Educational Institute ("the SAJEI") bears the responsibility to train judicial officers across the spectrum.

The first Council of SAJEI was appointed in May 2009. It has, however, only been able to commence with its training programmes in January 2012. In that month alone, orientation programmes were running for Judges, Regional Court Magistrates and District Court Magistrates who had not been trained since their appointment as a result of SAJEI's inability to conduct training programmes.

There has been a series of training programmes for different levels of Judicial Officers.

Just last week, we were running an Aspirant Judges Programme to build a pool of transformation agents from which we could draw Acting Judges for the High Courts and equivalent Courts. We hope to prepare these lawyers so well that as Acting Judges, and even if appointed

permanently, they would contribute to the smooth-running of the Courts. We intend to continue to widen and deepen this pool of potential Judges.

Two days from today, we will be giving training to 100 Judges from different Divisions, on the intricate aspects of the Companies Act. From 3 August 2012, the leadership of the Judiciary, including Deputies, Regional Court Presidents and Chief Magistrates will have a strategic planning session for each group of leaders, assisted by facilitators who are experts in the area of leadership, performance measurement and efficiency enhancement in the Judiciary.

The point that must be made is that the SAJEI is fully operational. Our curriculum for Aspirant Judges and newly appointed Judicial Officers is deliberately designed to pay special attention to areas like judgment writing, civil and criminal trial management and motion court management, ethics, constitutional litigation, etc. All these areas are bound to equip Judicial Officers to carry out their duties well.

Both serving and retired Judges have been very active in the Judicial Faculty. We have received messages from retired Judges in response to our request that they indicate where they could be of help, some saying that they would be willing to teach, others to mentor. I have a meeting scheduled for tomorrow with some of them to discuss ways in which they could be of help. More resources will be needed to secure a decent building for SAJEI, to develop a programme for a wide range of soft skills and to offer that programme, for example, as the Germans do.

Judicial Education is one of the most effective instruments at our disposal to empower Judges and Magistrates to deliver quality justice to all our people. It must be given all the support it needs and be well resourced. It will help us to close the gap between those appointed on the basis of potential and those who had vast experience at the time of appointment, and it will enhance the efficiency and effectiveness of the Court System as a whole.

1.5 PERFORMANCE MEASUREMENT

We will never really be on top of the performance-related challenges until we have a tool or system through which court performance could be measured on an ongoing basis.

It is necessary to nip these problems in the bud. To do so, the capacity to spot them when they arise is crucial. The Judiciary needs to build in-house statistics generation capacity and performance measurement and quality assurance instruments so that, unlike now, we do not wait for the Minister's report after about 12 months, to know about the problems we have when it would at times already be too late to address the issues properly.

We should be able to tell at the touch of a button what is happening in whatever Court at any given time. This is the facility that Malaysia, Singapore, Ethiopia and the Russian Federation have developed. The Deputy Chief Justice of Malaysia will be sharing their experiences on this matter with us from 3 August 2012. When we have that system in place, it would be easier to take remedial action timeously. That system would have to be court-room specific so that we know where help is needed and where discipline is called for.

A way would also have to be found to ensure that not only Judicial Officers are held accountable for their underperformance, but leaders as well. The truth of the matter is that if a Head of Court is hardly ever at the Court she leads, problems will arise and be compounded by her continuous absence. The quest for accessible quality justice that we have all committed ourselves to in July last year, would thus be a pipedream.

The sooner the Superior Courts Bill and the 17th Constitution Amendment Bill are passed into legislation, the better for the justice system. For once we have the Superior Courts Act in place, the Chief Justice can then, after consultation with fellow leaders, introduce norms and standards. These norms and standards would have the requisite statutory backing and would thus be enforceable. Other jurisdictions have determined that both civil and criminal cases in the lower Courts should, as a matter of course, be finalised within two to three months. Failure to do so, barring an acceptable reason for departure, attracts serious sanctions.

1.6 JUDICIAL CASE MANAGEMENT

Our Courts have a case management system in place, which has never really changed much for decades. One of its obvious disadvantages is that it keeps a Judicial Officer ignorant of the preparatory work that is being done, if any, until a few days before the hearing. This generally denies the Judicial Officer the opportunity to influence the speed at which preparation happens and the quality of the preparation, until it is often too late to do anything about the situation.

Pre-trial conferences which do not involve a Judicial Officer seldom live up to the expectations that they were meant to meet. Trials, therefore, continue to be much longer than they could otherwise have been, had a more efficient case management system been put in place.

The Heads of Court set up a Judicial Case Management Committee some years ago. It recommended the implementation of a case management model or system which facilitates the early intervention of a Judicial Officer in matters and her involvement with legal representatives in referring cases for hearing. Jurisdictions like Botswana and the USA put this model into operation with visible positive results within 18 months. Backlogs were almost cleared and cases finalised quicker than before. This has been part of our practice over the years. We have however been using it very sparingly. This would be in relation to very complex cases, multiple accused or multiple claimant cases and cases that require speedy resolution by reason of the far-reaching implications of the anticipated judgment.

After an extensive study, and an exchange of ideas with experts in this area, the Heads of Court have decided to run pilot projects in three Courts this year, for a period of twelve months. Thereafter, we will launch this model in all High Courts and later Magistrates Courts.

Like every change, we expect it to have its own teething problems. But, we are certain about the fundamental difference it shall make because some High Courts in

our country have already implemented the attenuated version of it, with very positive results. What remains to be done is to engage in an aggressive communication drive with the key role-players. The NPA and the Law Society of South Africa have been briefed fully, I am addressing case management in the Eastern Cape on 19 July 2012, and the members of the General Council of the Bar on 20 July 2012. This case management model must feature significantly.

Again, resources are required to make the most of this possibility to turn our justice system around.

1.7 AN INTEGRATED APPROACH TO THE CRIMINAL JUSTICE SYSTEM AND TO THE JUSTICE SYSTEM AS A WHOLE

The seven-point plan proposed by Advocate Johnny De Lange ("De Lange seven-point plan") with a view to strengthening the criminal justice system is brilliant. It is the way to go if the criminal justice system is to turn around so that it can function efficiently and effectively.

It, however, has two fundamental flaws in its implementation. First, the Judiciary was never consulted about it. Second, and more importantly, the Judiciary was never intended to have any meaningful role to play in its implementation.

Any endeavour to do the following without any meaningful involvement of the Judiciary is a highly impoverished one and is unlikely to bear any fruit:

a) adopt a single vision and mission, leading to a single set of objectives, priorities and performance measurement targets for the criminal or civil justice system by the justice crime prevention and security cluster;

b) establish a new and realigned single coordinating and management structure for the system,flowing seamlessly from Cabinet to each Court, lead by a person from the Executive, as head of the structure with coordination and management functions;

c) make substantial changes to the present court process to improve court performance;

d) determine and implement the automation, projects and modernisation initiatives; and

e) implement any statistics or information gathering system.

The De Lange seven-point plan must be implemented urgently in relation to criminal cases and suitably adapted in line with the civil justice review proposals and the access to justice conference resolutions. If the Judiciary, which is located at the centre of all justice-related matters, does not drive these initiatives, there must be joint leadership by the Executive and the Judiciary in this regard. Failure to do so provides an explanation for the underperformance of the Courts over the years.

