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Beyond Polokwane: *Safeguarding South Africa's Judicial Independence*

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Executive summary

The International Bar Association's Human Rights Institute (IBAHRI) commissioned a high-level delegation visit to South Africa in May 2008. The mission was prompted by concerns regarding potential threats to the independence of the judiciary raised by civil society, members of the legal profession and members of the judiciary in South Africa.

The concerns related to several bills that had been laid before parliament, in particular the Superior Courts Bill and the 14th Amendment to the Constitution Bill. The bills form part of a package of reforms which are intended to further the transformation of the judiciary. Several proposed changes were particularly contentious, including changes to court administration, the appointment process of judges and court rule-making powers. The bills were initially gazetted in December 2005; however, after consultation with various stakeholders, no further action was taken on them and President Mbeki ordered their withdrawal from parliament in November 2006.

In December 2007, at the 52nd National Conference of the African National Congress (ANC) in Polokwane, a resolution was passed entitled 'Transformation of the Judiciary', which called upon the incumbent government to act upon the matters contained within the two bills and to implement their provisions before the end of the present term of the government. Given the urgency expressed in the ANC resolution and a statement made by President Mbeki calling for the passing of these bills before the end of the year, there were some concerns that the bills might be reactivated in their original form. It was felt that it would, therefore, be appropriate for the IBAHRI to visit South Africa to discuss any issues relating to judicial independence with relevant stakeholders in order to develop a fuller picture of the situation.

The delegation held meetings with the Chief Justice and other Judges of the Constitutional Court; the President of the Supreme Court of Appeal; Judges of the High Court; the Minister of Justice and representatives of the Ministry's Directorate-General of Operations; ;the Treasurer-General of the ANC; the Chair of the Portfolio Committee on Justice and Constitutional Development; the Acting National Director for Public Prosecutions; the Chief Executive Officer of the Human Rights Commission; the General Council of the Bar; the Law Society of South Africa; and Advocates for Transformation, Mr George Bizos and former Chief Justice Arthur Chaskalson.

The IBAHRI supports the South African Government's efforts in reforming and transforming the judiciary as it moves away from its past as an instrument of repression to one which stands clearly for the rule of law and the respect of human rights. Indeed, the government is to be commended for its efforts to create a justice system that has the protection of human rights at its heart. However, while the transformation of judiciary is essential it must take place with appropriate respect for the independence of the courts. Due regard must be given to its unique characteristics and its constitutionally mandated role to dispense justice, independently without fear or favour.

The IBAHRI welcomed the frequent confirmations of the importance of the independence of the judiciary and the strengthening of the judicial system by the government and its openness to consultation on the matter. The IBAHRI received further assurances from several members of the government and parliament that action would not be taken on the bills without further consultation.

The Minister of Justice informed the delegation that the Department of Justice and Constitutional Development (DOJCD) was preparing a policy paper on the various reform issues and that once prepared it would be discussed with the judiciary. It was also made clear to the delegation that parliamentary action on the bills was unlikely to take place before the end of the term of the current parliament.

The IBAHRI recognises that all members of the judiciary met by the delegation during the visit were strongly committed to the process of transformation and the need to reform judicial processes. The IBAHRI is convinced that the judiciary, as led by the Constitutional Court, is an important partner in the reform process, and is only motivated by a desire to strengthen judicial independence in order to improve the effectiveness of the courts, not to protect its privileged position.

Summary of the key conclusions and recommendations

Court administration and budget

There are a variety of approaches to court administration, however international best practice reflects a growing move to provide greater safeguards for judicial independence with respect to court administration. This can take several forms: entrusting the administration of the courts to the judiciary themselves; establishing an independent administering body; or while maintaining executive control, having an independent, external oversight body or judicial input.

Given the international movement away from executive control towards more judicial control, the IBAHRI believes that the government should adopt, at a minimum, a model with substantial judicial input. The IBAHRI is not suggesting that court administration should be undertaken by the judges themselves in addition to their judicial duties, rather that administration is directed by and responsive to the needs of the judiciary and the interests of justice. Adequate accountability for the manner in which the judiciary administers the courts can be introduced in the same manner as other independent statutory agencies and by requiring that the courts are administered with a view to achieving certain goals such as efficiency, high quality public service and access to justice.

Recommendations

- The Constitutional Court of South Africa should retain the power to administer its own operations in order to properly promote and protect judicial independence.
- For the lower courts, the IBAHRI encourages the government to consider judicial control or a model of an independent agency responsible for the administration of the courts that effectively balances issues of independence, accountability and effectiveness.
- If the government chooses to maintain control over court administration, the IBAHRI recommends that the government delineates more specifically the areas where the judiciary has responsibility, with respect to both judicial and administrative functions, and institutionalises a process of consultation and supervision by the judiciary at all levels of the court system.

Rule-making power

The IBAHRI is concerned about the current problems with the rule-making system in South Africa, in particular the disagreement that seems to exist between the Ministry of Justice and the judiciary as to the rule-making process.

The IBAHRI believes that, in line with international practice, the rule-making process should be left to the courts themselves, without impinging on the ability of the legislature to prescribe certain procedures itself. It is felt that, given its central role in upholding the constitution and ensuring the legality of the actions of the other branches of government, the Constitutional Court of South Africa should retain its rule making-power. This would be in line with the practice of other apex courts.

For the lower courts, the current process of extensive consultation by a Rules Board consisting of representatives of relevant stakeholders is an appropriate mechanism for the generation of rules.

The IBAHRI finds it difficult to comprehend why rules are currently not being passed promptly by the DOJCD, after such an extensive consultation process in which the DOJCD participates. The IBAHRI feels that policy inputs by the DOJCD are more appropriate during the rule making process by the Rules Board, where their implications for court procedure can be fully discussed, rather than at the end of the process when they have been agreed upon by the Board.

Recommendations

- The IBAHRI recommends that rule-making should remain the responsibility of the courts.
- The IBAHRI further recommends that the Constitutional Court should remain responsible for regulating its own practice and procedure.
- For other courts, in line with international best practice, a separate body composed of various stakeholders, including the judiciary, the legal profession and the DOJCD, is an appropriate process for the generation of rules and ensuring a broad consultation process.
- The Minister of Justice should not have the power to amend rules.
- To ensure that the courts operate effectively, and that rules are issued promptly, the IBAHRI believes that legislation should provide that rules issued by the board shall take effect within a set period of time (for example 30 days), after being laid before parliament unless the Minister, or a resolution of the parliament, rejects them, giving reasons.

Judicial appointments

The proposed amendment to the appointment process of Judges President and Deputy Judges President of the High Courts is of concern to the IBAHRI as it could be perceived to represent a more politicised appointment process for the Heads of Court. While international standards do not specify a particular process of appointment – only requiring that appointments are based upon merit – the proposed amendment makes it more difficult to evaluate the basis for appointment. The concern regarding politicisation is of particular importance in the case of heads of court, given their role in the allocation of cases and the overall supervision of their courts.

The appointment of acting judges, while they may be necessary to fill temporary judicial vacancies or for temporary increases in the work of the courts, have significant implications for judicial independence. The temporary appointment of a judge violates one of the fundamental safeguards of judicial independence – that of security of tenure. The risks to judicial independence are decreased if a judge is appointed for one non-renewable term (and therefore not eligible for future judicial appointment) or from a list of pre-approved individuals, prepared for example by a Judicial Services Commission. The proposed amendment seeks to increase the ability of the executive to appoint acting judges in the court system, in particular to leadership positions in the judiciary who have significant powers by virtue of their position.

A central concern in both these proposals relates to the fact that individuals can be appointed to the position of Judge President or Deputy Judge President, whether acting or permanent, from outside the current bench of the court. It is difficult to see a rationale for the appointment of an acting judge to a Deputy Judge President position when the incumbent is merely absent from his position, as those functions should be exercised by another judge, with security of tenure, temporarily from within the court. Similarly, when there is a vacancy in that position, it should be filled by a permanently appointed judge. In many countries judges are appointed to positions at the Head of Court on the basis of seniority within the court, ensuring that these appointments are not politicised.

Recommendations

- The IBAHRI urges the government to reconsider the amendments and strengthen the role of the Judicial Service Commission in any appointments.
- The IBAHRI urges the government to reconsider the way in which acting judicial appointments are made given the inherent risk that these appointments pose for judicial independence.

Judicial education and conduct

Judicial education is an important part of ensuring the continuing quality of judicial decision-making and therefore of the judiciary's ability to uphold justice. The IBAHRI welcomes the proactive approach taken by the judiciary on this issue and its commitment to ensuring the quality of judicial decision-making. The IBAHRI also welcomes the extensive consultation and subsequent agreement on the structure and organisation of the Judicial Education Institute and looks forward to its establishment after the passage of the legislation.

There is a growing international recognition of the need to strengthen judicial accountability. In many parts of the world, as is the case in South Africa, this initiative is being led by the judiciary itself. In 2002, the Bangalore Principles of Judicial Conduct were promulgated by a group of judges representing the major regions and legal traditions of the world. Given the tension that exists between independence and accountability, efforts to improve judicial accountability need to be sensitive to these concerns.

The IBAHRI welcomes the moves to improve judicial accountability in South Africa, but is concerned about the ongoing disagreement regarding the content of a Judicial Code of Conduct.

The IBAHRI is also concerned at the failure to endorse the Guidelines for Judges adopted by the judiciary in 2000.

Recommendations

- The delegation recommends that a consensus agreement between the executive, legislature and judiciary be reached on the contents of the Judicial Code of Conduct before the adoption of the JSCA Bill.