What needs to happen is to establish case management or efficiency enhancement structures at a district, subcluster, cluster and provincial level, where none exists, and to strengthen them where they already exist. These are structures designed essentially to shepherd the De Lange seven-point plan, identify all threats to the efficiency and effectiveness of the broader justice system and to identify solutions to them.

Additionally, a national efficiency enhancement structure or committee comprising the same parties as above must be established. The constituent members of these structures are of course the Judiciary, the SAPS, Correctional Services, Legal Aid Board of South Africa, the Attorneys' profession, the Advocates' profession, the Departments of Justice and Constitutional Development, Public Works and Home Affairs.

Challenges which the district cannot resolve without external intervention will be referred to the subcluster, all the way up to national level. Those arising from a district or subcluster, which call for the urgent and definitive intervention of the national structure, could be allowed to bypass structures above them to facilitate timely intervention.

Systems could then be put in place to determine which particular Court or Judicial Officer has challenges and thus needs special attention and what kind of remedial action would be appropriate.

1.8 THE STATE OF THE COURT SYSTEM

Many Courts have discharged their constitutional mandate commendably. Others have underperformed. The report released by Minister Jeff Radebe on Court Performance highlights some performance indicators that have given the leadership of the Judiciary reason to be deeply concerned. But, the report adds to what we already knew about the state of the Courts. We have learnt over the years from different sources, including me Magistrates and other court-process participants, and from our own experience that there are far too many postponements which are difficult to justify; that backlogs continue to haunt us; that too many Judicial Officers take leave while they have part-heard matters and without a temporary replacement; that many Court staff are not prepared to work either at all or beyond 13h00 on Fridays; that there is a lack of proper supervision; and there is general unavailability for Court work by some Heads of the lower Courts.

But, there are also some infrastructural challenges that require attention. Library facilities and other tools of trade are concerns raised, particularly by the Magistracy as impediments to the proper functioning of the Courts. They have also expressed reservations about the correctness of the statistics generated by the NPA and the Ministry. We happen to say that helping the Judiciary to build the capacity to generate its own performance-related statistics is the answer to this longstanding contestation.

The fact of the matter is that our clients, the public, are not satisfied with our overall performance as the Courts and the justice system as a whole. There is a yawning gap between the performance of most lower Courts and the acceptable standard of performance. There is vast scope for improvement even for the higher Courts. What then do we need to do to have the ideal Judiciary and justice system in place by 2030.

1.9 2030 VISION FOR THE JUDICIARY

The Chief Justice, the Deputy Chief Justice, the President of the Supreme Court of Appeal and his Deputy, the Judges President and their Deputies, where there are Deputies, and where there are no Deputies, the next most senior Judges in the Division, will have a strategic planning sessions from 3 to 5 August 2012.

The Regional Court Presidents will have a similar retreat from 8 August 2012 to be followed by a retreat by the Chief Magistrates.

The retreat will be facilitated by, among others, experts in the area of leadership, Court performance measurement and quality assurance, Court automation and someone who can give a perspective on how South Africans view the Courts and their performance. The overall objectives sought to be achieved are to afford the leadership of the Judiciary the first opportunity ever to do a brutal self and institutional introspection, identify all Court performance-related challenges, find solutions to those problems and design the most effective action plan with timelines as well as appropriate monitoring systems.

This does not mean that there is no vision in place.
Elements of that vision follow below:

a) JUDICIAL EDUCATION

The SAJEI and the Judiciary have, as indicated above, committed themselves to a more aggressive Aspirant Judges and Magistrates' Programme. More black people and women must be prepared for possible appointment to the High Court Bench and the Bench of equivalent Courts as well as the Magistrates Court.

The programme affords us the possibility to create a large and healthy pool of potential acting and permanent appointees, as indicated earlier. The success of this exercise partly depends on a radical change of the briefing patterns in this country. Many black and women practitioners left practice during apartheid because work that was critical to the sustenance of a decent practice and the development of a very good lawyer was virtually the exclusive preserve of white males. Sadly, this pattern continues almost unabated. Granted, there are droplets of black practitioners and women practitioners who are remembered these days.

But, this does not detract from the fact that work that matters is given to white males, who would occasionally lead junior white females but hardly ever black Advocates. This is almost the norm in the Constitutional Court. Big business, parastatal bodies and Government Departments do so. Very few people or institutions seem to be making an effort to give good commercial cases to black and women Attorneys and similar briefs to black Advocates or women Advocates. Also, few who have briefed white senior counsel with expertise in the particular field of the law, then brief black or female juniors to learn from the senior and develop the expertise referred to in this Commission's proposals relating to appointments.

When appointments meant to transform the Judiciary in line with the constitutional imperatives are made, complaints flood the public domain that incompetent people have been appointed. The Attorneys profession, the Advocates profession and the captains of industry and Government Departments owe this Country a duty to invest in their lawyers and Magistrates, who are our future Judges, so that it can have the Judiciary it deserves. As indicated above, regular workshops and training programmes will be conducted for newly appointed Judicial Officers and Judicial Officers who have been on the Bench much longer.

b) JUDICIAL CASE MANAGEMENT

I have explained the concept of a case management model above. More resources must be poured into this programme for the success of pilot projects and the roll out of this model to all other Courts. Judicial Officers must take charge of the pace of litigation and the model/s that are objectively realisable.

c) PERFORMANCE MEASUREMENT

Performance measurement and quality assurance are key to the proper functioning of any institution and the Judiciary cannot be an exception.

The Magistrate Commission has a quality assurance unit with laudable objectives. Rather than reinventing the wheel, I think it requires a bit of fine-tuning and a proper training of officials appointed to that unit to achieve optimal results. It would be good to extend that to High Courts and equivalent Courts in the light of some of the delays experienced there as well.

The capacity to harvest statistics, the insistence on a final recordal of the reasons for all postponements and norms and standards on case finalisation will help to arrest delays. It should take at most two to three months to finalise a case in the Magistrates Court and not more than six months in the High Court.

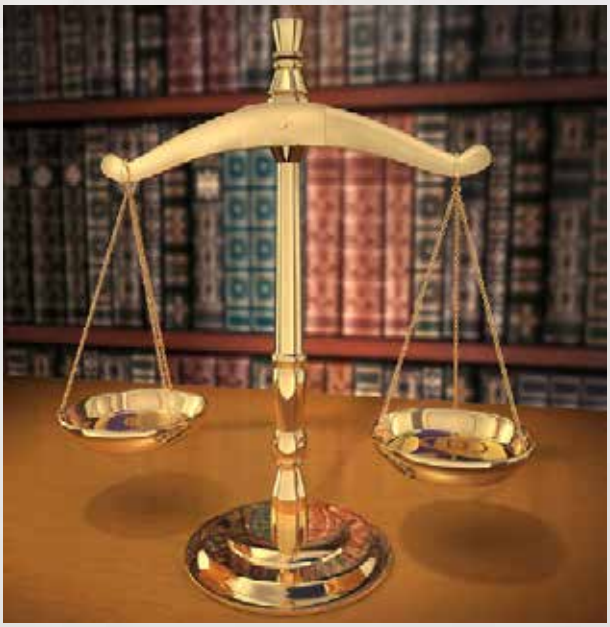
We must have a system in place that the Chief Justice, or any kind of court which needs to know what progress is being made in each particular Court, can easily access and utilise.

d) INTEGRATED APPROACH

Collaboration among key roleplayers is vital to the suc-

cess of the justice system. For example, everything possible must be done by the parties to avoid effecting an arrest before an investigation is complete.

Court rolls in the Magistrates Courts, particularly on Mondays, are clogged by weekend arrests. It will be recalled that the Constitution enjoins the police to present any arrested person before Court within 48 hours of the arrest, whether detained or not. Most of them use that appearance to apply for bail, which is often opposed. The result is that a significant percentage of Court time is consumed by these appearances and bail applications, adding to the backlogs we already have. Matters are often set down before the investigation is completed. This contributes to some of the postponements, for further investigations to be concluded. In other jurisdictions, no case will come before court until the investigation is completed. This is the way to go.



The indulgences that practitioners accord one another and the ease with which they are able to have civil matters postponed militate against the efficiency and effectiveness of the Courts. When undue delays result from this laxity, it is Judicial Officers that are blamed. These delays also make litigation too expensive and justice inaccessible to many. Working together with the organised professions would help us to address these challenges through, I believe, judicial case management.

e) AUTOMATION OF THE COURTS

The introduction of electronic filing is essential to the proper functioning of the Courts. This would afford practitioners the opportunity to file their papers irrespective of where they are and what time of the day it is and irrespective of whether or not court officials are present at Court.

Electronic records would be easily, cheaply and speedily available to practitioners and litigants for the purpose of lodging appeals. Automatic reviews could also be expedited, unlike these days where it often takes much longer than the prescribed seven days to receive review records. It has been recorded that by the time some automatic reviews are concluded in favour of the accused persons, the sentence has already been served in full. This injustice will be curbed by introducing electronic filing and record keeping, and intensifying our computer literacy workshops for all our Judicial Officers. It may interest you to know that Malaysian, Ethiopian, Ugandan, French and Russian Federation Courts have made great strides in this regard and most of their Courts are paperless.

The theft or inexplicable disappearance of court records, which has become the order of the day, resulting in the release of many convicted persons who were probably correctly convicted and sentenced, would be effectively addressed by developing the capacity to keep electronic records on and off site.

f) LANGUAGE SERVICES

The only Judicial Officer that many illiterate or semi-literate people or people who are not proficient in English or

Afrikaans know is an Interpreter.

Several years ago, Court Interpreters were generally very good. They not only had an excellent command of the languages, but were also familiar with legal expressions. Less able Interpreters were hard to come by. Now, it is the other way round. This compromises not only the quality of justice, but justice itself. Decisions are made against those who should have succeeded, had it not been for the poor quality of language services.

There is an urgent need to professionalise language services. Interpreters must be properly trained by those who are good in the area and refresher courses offered by real experts in the field must be undergone regularly.

g) ACCESS TO JUSTICE

Previously, disadvantaged South Africans in townships and rural areas found it difficult to access the Courts and justice. They generally had to travel long distances at great costs, given their meagre earnings and could not afford legal representation.

During the 2011 Access to Justice Conference, delegates, particularly members of Parliament, raised grave concerns about the inaccessibility of justice to many, especially the poor. To address these issues, it was agreed that elements that have transformed the Commission for Conciliation Mediation and Arbitration into an efficient mechanism that it has since become must be factored into the broader court system. We agreed. Alternative dispute resolution must be introduced into the entire court system, as will be indicated below.

Rationalisation of lower Courts and their areas of jurisdiction must be finalised. People in Mokgola and Lekubu villages have to pass Zeerust Magistrate Court to go to the former homeland Court.

It is proposed that Small Claims Courts be properly restructured and resourced. Its jurisdictional amount may have to be revisited. Matters must be held during normal court hours in these Courts. Permanent or contracted Judicial Officers and their own personnel and court space would enhance the delivery of justice.

Community Courts must be established, particularly in townships, to deal with minor offences, as is the case wherever they exist around the world.

Traditional Courts, properly transformed to be constitutionally compliant and adequately resourced, must be empowered to fulfil their traditional role. Our traditional leaders who are headmen and women who adjudicate these courts must be trained properly. The SAJEI stands ready to do so. Botswana provides some guidelines worth considering as to how to use Traditional Courts to make quality justice accessible even to the poor.

Sexual Offences Courts must be reintroduced nationwide to deal effectively with the ever-increasing spate of sexual offences. A way must also be found to grapple with the prohibitive costs of litigation. Strengthening measures to ripen cases for trial through the early intervention of Judicial Officers, reducing postponements dramatically by being better prepared, better organised and predictably strict without trampling on the constitutional rights of the litigants, speeding up the finalisation of cases, enhancing Judicial Officers' trial management and judgment writing capacity and enabling strategic leadership to play its role fully, are among the factors that would make quality justice accessible to all, rich and poor. Finally video conferencing is yet another powerful tool for making justice accessible to all. A lot of time, person power and money could be saved by using video conferencing in postponement of cases. People in far flung areas, as is the norm in the Russian Federation, could give their evidence via video conferencing. Its introduction is urgent and the Judiciary must be taken on board.

h) ALTERNATIVE DISPUTE RESOLUTION

Court-annexed mediation needs to be introduced urgently. Many cases that take up a large percentage of Court time could be resolved through alternative dispute resolution.

The Ministry for Justice and Constitutional Development, through its Civil Justice Review Project and the Judiciary, through the Access to Justice Conference Resolution, have identified the need to implement court-annexed mediation. The Minister and the Chief Justice have agreed to work together in preparation for the implementation of court-annexed mediation. The process is, however, disturbingly slow.

We believe that everything necessary will be done to implement this project, at the latest by February 2013.

i) PLEA BARGAINING

Judicial case management has, in both criminal and civil cases, resulted in the settlement of more than 70% of cases where it is properly implemented.

What further enhances the speedy delivery of quality justice is the correct application of the plea bargaining system. Prosecutors and Judicial Officers should be trained properly to implement this system well. It is a good system and we should not allow cases where it might have been unsatisfactorily applied to stop us from applying it. The public needs to be educated about it, but court-process participants must also have the courage to implement it even as the public still battles to understand it.

j) COURT INFRASTRUCTURE

A number of Courts are in a disturbing state of disrepair. Others have an acute shortage of courtrooms and office space. This has been the case for a number of years. Where repairs were effected, the job was at times done by people who did not have the capacity to do it. The result is, money was spent but the job virtually remains undone. I can present facts if necessary.

By 2030, all the office space and courtrooms needed for the Courts to run without interruptions must be provided.When High Courts go on circuit, they sometimes occupy the courtroom and office space needed either by the Regional Court or District Court. Some of these Courts grind to a halt and case rolls are thus affected negatively.

The Judiciary must be involved in the resolution of these challenges in identifying courts that must be prioritised and how they are to be catered for.

k) COURT ADMINISTRATION

The Access to Justice Conference further resolved that the Judiciary must ensure that judicial integrity and accountability shall be upheld and that those efforts must be supported by the other two branches of government, namely, the Executive and the Legislature, as required by the Constitution. It also resolved that the three branches of government will continue to carry out their constitutional mandate in a manner that is sensitive to the doctrine of separation of powers and that all steps necessary shall be taken to facilitate the institutional and functional independence of the Judiciary.

The Office of the Chief Justice was proclaimed a National Department in 2010. It has a Chief Account Officer at the level of a Director General, with several officials to provide the necessary support.