Criticism of judges

Public faith and trust in the judicial system – its independence, integrity and fairness – are important elements in building a state based upon the rule of law. The work of the courts is therefore of significant public interest and the transparency of court activities is important to the maintenance of this trust. The public has a legitimate interest in court decisions, which should not be immune from public debate or criticism. However, engaging in public criticism or personal attacks upon members of the judiciary undermines public faith in the independence of the judiciary and the rule of law. This is particularly damaging to the judiciary as individual judges are unable to respond directly to criticism, or engage in public debates, in order that they do not bring the judiciary into further disrepute. They, therefore, rely upon other actors in society to safeguard and defend their integrity and independence. Given this inability to respond, the other branches of government need to be particularly careful in criticising individual judges or the judiciary.

Legitimate concerns about judicial conduct should be dealt with through appropriate complaints mechanisms, in line with promulgated standards of judicial conduct. These mechanisms provide a fairer means for evaluating judicial conduct and respecting standards of due process.

Recommendations

- The IBAHRI encourages the government, political parties and the press to be temperate in their criticism of judicial decisions. Legitimate concerns about judicial conduct should be addressed through formal complaints procedures.

Chapter 1: Introduction

1.1 This is the report of a fact-finding mission by international jurists who visited South Africa from 5–9 May 2008. The mission was organised by the International Bar Association's Human Rights Institute (IBAHRI). The IBA is the world's largest lawyers' representative organisation, comprising 30,000 individual lawyers and over 195 bar associations and law societies. The IBAHRI was formed in 1995 under the Honorary Presidency of former South African President Nelson Mandela. The IBAHRI is non-political and works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.[1]

1.2 The mission was prompted by concerns regarding potential threats to the independence of the judiciary raised by civil society, some members of the legal profession and some members of the judiciary in South Africa. The concerns relate to several bills that were laid before parliament in 2005 - 2006, in particular the Superior Courts Bill and the 14th Amendment to the Constitution Bill. The IBA undertook a legal analysis of the proposed legislation at that time which was published in April 2006.[2] After government consultation with various stakeholders no further action was taken on these bills and President Mbeki ordered their withdrawal from parliament in November 2006.

1.3 In December 2007, at the 52nd National Conference of the African National Congress (ANC) in Polokwane, a resolution was passed entitled 'Transformation of the Judiciary', which called upon the incumbent government to act upon the matters contained within those bills, and to implement their provisions before the end of the present term of the government. This issue was also raised in President Mbeki's State of the Nation speech on 8 February 2008, where he emphasised the importance of undertaking reforms 'to establish a new, modernised, efficient and transformed criminal justice system'[3] and to process the bills on the transformation of the judiciary, in consultation with the judiciary, this year. Given the urgency expressed in the ANC resolution and the statement made by President Mbeki calling for the passing of these bills before the end of the year there were some concerns that the bills might be reactivated in their original form. It was felt that it would therefore be appropriate to visit South Africa to discuss any issues relating to judicial independence with relevant stakeholders in order to develop a fuller picture of the situation.

1.4 The terms of reference for the mission were:

(a) to investigate the state of the independence of the judiciary in South Africa;

(b) to investigate the status and the implications of recent proposed changes to the administration of justice; and to consider any current revised proposals, in the light of whether they will promote the rule of law, independence of the judiciary and efficiency in the administration of justice; and

1 Appendix 1 contains more information about the IBA.

2 For a prior analysis of the bills see 'Comments on the impact of South Africa's Constitution Fourteenth Amendment Bill and the Superior Courts Bill' (April 2006) International Bar Association. Available at www.ibanet.org/images/downloads/04_2006_April_Comments%20on%20the%20impact%20of%20South%20Africa%E2%80%99s%20Constitution%20Fourteenth%20Amendment%20Bill%20and%20the%20Superior%20Courts%20Bill.pdf.

3 State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament, 8 February 2008. Available at www.info.gov.za/speeches/2008/08020811021001.htm.

(c) to analyse any relevant and applicable international, regional and domestic legal norms.

1.5 The IBAHRI is grateful to the delegation members who accepted the invitation to participate in the mission. The delegation comprised:

- Justice Dato' Mohd Hishamudin Bin Haji Mohd Yunus, Justice of the High Court of Kuala Lumpur, Malaysia;
- Sternford Moyo, Vice-Chair of the IBAHRI, President of the Southern African Development Community (SADC) Lawyers' Association and former President of the Zimbabwe Law Society, Zimbabwe;
- Professor Oluyemi Oluleke Osinbajo, former Attorney-General of Lagos State; member of the United Nations Secretary-General's Committee of Experts on Conduct and Discipline of UN Peacekeeping Personnel, Nigeria;
- Greg Mayne, Rule of Law and Human Rights Consultant; former Assistant to the UN Special Rapporteur on the Independence of Judges and Lawyers (Mission Rapporteur); and
- Milli Lake, Human Rights Institute Administrator, International Bar Association.