This Department was proclaimed to create the administrative capacity necessary to enable the Chief Justice to carry out his or her constitutional, statutory and conventional duties. The Minister of Justice and Constitutional Development has been very supportive in this regard.

In order to breathe real life into the new Department, Memoranda of Understanding were concluded this year between the Department of Justice and Constitutional Development and the Office of the Chief Justice to transfer the administrative functions and personnel of the Constitutional Court, the Supreme Court of Appeal, the JSC, the Magistrates Commission and SAJEI to the Office of the Chief Justice. The only leg of the preparations remaining is the agreement with the Unions. The process should be finalised in three months' time.

The transfer of the administration of the Courts from the Executive to the Judiciary is supposed to take place in three phases. The first is the departmental phase, the second is the independent entity phase with limited functions, whereas the third and last phase is about the wholesale transfer of court administration. This is how it was planned.

I am convinced that we do not need phase two, in relation to which a proposal model has already been sent to the Minister for consideration by the Cabinet. The Office of the Chief Justice will be ready to move from phase one straight to phase three by the end of 2013, if the Executive supports this proposal. When an agreement has been reached on what needs to be transferred to the Office of the Chief Justice, that decision should be implemented as soon as the necessary consultations have taken place and logistical arrangements have been made, then personnel and the budget could be transferred.

Many jurisdictions have made great strides in this regard. One of the latest and probably most institutionally independent Judiciaries I am aware of is the Russian Federation. A Judicial Department was established in terms of legislation in 1998. It is responsible for everything that affects the administration of the Courts. This is the model that I find to be more appealing than all self governance models I have been able to reflect on.

1.10 CONCLUSION

The levels of contact crime and corruption in the public and private sector, pockets of inefficiencies in the justice system and the need to reinforce the independence of the Judiciary, all call for urgent and extraordinary interventions.

The justice system must be one of the key priority areas to build the kind of investor confidence and attract the kind of investment that can create the much needed jobs and the economic boost that our country so desperately needs. The justice system must be strengthened. The skeletal proposals set out above, the De Lange seven-point plan and such additional measures as might be proposed offer the retreat by the leadership of the Judiciary must, in our view, be implemented as a matter of priority.

Like the other branches of government, the Judiciary must be allowed to function independently of the Executive, to identify measures that would help it to function efficiently and effectively, and implement them as soon as the situation requires this to be done. Policy decisions in relation to court administration must also be taken so that suitable arrangements are made as soon as possible.

Judicial education requires a massive capital injection to achieve the goal of empowering aspirant and serving Judicial Officers. That budget must cater for the involvement of retired Judges as members, lecturers in SAJEI and quality assurance officials.

The ideal justice system is achievable by 2030 if all the above measures could be implemented as proposed.

2013 ANNUAL HUMAN RIGHTS LECTURE OF THE STELLENBOSCH LAW FACULTY

"THE IMPLICATIONS OF THE OFFICE OF THE CHIEF JUSTICE FOR CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA" UNIVERSITY OF STELLENBOSCH, CAPE TOWN (Thursday, 25 April 2013)

CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

2.1 Introduction

When all others fail in their obligations to give practical expression to the rule of law, human rights and the constitutional aspirations of all the people in any democracy, that constitutional democracy would be safe, provided a truly independent body of Judges loyal to the oath of office or solemn affirmation, is in place and ready to administer blind justice to the aggrieved.

Government by its very nature is divided into three branches. The Executive, the Legislature and the Judiciary. As you know, the three tiers of the Executive government are led by the President. Each tier enjoys real autonomy beginning with the national and provincial governments to the smallest municipality you can imagine. Their success or failure is entirely or largely in their hands. Similarly, the Legislative branch of government is led by the Speaker and the Chairperson of the National Council of Provinces at national levels, by Speakers at Provincial levels, again by Speakers at local government level. They are also institutionally independent.

These two branches of government have their own vote accounts, they are vested with the power to determine the administrative support they need, to work out job descriptions and salary levels for their personnel and to decide which projects to embark on according to their own order of priority. But the same cannot be said of the South African Judiciary.

2.2 The History of Court Administration

The Judiciary in this country has over the years looked very much like a unit within or an extension of the Department of Justice and Constitutional Development. It had no say on any major projects intended to improve the efficiency and effectiveness of the courts, no control over the budget, very little, if any say, on the IT that could best serve its needs, the appointment of the limited support staff the Judiciary has been assigned by the Executive, to mention but some of the challenges. Yet, it is not just a national or provincial department but the third arm of the State. Unlike the NPA and the Chapter 9 institutions, it has not been allowed to run its administrative affairs. And this cries out for urgent and meaningful attention.

The lack of institutional independence perceived to be in conflict with the Constitution has also presented a whole range of practical challenges to the Judiciary. Some of the challenges include the determination of court budgets without consultation with the Judiciary, inadequately trained administrative staff, shortage of courtrooms and chambers for Judges and Magistrates and substandard interpretation services. It is for these reasons that the Judiciary has been calling for a radical paradigm shift from the current executive court administration system to one that is led by the Judiciary.

Over the years the role and functions of the Chief Justice as head of the Judiciary and head of the Constitutional Court have steadily escalated. The Chief Justice has, however, not had the benefit of an adequate support structure to provide the capacity and human resources required for this purpose. As a result, the attention of successive Chief Justices have been diverted from their core judicial functions to the need to attend to various administrative tasks, and they have had to rely largely on support from the Executive to enable them to do so.1

This raised important issues concerning the independence of the Judiciary, and led to requests by Chief Justices for the capacitation of their office to facilitate the performance by them of their duties and functions. Important issues were also raised by the Judiciary concerning the system of court administration inherited from the apartheid state, which was driven by the Executive. There have been ongoing discussions between the Judiciary and the Executive in regard to these matters and the establishment of a system of court administration consistent with the Constitution and the evolving system of judicial independence contemplated by section 165.2

When Arthur Chaskalson was the Chief Justice of this great country, he organised the first National Judges' Conference in Johannesburg, in 2003. He arranged that Justice Sandile Ngcobo deliv-

ers a paper on court administration and what needed to be done to enhance the independence and efficiency of the court system.3 Justice Ngcobo said:

"At a conceptual level, one cannot talk about the judiciary as a genuinely independent and autonomous branch of government if it is substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operations. The practical dimension flows directly from this. While the judicial officers may be free to operate independently and to hand down fair and impartial decisions according to law, their ability to do this may be constrained in various ways, notably by the financial, human and physical resources available to perform theirtasks. A key element of this is the extent to which the judiciary has control over its own resources and thus is able to determine its policy and strategic priorities and how funds are to be allocated to pursue those priorities."

Following on that paper and conference discussions, the Heads of Court resolved that more capacity be built around the Chief Justice to help him carry out the administrative functions that lay on his shoulders with relative ease. The proposal was that the envisaged administrative structure was to be led by a Director General with a team that would include a media relations officer. In response the Executive approved additional capacity but downgraded the head to the level of a Chief Director added one Director to assist the JSC, but the request for a communications director was declined. These functionaries were appointed and did alleviate the administrative workload of Chief Justices Chaskalson and Langa to some degree.

The bulk of the functions that are at the core of a court system remain in the hands of the Justice Department. The Judiciary asks, and their request may be granted or denied. It virtually has no control over the budget for the courts.4

To help us locate the role of the courts in this great nation, I quote the provisions that highlight the essence of our constitutional democracy and the kind of Judiciary we are promised by our Constitution below.