1.6 The delegation held meetings with: the Chief Justice and other Judges of the Constitutional Court; the President of the Supreme Court of Appeal; Judges of the High Court; the Minister of Justice and representatives of the Ministry's Directorate-General of Operations; the Treasurer-General of the African National Congress (ANC); the Chair of the Portfolio Committee on Justice and Constitutional Development; the Acting National Director for Public Prosecutions; the Chief Executive Officer of the Human Rights Commission; the General Council of the Bar; the Law Society of South Africa; and Advocates for Transformation, Mr George Bizos and former Chief Justice Arthur Chaskalson. The IBAHRI wishes to express its sincere gratitude for the hospitality and assistance given by all those it met.

1.7 This report is based on the analysis of the information gathered in meetings with those mentioned above, comparative experience, as well as on relevant domestic and international laws and standards. The conclusions and recommendations of the mission are set out in Chapter 5 of this report.

Chapter 2: Background

2.8 South Africa is a multiparty parliamentary democracy with a three-tier system of government. The national, provincial and local levels of government all have legislative and executive authorities in their own spheres.[4] The Constitution of the Republic of South Africa (1996) was approved on 4 December 1996 and came into force on 4 February 1997.[5] Amendments to the Constitution require the support of two-thirds of the National Assembly as well as the supporting vote of six of the nine provinces represented in the National Council of Provinces (NCOP). Amendments relating to Section 1 of the Constitution, which sets out the state's founding values, require a 75 per cent majority in the National Assembly.[6]

2.9 The Constitution sets out that the Republic of South Africa is one sovereign, democratic state founded on the following values:

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

2.10 The executive authority of the Republic is vested in the President,[7] who is the head of State and head of the government.[8] The President is elected by the National Assembly from among its members for a maximum of two five-year terms of office.[9] The President may only be removed with two-thirds of votes of the National Assembly on the grounds of a serious violation of the Constitution or the law; serious misconduct; or inability to perform the functions of office.[10]

2.11 Legislative authority is vested in parliament which consists of the National Assembly and the National Council of Provinces.[11] The National Assembly comprises no fewer than 350 and no more than 400 members elected for a five-year term on the basis of a national common voters' roll.[12] The African National Congress (293 seats), Democratic Alliance (47 seats) and the Inkatha Freedom Party (23 seats) are the main parties represented in the National Assembly.[13] The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates, six of them permanent members and four special delegates headed by the provincial premier or a member of the provincial legislature designated by the premier.[14]

4 South Africa Official Gateway, 'Government in South Africa'. Available at www.southafrica.info/ess_info/sa_glance/government/gov.htm , accessed 6 February 2008.
5 See www.info.gov.za/documents/constitution/index.htm, accessed 6 February 2008.
6 Article 74 of Constitution of the Republic of South Africa.
7 Article 85 of the Constitution.
8 Article 83 of the Constitution.
9 Article 86 of the Constitution.
10 Article 89 of the Constitution.
11 Article 42 of the Constitution.
12 Article 46 and 49 of the Constitution.
13 See www.southafrica.info/ess_info/sa_glance/constitution/polparties.htm, accessed 11 February 2008.
14 Article 60 of the Constitution.

2.12 Judicial authority is vested in the courts. Section 165 of the Constitution sets out strong guarantees for the independence of the judiciary providing:

> (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 function 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; and
>
> (5) an order or decision issued by a court binds all persons and organs of state to which it applies.

The judiciary in South Africa comprises the Constitutional Court, the Supreme Court of Appeal, High Courts, Magistrates Courts and other courts established or recognised by an Act of Parliament.[15]

2.13 The Chief Justice and the Deputy Chief of Justice are appointed by the President, after consulting the Judicial Service Commission (JSC) and the leaders of parties represented in the National Assembly. The President and Deputy President of the Supreme Court of Appeal are also appointed by the President of South Africa after consulting the JSC. Other judges of Constitutional Court are appointed by the President after consulting the Chief Justice and the leaders of parties represented in the National Assembly. The President must appoint the judges of all other courts on the advice of the JSC.[16] In 2001, the title of President of the Constitutional Court of South Africa was changed to that of Chief Justice under the Constitutional Amendment Act 34 of 2001. Under the same Act, the title of the head of the Supreme Court of Appeal was changed from Chief Justice to President of the Supreme Court of Appeal. References to these positions should take into account this change.[17]

2.14 According to section 176 of the Constitution, judges in the Constitutional Court remain in office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge. Section 4 of the Judges Remuneration and Conditions of Employment Act No 47 of 2001 permits Constitutional Court judges to serve beyond 70 years until they have completed 15 years active service or reached the age of 75 years, whichever comes first. Other judges remain in office until they are discharged from active service in terms of an Act of Parliament.[18] A judge may be removed from office by resolution of the President for reasons of incapacity, gross incompetence or where he or she is guilty of misconduct. The President must be supported by the votes of at least two-thirds of the National Assembly.[19]

2.15 The JSC was established under Article 178 of the Constitution. It consists of: the Chief

15 Article 166 of the Constitution.
16 Article 174 of the Constitution.
17 Constitutional Amendment Act 34, 2001. Available at www.justice.gov.za/legislation/acts/acts/2001/2001-34.pdf.
18 Article 176 of the Constitution.
19 Article 177 of the Constitution.

Justice; President of the Supreme Court of Appeal; one Judge President; the Minister of Justice; two practising advocates; two practising attorneys; one teacher of law; six persons of the National Assembly; four permanent delegates to the National Council of Provinces; and four persons designated by the President. When matters specifically relating to a provincial or local division of the High Court are being considered, the Commission also consists of the Judge President of that division and the Premier of the province concerned.[20] The JSC is empowered by section 178(5) of the Constitution to advise the national government on any matter relating to the judiciary or the administration of justice, as well as any other powers and functions assigned to it by legislation.

South Africa's international and regional human rights obligations

2.16 South Africa is a signatory to the United Nations (UN) Charter and has ratified the following international human rights treaties:

- the International Covenant on Civil and Political Rights (ICCPR) and its First and Second Optional Protocols;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention for the Elimination of All Forms of Discrimination Against Women;
- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention Against Torture, Cruel, Inhuman and Degrading Treatment or Conduct and its Optional Protocol;
- the Convention on the Rights of the Child and its Optional Protocols; and
- the Convention on the Rights of Persons with Disabilities.

2.17 The UN has also adopted several other standards on human rights, particularly as they relate to the administration of justice. Of particular relevance here are the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers.

2.18 South Africa is a member of the African Union (AU) and the Southern African Development Community. It has ratified the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child. Other African standards of relevance are the AU Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

2.19 South Africa is also a member of the Commonwealth, under which it subscribes to the Harare Commonwealth Declaration 1991, the Millbrook Commonwealth Action Programme on the Harare Declaration 1995, and the Commonwealth (Latimer House) Principles on the Three Branches of Government 2003.

20 Article 178 of the Constitution.

Chapter 3: The judiciary

Transformation of the judiciary

3.20 After the end of apartheid in 1994, South Africa began a process of 'transformation'. This process required a movement of power from the white minority to all South Africans, as well as the transformation of all South African institutions – political, economic and social. The key bases of this transformation are constitutional democracy, the rule of law and the protection of human rights.[21] The 1996 Constitution aimed to provide a governing framework to assist in the transformation of South African society from one divided on the basis of race to one which recognised the equality of all South Africans. This process of transformation was considered to be particularly important with respect to the justice system, due to the fundamental role it plays in safeguarding the new constitutional order and in light of the fact that the courts were perceived to have legitimated some of the worst aspects of apartheid.

3.21 When the new Constitution was being developed, the constitutional framers decided to incorporate the existing pre-apartheid court structures and personnel into the new constitutional framework. This was done with the proviso that, as soon as was practical after the new constitution took effect, all courts and relevant legislation were to be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution. These reforms included the structure, composition, functioning and jurisdiction of the courts.[22]

3.22 However, at this initial stage, two central reforms of the judiciary were introduced into the constitutional structure. These were the establishment of the Constitutional Court and the JSC. The inclusion and configuration of these institutions was informed by an emerging international best practice reflected in other constitutional democracies based upon the respect for human rights, the rule of law and in recognition of the role of an independent judiciary in upholding that order.

3.23 The Constitutional Court, with its role in safeguarding the newly established constitution and assisting in the transformation of society, was established separate to the existing court system and as a model for the future development and reform of the lower courts. It was felt that this task could not be safely entrusted to the existing court system due to the role the courts had played during apartheid. The Constitutional Court has jurisdiction to hear constitutional matters, including the constitutionality of parliamentary bills and amendments to the Constitution. The Constitutional Court Complementary Act of 1995 sets out certain ancillary provisions pertaining to the nature, powers and administrative functioning of the Court.

3.24 The JSC was established by section 178 of the Constitution as an independent body, which would advise the government on any matter relating to the judiciary or the administration of justice, particularly in relation to the appointment and removal of judges. It is composed of a mixture of representatives from the judicial, executive and legislative branches along with representation from the legal profession and academia. Its composition is intended to ensure that it is a broad-based

21 See for example, the Freedom Charter, adopted by the African National Congress in 1955.

22 Schedule 6, Article 16(6), Constitution of the Republic of South Africa 1996.

forum, representing a variety of viewpoints from the major actors in the justice system. It is also intended to provide appropriate checks and balances in accordance with the separation of powers.