1 See para 1.2.1 of the CIM Report.
2 Van Rooyen & Others v S & Others 2002 (4) SA 843 (CC) para 75. See also para 1.2.2 of the CIM Report.
3 "Delivery of Justice: Agenda for Change" (2003) 120 SALJ 688.

4 The budget of the South African Judicial Education Institute was cut this year, and I only got to know why, when I asked.

2.3 The Nature of our Constitutional Democracy

Section 1 of our Constitution defines the nature of our constitutional democracy in these terms:

"The Republic of South Africa is one, sovereign, democratic State founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

And section 2 underscores the supremacy of our Constitution as follows:

"This Constitution is the Supreme Law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Under the chapter on "Courts and Administration of Justice",section 165 provides for the Judiciary this nation deserves thus:

"(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of State may interfere with the functioning of the courts.

(4) Organs of State, through legislative and other measures,must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."5

These provisions put together, constitute the nerve-centre of our constitutional democracy. Without the essence of these foundational values, our constitutional democracy would cease to exist. For this reason, unlike other constitutional amendments that require two thirds majority to effect,6 section 1 and subsection 1 of section 74 of the

Constitution can only be amended by the National Assembly with the support of at least 75 per cent of all its members and a supporting vote of at least six provinces in the NCOP.7 It is important to note that provision is only made for the amendment but not for the repeal of the section that sets out the foundational values at the heart of our constitutional democracy.

Turing to Judicial independence, as Chaskalson and Langa8 said, it is always necessary to stress the centrality of judicial independence to the post-apartheid legal order. Judicial independence is a condition precedent for the existence of a constitutional democracy and for its protection and advancement.9 Section 165 is a crucial provision of our post-apartheid Constitution which entrenches fundamental rights and binds the Legislature, the Executive and all organs of State.

Courts are required to enforce the criminal law, resolve civil disputes in which other branches of government or senior players therein are involved and to enforce legislation enacted by Parliament or initiated by the Executive. In doing so they must, protect the public, enforce entrenched rights, uphold the fundamental values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and on occasions consider the constitutionality of legislation and legality of actions of all organs of government, including the Legislature and the Executive.10

This means that the State in one form or another is frequently party to court proceedings. Hence, the requirement for judicial independence. Judicial independence is for the protection and benefit of the public. It is to ensure that the Judiciary is able to carry out its role as guardian of the Constitution without fear or favour, and to inspire the confidence of the public that it is able to, and will do so.11

At the core of judicial independence is 'the complete liberty of individual Judges to hear and decide the 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.'12 In addition, judicial independence includes security of tenure, financial security and institutional independence.13 Institutional independence concerns the day to day operations of courts and is required to ensure that they are not directly or indirectly controlled or seen to be controlled by other arms of government. It is to this end that the phased transformation of court administration is directed,14 and this underscores the urgency and critical importance of judicial self-governance.

The Judiciary must "determine its policy and strategic priority and how funds are to be allocated to pursue those priorities".15 This entails determining which personnel is best suited to support it in the execution of its constitutional obligations and that those functionaries be answerable to judicial authority. It must identify all the needs that are closely related to the proper functioning of the courts,

budget for them, prioritise them and have them carried out under its eye. It must run its own affairs in keeping with the principle of separation of powers and judicial independence.

The placement of court administration in the hands of the Ministry has given rise to an unfortunate public perception that the Minister for Justice and Constitutional Development is the head of the Judiciary. This openly articulated perception, exacerbated by the fact that special and long leave of all Judges including the Chief Justice is authorised by the Minister, has the unintended effect of undermining the authority, dignity, independence and efficiency of the courts, contrary to the thrust of section 165(4) of the Constitution. It underscores the critical importance of the debates that have been going on between the Judiciary and the Executive about judicial self-governance over the years.

5 Subsection (6) is provided for in the Constitution Seventeenth Amendment Act.
6 Section 74(2) and (3) of the Constitution.
7 Section 74(1) of the Constitution.
8 See para 1.4.12 of the CIM Report.
9 Ackermann J captured the essence of this definition in De Lange v Smuts NO & Others 1998 (3) SA 785 (CC) para 59 '. . . judicial independence which is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution . . .'
10 See para 1.4.13 of the CIM Report.
11 See para 1.4.14 of the CIM Report. See also section 165(2).
12 Van Rooyen supra at para 70.
13 De Lange supra; Van Rooyen supra.
14 See para 1.4.15 of the CIM Report.
15 See Justice Ngcobo's article above.

2.4 The Role of the Chief Justice

The Chief Justice of the Republic of South Africa is the most senior Judge and presides over the Constitutional Court, which is the apex Court of a single Judiciary. In addition to his or her judicial role, the Chief Justice represents the Judiciary nationally and internationally, which entails various coordinating and administrative responsibilities, and is also required to perform a multiplicity of constitutional and statutory duties and functions. The Chief Justice is regarded as the de facto head of the judiciary.16

The Constitution Seventeenth Amendment Act formalises the Chief Justice's role as head of the Judiciary.17 The Superior Courts Bill makes provision for the rationalisation of the structure of the superior courts and for matters relating to court administration. It vests additional powers and functions in the Chief Justice.18 These draft legislations have been the subject of discussion between the Judiciary, Parliament and the Executive and are on the verge of being signed and promulgated into law.19

In his budget speech on 07 June 2011 Minister Jeff Radebe referred to these pieces of legislation and said of the Constitution Seventeenth Amendment Bill:

"[t]he Constitution Seventeenth Amendment Bill provides a Constitutional framework for the judiciary to take charge of court administration. It affirms the Chief Justice as the head of the judiciary and entrusts the incumbent of the highest office of the judiciary, with the authority to develop norms and standards for all courts. Flowing from the envisaged Constitutional amendments, a court administration framework that is commensurate with the model of separation of powers in our Constitution will be developed. I will seek guidance of Cabinet and this House at the appropriate time once we have come up with firm proposals from both our research and those undertaken by the Chief Justice and his office."

Consistent with this, the Preamble of the Superior Courts Bill states that rationalisation is an ongoing process that 'is likely to result in further legislative and other measures in order to establish a judicial system suited to the requirements of the Constitution'. I deal with some of these issues later.

16 Para 1.1.1 of the report of the Committee on Institutional Models. (CIM Report).
17 See also Section 165(6) of the Constitution after the recent Constitution Seventeenth Amendment Act. See also section 166 of the Constitution Seventeenth Amendment Act, which expressly recognises the Constitutional Court as the apex Court.
18 See sections 8, 9(2), 11(1)(c) and 54 of the Superior Courts Bill that is on the verge of being passed into law.
19 In fact the Constitution Seventeenth Amendment Act has already been signed and promulgated by the President.

2.5 The Establishment of the Office of the Chief Justice

Ultimately, agreement on how to address these issues was reached between Chief Justice Ngcobo and Mister Jeff Radebe in 2010. This led to an exchange of correspondence between Minister Jeff Radebe and the Minister for Public Service and Administration. It was about the establishment of permanent capacity for the Chief Justice to perform his or her functions as head of the Judiciary and head of the Constitutional Court, and the need to establish a judicially based system of court administration.20 The process agreed to was defined in the following three distinct Phases:

Phase 1: The establishment of the Office of the Chief Justice as a national department located within the Public Service to support the Chief Justice as head of the Judiciary and Head of the Constitutional Court;

Phase 2: The establishment of the Office of the Chief Justice as an independent entity similar to the Auditor-General; and

Phase 3: The establishment of a structure to provide judicially-based court administration.