3.25 One of the primary aims of the transformation of the judiciary was to ensure that judicial personnel reflected the demographic composition of society more accurately. At the time of the inauguration of the new constitution the judiciary was almost entirely white and male. As of the middle of 2007, of the 218 judges, 53 per cent (115) were white, 31 per cent (68) were African, three per cent (16) were coloured and nine per cent (19) were Indian. Overall, 16 per cent were female and 84 per cent were male. In terms of the lower court judiciary, of the 1,912 magistrates, 47 per cent were white, 38 per cent were African, seven per cent were coloured and eight per cent were Indian. Overall, 31 per cent were female and 69 per cent were male.[23]

3.26 Several interlocutors mentioned that one of the key difficulties in satisfactorily transforming the judiciary and attracting new judges to the bench has been the poor judicial salaries on offer for judicial service. This has proved to be a significant obstacle to the recruitment of senior members of the legal profession, both black and white. Another obstacle emphasised to the delegation was the lack of adequate exposure to commercial and other matters on the part of black and coloured advocates. This was said to be a result of the fact that established law firms tended not to brief them, meaning that there was often insufficient exposure to the broad range of experience necessary for success on the judicial bench.

3.27 As part of the transformation process, the Department for Justice and Constitutional Development (DOJCD) has engaged in an extensive series of consultations and promulgated several policy documents setting out the DOJCD's approach to reform. Justice Vision 2000 was issued in 1997 and set out the principles that guide the DOJCD's activities, its strategies for reform and the process by which it seeks to implement reform. With respect to the courts, Justice Vision 2000 seeks to create 'a legitimate, service-oriented and efficient system of courts and other structures administering justice that is staffed by people who represent everybody in South Africa'.[24] The strategies employed to realise this are: desegregating and increasing the number of the courts; increasing access to justice; increasing the speed at which cases in the courts and other structures are managed and concluded; re-organising court management and introducing a cluster system for the lower courts to enhance and speed up the flow of information; providing all the people who work in the justice system with training on dignity, human rights, attitudes and diversity; strengthening judicial independence; increasing popular participation in the justice system; and making the justice system more accountable to the public.

3.28 In connection with this, the government has proposed a series of reforms including: unifying the court system and rationalising court structures into a single structure with the Constitutional Court at its head; making provisions for judicial education and training and discipline; reforming the magistracy and securing its integrity and independence; ensuring that the courts are efficient, fair and effective; and improving access to justice for the poor and marginalised. The transformation of other aspects of the justice system including the police, prisons, the prosecutorial service and the legal profession were also key aims.[25]

23 See www.info.gov.za/aboutgovt/justice/system.htm.

24 Justice Vision 2000. Available at www.doj.gov.za/policy/misc/justice2000.htm.

25 See generally, Justice Vision 2000, Department for Justice and Constitutional Development (December 1997). Available at www.doj.gov.za/policy/policy_list.html.

3.29 The reforms outlined above were put forward in a number of bills for the consideration of parliament. They were the product of a long series of debates and consultations by the DOJCD and the judiciary, which had taken place mostly in private. The bills included the Judicial Services Commission Amendment Bill, the Judicial Conduct Tribunals Bill, the Judicial Education Institute Bill, the Superior Courts Bill and the 14th Amendment to the Constitution Bill, of which the latter two proved to be particularly controversial.

3.30 At the time the Superior Courts Bill and the 14th Amendment to the Constitution Bill were made public in December 2005, there was a strong reaction against certain provisions[26] from some sections of civil society, the judiciary and the legal profession. This was due to concerns about their implications for judicial independence and the fact that the one-month period of consultation required by the Constitution ran over the summer holiday period. This move was perceived as a way to potentially limit debate on the content of the bills. Due to this reaction the consultation period was extended for several months until May 2006 and in November 2006 the President of South Africa suspended all action on the bills. However, as a result of the comments made at the ANC National Conference in Polokwane in December 2007, and in President Mbeki's State of the Nation speech in February 2008, there was some concern that the bills may be reactivated in their original form before the end of the current electoral term.

3.31 During the visit to South Africa, several members of the government and parliament assured the delegation that action would not be taken on the bills without further consultation. The Minister of Justice informed the delegation that the DOJCD was preparing a policy paper on the various reform issues and that once prepared it would be discussed with the judiciary. It was expected that the policy paper would be finalised within a period of one to two months (from the date of our visit). Furthermore, it was made clear that parliamentary action on the bills was unlikely to take place before the end of the term of the current parliament. The Chair of the parliamentary Portfolio Committee on Justice and Constitutional Development informed the delegation that the committee had requested that the Minister consult with the judiciary before bringing any further policy statements, and that several workshops on the reforms would likely take place in the second half of 2008.

3.32 The transformation of the judiciary takes place against a backdrop of continuing social injustice and inequality, high levels of crime and corruption and a perception that the judiciary is still not sufficiently representative of South African society and the new constitutional order. It was reported to the delegation that the judiciary and individual judges have also been the subject of occasional personal attacks from the press or from members of political parties.

3.33 The continuing process of transformation was frequently cited to the delegation as underpinning the proposed reforms currently being debated in South Africa, which are the subject of this report. The IBAHRI supports the South African Government's efforts in reforming and transforming aspects of the judiciary so it can move away from its past as an instrument of repression to one which stands clearly for the rule of law and the respect of human rights. Indeed, the government is to be commended for its efforts to create a justice system that has the protection

26 The bills also contain a wide variety of other essential structural reforms to the South African judicial system which are not as contentious and hold few implications for judicial independence.

of human rights at its heart. However, whilst the transformation of judiciary is essential it must take place with appropriate respect for the independence of the courts. Due regard must be given to its unique characteristics and its constitutionally mandated role to dispense justice, independently without fear or favour. It is in this context that the current reforms must be assessed.

Judicial independence – individual and institutional

3.34 The founding principles of the post-apartheid society in South Africa, as reflected in Article 1 of the Constitution, are human dignity, non-racialism and non-sexism, universal adult suffrage and supremacy of the Constitution and the rule of law. Fundamental to upholding these values is a system of governance based upon the separation of powers, in which the independence of the judiciary plays a central role in the constitutional system of checks and balances.[27] In fact one of the most notable aspects of the transition from apartheid is the reliance upon, and the faith shown in, the court system as it has developed since 1994, in particular the Constitutional Court, in upholding the values of South African society and securing the new dispensation.

3.35 Independence of the judiciary does not exist for the judges themselves but, instead, to protect their role in safeguarding the rule of law and human rights. This does not mean, however, that judges are immune from public scrutiny and cannot be held accountable for their conduct. Individual judges are accountable through the requirement to publish and reason their decisions, through the public nature of their hearings and through appropriate discipline, suspension and removal provisions.

3.36 Judicial independence is commonly described as being comprised of two components – the individual independence of judges and the institutional independence of the courts. Individual independence refers to the requirement that judges decide cases independently and impartially 'on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.[28] This independence not only refers to external influence but also to influence from other judges themselves. Institutional independence is the independence of the judicial branch itself from the other branches of government, which enables it to carry out its role safeguarding judicial process and protecting the individual independence of judges.

3.37 In South Africa, section 165 of the Constitution provides, in relevant part:

> (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; and
>
> (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.

27 *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), at para 17.
28 Principle 2, UN Basic Principles on the Independence of the Judiciary.

3.38 The Constitutional Court of South Africa has also discussed the issue of judicial independence. In *Van Rooyen and Others v The State and Others*[29] the court, in endorsing the approaches taken in the earlier case of *De Lange v Smuts NO and Others*[30], emphasised the importance of the two elements – individual and institutional – of judicial independence.

3.39 The court went on to say that 'judicial independence can be achieved in a variety of ways; the "most rigorous and elaborate conditions of judicial independence" need not be applied to all courts and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system'.[31] Therefore the higher the court the more stringent the requirements for independence will be. However certain elements would need to be met even if they took a different form to other parts of the court system.[32] Key elements of judicial independence are 'the requirement that judicial officers have security of tenure, a basic degree of financial security, and institutional independence concerning matters that relate directly to the exercise of the judicial function, as well as judicial control over administrative decisions "that bear directly and immediately on the exercise of the judicial function".'[33]

3.40 The court stated that the test is whether 'from the objective standpoint of a reasonable and informed person, [a court] will be perceived as enjoying the essential conditions of independence. That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted' [internal citations omitted].[34] The perception is of '[t]he well-informed, thoughtful and objective observer… sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts'.[35]

Court administration and budget

3.41 The provision of an adequate budget and the impartial administration of the courts is an important element in the fair, efficient and effective functioning of justice systems. International standards require states to provide adequate resources to enable the judiciary to properly perform its functions.[36] Lack of adequate administration can severely affect an individual's right to a prompt fair trial, and abuse of the provision of adequate administration undermines the independence of the judiciary. For example, individual members of the judiciary can be influenced through the denial or provision of staff, adequate transport, security arrangements or other resources for the effective functioning of the courts. Core aspects of court administration range from the management of court facilities and staff, provision of other services such as libraries, registries and transcription and interpretation services, to case management and the enforcement of court orders.

29 2002 (5) SA 246 (CC).

30 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

31 Stated in relation to Magistrate Courts, that due to their lower level in the court system, and the differences in their subject matter jurisdiction, they may not need as rigorous protections. *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 27.

32 *Ibid*, at para 28.

33 *Ibid*, at para 29.

34 *Ibid*, at para 32.

35 *Ibid*, at para 34.

36 Principle 7, UN Basic Principles on the Independence of the Judiciary.

3.42 There are currently two separate systems for court administration and budgetary control in South Africa. For the Constitutional Court, the Constitutional Court Complementary Act 1995 sets out the provisions concerning court administration and budget. Section 14 (1) of the Act provides 'The Minister shall, subject to the laws governing the public service, on the request of and in consultation with the President of the Court, appoint for the Court a registrar, assistant registrars and other officers and staff whenever they may be required for the administration of justice or the execution of the powers and authorities of the Court.' Subsection 2(a) provides: 'The President of the Court may, in consultation with the Minister, from time to time appoint for the Court one or more persons to undertake such research or perform such other duties as the President of the Court may determine.' The Chief Justice has an Executive Secretary that assists him in carrying out the administration of the courts.