Phase I was subsequently initiated by the President who established the Office of the Chief Justice as a government Department. This was done by means of Proclamation 44 of 2010, dated 23 August 2010, which amended Schedule 1 to the Public Service Act 44 of 2010 to make provision for the new Department.

The functions of the OCJ in Phase 1, as determined by the Minister for Public Service and Administration in terms of the Public Service Act 1994, are to:

- provide and coordinate legal and administrative support to the Chief Justice;
- provide communication and relationship management services and inter-governmental and international co-ordination;
- develop courts administration policy, norms and standards;
- support the development of judicial policy, norms and standards;
- support the judicial function of the Constitutional Court; and
- support the Judicial Service Commission in the execution of its mandate.

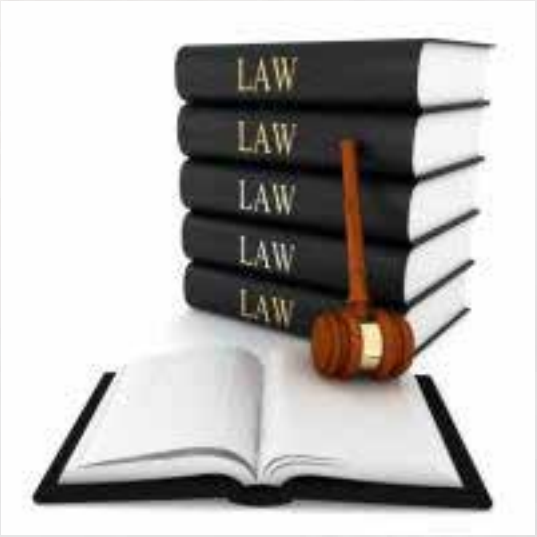
The ongoing process bolstered by the establishment of the OCJ was reaffirmed by Minister Jeff Radebe during his address at the opening of the "Access to Justice Conference" in July 2011. He said then:

"The constitutionalisation of the judicial leadership powers and functions of the Chief Justice which he or she exercises jointly and collectively with the other senior judicial officers who are heads of the different courts, is not only consistent with the trends in established democracies world-wide, but is a furtherance and enhancement of judicial independence. The enactment of the Constitution Seventeenth Amendment Bill and the Superior Courts Bill will put the judiciary on course for the ultimate goal of administrative autonomy which would enhance judicial

independence which is necessary for the rule of law as well as the strengthening of the accountability arrangements. We will be guided by the outcome of the on-going research undertaken by the Department and the judiciary on the appropriate court administration model that will be commensurate with our Constitutional framework."

This commitment by the Minister, to further and enhance judicial independence is consistent with our Constitution, which entrenches the independence of the courts and requires that independence to be ensured by organs of state through legislative and other measures.21

The establishment of the Office of the Chief Justice provides a platform for the implementation of initiatives designed to improve the culture of non-performance that has sneaked into the Judiciary over the years. The Chief Justice in his or her capacity as the head of the Judiciary is responsible for developing policies, norms and standards for case management and monitor and evaluate performance of the courts.



Additionally, he or she is responsible for information technology and knowledge management which have an important role to play in enhancing access to justice. Financial and administrative support to Heads of Court, court budget, and support for SAJEI and allied judicial institutions, are his or her additional responsibilities.

The creation of the capacity necessary to undertake these responsibilities would assist the Judiciary to execute its constitutional mandate more efficiently.

We continue to grapple with issues relating to the achievement of a truly independent Judiciary. The dialogue in July 2011 at the 'Access to Justice Conference' and the subsequent 'Judicial Leadership Retreat' in August 2012, bear testimony to our endeavors. The resolutions taken constitute a milestone in our quest for unquestionable judicial independence.

The over-arching objective of the 'Judicial Leadership Retreat' was to afford the leadership of the Judiciary the first opportunity ever to do a brutal self and institutional introspection, identify all performance-related challenges, find solutions to those problems and design the most effective interventions to address them. Ideas were exchanged and strategies discussed on how best to achieve an independent and single Judiciary, which is consistent with our Constitution.

The creation of a judicially based court administration system will not compromise the independence of the Judiciary, at all. Unlike the Auditor General who must personally account to Parliament, the accounting responsibilities for a court administration model led by the Judiciary rests squarely on the shoulders of the Secretary General, as is the case in the USA and the Russian Federation. She will thus have to face to Justice Portfolio Committee all by herself, possibly with an occasional voluntary appearance by the Chief Justice.

20 For the purpose of this section, I draw very generously from the Chaskalson-Langa CIM Report, para 1.2.3 to 1.2.7.
21 Section 165(4) of the Constitution.

2.6 Norms and Standards

In anticipation of the coming into operation of the Superior Courts Act and the Constitution Seventeenth Amendment Act, we have started the process of developing norms and standards and working out how their implementation could be properly monitored. We are concerned about the disturbing regularity of delays, the backlogs, absenteeism and sub-standard performance by some Judicial Officers. It is through the envisaged norms and standards, which seek to address realistic case finalisation periods and performance monitoring and evaluation, that these decades-long problems can be effectively addressed.

The Office of the Chief Justice, even in its current mode, has helped the Judiciary to build some capacity to look at the best practices in jurisdictions in comparable democracies, so as to work on our own norms and standards, performance monitoring and evaluation mechanism, an effective case management system, determining of Judicial policy and strategic objectives, performance–enhancing Judicial Education programmes and self–governance system commensurate with Judicial independence.

With the coming into operation of the new legislation, we will circulate the drafts among Colleagues for their input to circumvent delays in putting these measures into operation, to serve our democracy better.

2.7 Judicial Case Management

The effective management of cases is central to excellent court performance. Within the limited operational space at its disposal, the OCJ has been able to test the efficacy of the case management model that would best help us address our performance challenges, wherever they persists, more importantly to enhance efficiency because there is always room for improvement. We are running a pilot project in the North and South Gauteng High Courts, the KZN High Court and the Western Cape High Court for about one year. The pilot projects commenced in September 2012 and they are running very smoothly. From the lessons drawn from these projects, we will be better prepared for a roll out to all High Courts and later to the Magistrates' Courts.

This project and the very nature of the judicial case management model has generated so much interest that both the North West and the Eastern Cape High Courts have volunteered to be additional pilot sites.

The progress recorded has been humbling. Wherever this case management model was correctly implemented, superior performance has been the result.22

The establishment of the OCJ has made it possible to build additional capacity in the pilot sites to facilitate the proper implementation of the system, some predictable resistance notwithstanding.

22 In essence, this model takes the control of the pace of litigation from legal representatives and restores it to judicial officers, in both criminal and civil matters. Botswana, Courts in the USA, North West, the Gauteng, Western Cape and KZN High Courts.

2.8 Judicial Education

The OCJ met the staffing needs of SAJEI while it was without any permanent or acting staff member, except for the Council minute taker.23 We used our semi-autonomy to have personnel seconded to us by the NPA and Justice Department and that is how we were able to get SAJEI up and running from 2012.

To ensure that those who are appointed to act as High Court Judges and those who are permanently appointed are appropriately equipped for their judicial functions, we commenced with our aspirant Judges training programmes, the orientation of newly appointed Judges and Magistrates and continuing judicial education of Judges and Magistrates from 16 January 2012. SAJEI has since organised many workshops and educational programmes designed to empower Judicial Officers across the board, to discharge their functions more efficiently.

23 Permanent staff members of SAJEI have since been appointed and the CEO at the level of Deputy Director General has been recommended for appointment through the collaborative efforts of the SAJEI Council and the OCJ.

2.9 Modernisation

One of the major contributors to court efficiency and effectiveness is court modernisation or automation. We have through our Heads of Court IT Committee, duly assisted by the IT Directorate of the OCJ, identified the need for the Judiciary to have a server that is separate from that of Justice Department to eliminate the possibility of inadvertent and premature access to our draft judgments and alleviate the burden of the already overladen Justice server. Electronic filing and electronic record keeping on- and off-site will, in our view, facilitate the efficient management of cases and their speedy finalisation and ensure that the disappearance of records of proceedings, which often result in grave injustice to the affected parties sometimes even the general public, becomes something of the past. These are some of the projects that the Judiciary, with the support of the OCJ, has identified and is working on.

The Judiciary has through the OCJ, begun to embark upon the development of the capacity to gather and analyse its own court performance statistics. This will enable us to establish timeously, the court performance challenges that require intervention so that early and appropriate remedial action is taken without delay. At the moment, only the NPA and the Justice Department has that capacity and we are informed by them, how courts are performing. And this has caused some members of the Judiciary to raise serious concerns about the implications of this kind of monitoring and evaluation of judicial performance by "outsiders" on judicial independence. We have embarked upon case file audits in all the higher courts to identify dead files or old cases that should have been finalised a long time ago, and to prioritise them for finalisation. Again, the OCJ has provided some capacity to address this issue.

2.10 Access to Justice

The leadership of the Judiciary at all levels, has resolved to begin a massive project of overhauling all the Rules of the High Court and Magistrates' Courts. This is made possible by the willingness of colleagues to sacrifice their time and the support we have from our own Department, the OCJ.

This project will help us do away with archaic Rules, progress- and efficiency-retarding Rules, to inject flexibility, facilitate the full scale implementation of electronic filing and electronic record-keeping, video conferencing, judicial case management harmonisation or streamlining of all Court Rules.

More importantly, this overhauling will facilitate access to justice. When Rules of Court are easy to understand, lay people who can read and write will be able to represent themselves more meaningfully in courts of law. The need to get to this point is underlined by the prohibitively high fees charged by lawyers these days. We believe that the successful accomplishment of this self-imposed responsibility would give meaning to our constitutional democracy by making justice accessible even to the poor, because the budgetary constraints do not allow Legal Aid South Africa to fund every indigent litigant. It is forced to be very selective.

When the spade-work has been done, and comments received from Colleagues, we will pass the draft Rules onto the Rules Board to fulfil its statutory role. The Memorandum of Understanding, to be briefly discussed later, paves the way for more meaningful engagement between the OCJ, the Judiciary and the Rules Board.

The point needs to be made however, that ideally rule making authority should vest in the Judiciary. Just as the other two branches of government make the rules that are intimately connected to their core business, so should this be with the Judiciary. We resolved at the "Judicial Leadership Retreat" to pursue this objective with more vigour.

2.11 Media Relations

As a matter of principle, the Judiciary ought not to borrow a voice from the Executive about its core business. They must speak for themselves. Otherwise, this could create the incorrect and unfortunate impression that the Judiciary is not as independent as it should. To this end, a media relations Director has been appointed by the OCJ, to help us communicate who we are and what we are about to the public and to educate them. Our visibility, particularly during August, when we ran the women Judges' programme, is a matter of public record.

In collaboration with a Committee of Judges drawn from all courts and representatives of the Magistracy, this Directorate will be developing a more comprehensive communication strategy.

2.12 Provincial Leadership

To facilitate better coordination of the functions of the Judiciary in each Province, the Superior Courts Bill seeks to streamline the leadership roles of the Judge President, Regional Court President and Chief Magistrate responsible for the Cluster. The Judge President will play an oversight role and this bodes well for more efficiency and effectiveness in the entire court system.

The capacity required by the Judges President to fulfil these and other duties will be created by the OCJ. The transfer of High Court functions to the OCJ would make it the responsibility of the OCJ to provide additional administrative capacity where necessary, obviously if the budget permits.

2.13 Role-Player Coordination

The Judiciary, with the financial and personnel support of the OCJ, was able to initiate the establishment of the National Efficiency Enhancement Committee (NEEC), on 13 October 2012. The NEEC comprises all the key role-players in the justice cluster, including the Attorneys and Advocates' professions. As the name suggests, the primary objective sought to be realised is the efficiency and effectiveness of the justice cluster, and brought closer to home the courts. Together, we identify challenges that undermine efficiency and employ our collective wisdom, behind closed doors, to find solutions, without compromising any principle.

We have established a wide range of committees to identify our common approach to common problems where practicable, we have identified challenges that we must each address in the short, medium and long term. We are confident that this integrated attempt to address issues that undermine our individual and collective performance will benefit our people and strengthen our constitutional democracy.24

We decided to do this because the underperformance of any key role player does not only affect that entity, but also impact negatively on the performance of others as well. Think about it !

24 Members of the NEEC are the Chief Justice, President of the SCA, Judge President of the North and South Gauteng High Courts, the Judge President of the Northern Cape High Court, a Judge representing the Judicial Case Management Committee, National Commissioners of SAPS and Correctional Services, DG's of Public Works, Justice, Health, Social Development, the Regional Court Presidents, the Chair and CEO of Legal Aid South Africa, CEO of RAF, the NDPP, Chief Magistrates, representatives of LSSA and the GCB, etc.

2.14 Memorandum of Understanding

On 26 January 2012, a Memorandum of Understanding (MOU) was signed by the Justice Department and the OCJ. In terms thereof, the administrative functions of the Constitutional Court, Supreme Court of Appeal, JSC and elements of SAJEI, Rules Board and the Magistrates' Commission were to be transferred from the Justice Department to the OCJ.

While consultation with the affected structures, including personnel and the trade unions were underway, Treasury proposed that the administrative functions of the High Courts should also be transferred to the OCJ. A breakthrough in finalising this project and in the OCJ acquiring the status of a fully fledged Department with its own vote account, is reportedly imminent. Our Secretary General, Ms Memme Sejosengwe,25 and the DG of Justice are engaged in discussions to translate these plans into reality.

But a departmental mode or phase is not what our constitutional democracy deserves. Like any national or provincial government, it has a political head, the Minister for Justice and Constitutional Development. It is with the Minister that the Secretary General signs her performance contract, not the Chief Justice. Arguably, it is the sole responsibility of the Minister to decide on the content of the contract, and to determine whether her performance is acceptable to him or not.

But, this deficiency cries out for urgent attention. And appropriate intervention will take the form of legislation in terms of which an independent entity will be created, to take over the responsibilities of this new Department. It is evident from Minister Jeff Radebe's 2011 budget speech and his address to the "Access to Justice Conference" of the same year, that he openly supports Judicial self – governance.

25 Who was appointed with effect from 01 April 2013.

2.15 Our Preferred Court Administration Model

The kind of court administration model that is, in our view, compatible with and conducive to judicial independence and the enhancement of dignity and efficiency, is one led by a Judicial Council comprising members of the Judiciary only. We have decided that that Council, to be constituted by Heads of Court, will have to be guided by an Advisory Board whose members will be drawn from a wide range of disciplines for purposes of judicial accountability and transparency. That administration system will have to be created in terms of legislation to facilitate migration from a Department to an independent entity, such as Parliament and the Executive entities have.

The entire Court Services Unit of the Justice Department, Regional Offices, Library Services, IT and facilities components of Justice would in the end have to be transferred to the OCJ or the new entity, created by legislation, together with the concomitant budget and personnel.

Just as there is no Cabinet Member responsible for Parliament, there should be none for the court administration structure led by the Judiciary. This augurs well for judicial independence and our constitutional democracy.

And the stage is set for that model. There have been meaningful engagements with other jurisdictions like the USA, the Russian Federation, Singapore, Ghana, Qatar, France, Germany, etc, to establish which of the many models would best serve our kind of constitutional democracy. We are satisfied that the court administration system of the USA,26 the Russian Federation, Singapore, Ghana and Qatar, would serve as a good model for the one our democracy deserves.

Senior officials in the OCJ, duly guided by Justice K.K. Mthiyane, the Deputy President of the SCA, and his Committee of Judges, have embarked on a process of working out this model and drafting a Bill. We hope that their finished product will be ready for circulation among Colleagues some time this year. Thereafter, we will present it to the Executive for consideration and hopefully, approval.

26 In the United States the Chief Justice is the head of the United States Judicial Conference which is composed of the Chief Justice of each judicial circuit, the Chief Justice of the Court of International Trade, and a district judge from each regional circuit. Their primary purpose is to make policy with regards to the administration of US courts and to supervise the Director of the Administrative Office. They also promulgate the rules for the Federal courts.

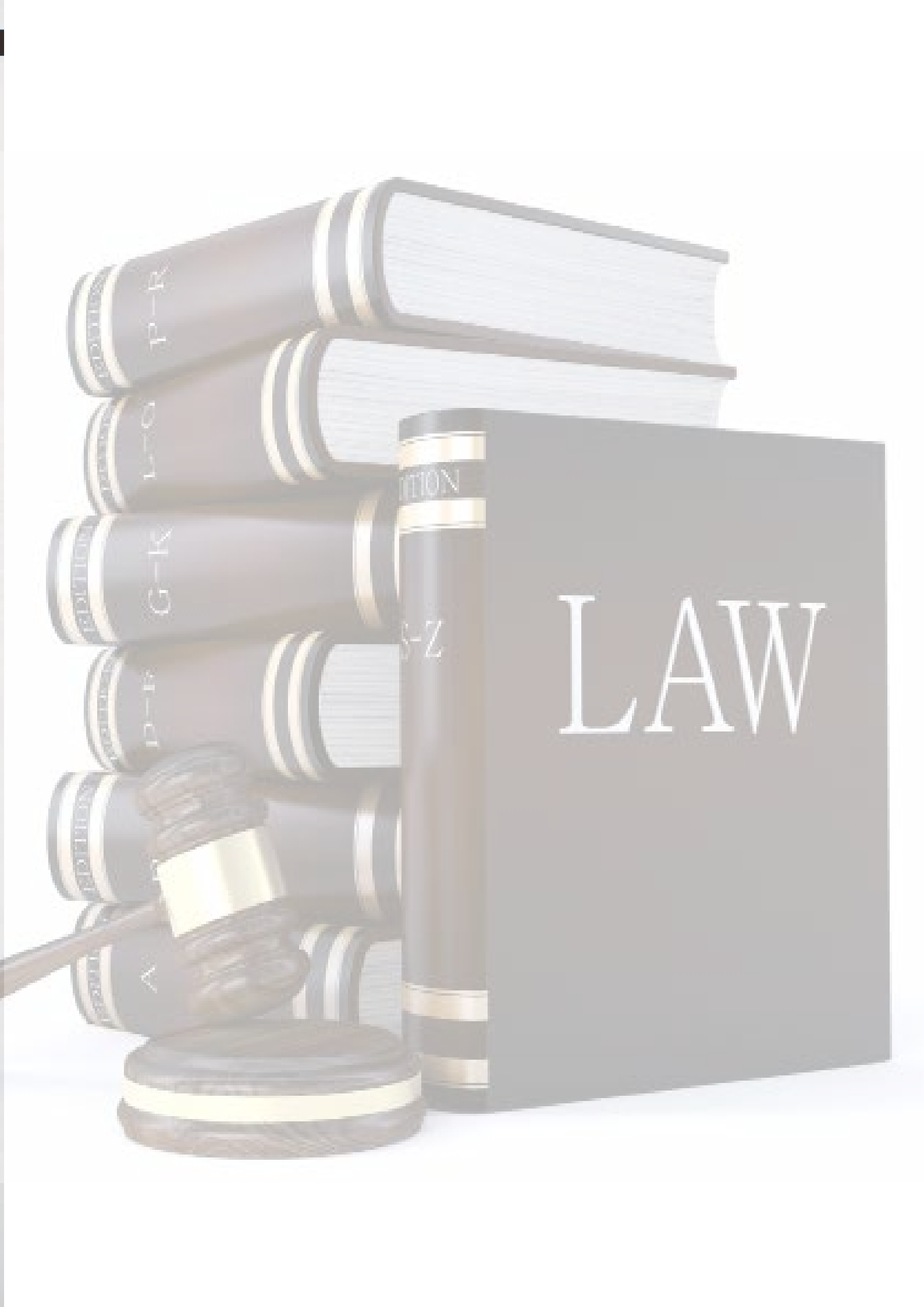
2.16 Conclusion

My predecessor Chief Justice Ngcobo appointed a Committee on Institutional Models, under the joint-leadership of former Chief Justices Chaskalson and Langa, to propose a court administration system that would best serve the needs of the courts. Its report proposes a self-governance structure created by legislation that would perform functions to be transferred to the OCJ. We changed certain aspects of the report and passed it onto the Executive. A response is awaited. For now we are still operating in a departmental mode led by a Director General who, as I said, bears the title of Secretary General.

The heading of the report on institutional models is particularly revealing, in the way it richly captures the implications of the OCJ for our constitutional democracy. It reads, "Capacitating the Office of the Chief Justice and Laying Foundations for Judicial Independence: The Next Frontier in our Constitutional Democracy: Judicial Independence". And that is what the OCJ has achieved – to lay a very solid foundation for Judicial self – governance, the only remaining barrier to the attainment of complete Judicial independence.

The implications of the OCJ for the constitutional democracy in this country are self-evident. And so is the role of a court administration system lead by the Judiciary in our constitutional democracy. The courts will be able to determine their policy and strategic priorities and how best to meet them, decide on projects to embark upon to help the courts take their rightful place as guardians of our constitutional democracy, and serve the nation more effectively and efficiently.

I THANK YOU ALL


LAW

Telephone number:
+27 (0)10 493 2500
Website address:
www.judiciary.org.za

Physical address:
188 14th Road
Noordwyk
Midrand
1685

Postal address:
Private Bag X10
Marshalltown
2107