3.43 Section 15(2) of the Act, which sets out the procedure for the determination of the judicial budget, provides: 'Requests for the funds needed for the administration and functioning of the Court, as determined by the President of the Court after consultation with the Minister, shall be addressed to Parliament by the Minister in the manner prescribed for the budgetary processes of departments of state.'

3.44 It is clear from the phrasing of the relevant sections that the President of the Court (now the Chief Justice) is to take the lead in determining the needs of the court and then enter into discussions with the Minister as to what can be appropriated. It is also clear that the administrative staff of the court report to, and owe their allegiance to the court and are managed by the Chief Justice.

3.45 The administration of the lower levels of the court system remains under the control of the DOJCD, an arrangement it inherited from the apartheid system. As part of the transformation process, the DOJCD has undertaken several reforms of court administration. It has attempted to move away from regional administrative centres and devolved responsibility for administration down to the court level in order to improve efficiency. Court managers have been appointed to be responsible for administration at each level of court, with the intention to free up judges for judicial work and thereby make them more productive. Efforts have also been made to improve information technology structures and to improve the case flow management system. All these reforms are aimed at improving service delivery in the courts, promoting efficiency and productivity, and separating the past fusion of executive (administrative) and judicial functions.

3.46 The proposed legislation, in line with its overall objective of unifying the court system into a single structure with the Constitutional Court at its head, seeks to place control over budgets and administration for all court levels in the hands of the DOJCD. In that regard it will remove the power of the Chief Justice to determine the budget and staffing requirements of the Constitutional Court.

3.47 The 14th Amendment to the Constitution Bill will amend section 165 of the Constitution by adding subsection (6) and (7), which are as follows:

> (6) The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.

(7) The Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts.

3.48 The Superior Courts Bill gives further content to these provisions by providing the following. Firstly, it gives a statutory basis to the creation of the Office of the Chief Justice, staffed by an Executive Secretary and other staff as determined by the Ministry for Justice, in consultation with the Chief Justice.[37] This office is responsible for administering the Chief Justice's obligations as set out in subsection (6) of the proposed amendment to section 165 of the Constitution, and for acting as the Secretariat of the JSC. The office undertakes this responsibility under the control and direction of the Chief Justice.

3.49 Secondly, section 15 of the bill confirms that responsibility for the administration and budget of all courts vests in the Minister of Justice and Constitutional Development. The Minister must consult with the Chief Justice on the funds required for the administration and functioning of the courts.[38] With respect to court staff, the Minister is responsible for appointing a court manager and registrar and any assistant managers and registrars to each level of the court system, after consultation with the head of the court concerned.[39] Any person appointed by the Minister is considered to be employed by the DOJCD and is subject to the laws governing the public service.[40] Court managers are explicitly placed under the control and direction of the Director-General of the DOJCD.[41]

3.50 The DOJCD has suggested several arguments for placing control over the administration of justice under the Department, primarily with respect to the need to transform the judiciary and improve its efficiency and effectiveness as highlighted above. It also argues that the placing of administration tasks in the judiciary is a breach of the doctrine of the separation of powers, the argument being that any form of administration is more properly considered a task of the executive. Furthermore, it is argued that the model proposed in the Superior Courts Bill is in accordance with the best practice standards from the Commonwealth.

3.51 Many interlocutors met during the mission felt that the arrangements proposed in the Superior Courts Bill would make the judiciary more dependent upon the executive branch and therefore imperil its independence. There was a broad degree of concern over the uncertainty as to what was included within the scope of administration and the failure of the proposed legislation to delineate more clearly where the boundaries or executive responsibility and influence lay. There was also a perception that the proposals represented a retrograde step away from the strengthened institutional independence provided to the Constitutional Court, and therefore could only be perceived as having negative implications for judicial independence.

3.52 It was also highlighted that many of the higher courts in South Africa, which are administered by the DOJCD, are already suffering from a significant shortage of resources, poorly trained staff, outdated processes and inefficiency. The DOJCD responded to these claims by stating that it is acting within tight budgetary requirements.

37 Section 12, Superior Courts Bill (draft of October 2005).
38 *Ibid*, section 15(5).
39 *Ibid*, section 16.
40 *Ibid*, section 16(d).
41 *Ibid*, section 16(e).

3.53 Concerns were also expressed as to the manner of the consultation process so far. It was felt by a number of those met by the delegation that there was a lack of clarity as to how the DOJCD was going to take the reform of the court system forward. Many were confident that a process of consultation would take place but were unclear as to how and when this would occur, particularly with regard to the most contentious issues. When asked about this, the Minister of Justice assured the delegation that the proper process of consultation would occur and that the correct procedure would be followed.

3.54 There was also an expression of concern that due to the changes in court administration with the appointment of court managers and an increased movement away from judicial control, that there was increased uncertainty with respect to accountability issues, resulting in an increase in corruption in the court system.

Comparative approaches

3.55 During the mission many interlocutors mentioned the importance of the experience of other countries to inform the process of reform in South Africa. This was particularly important given the Minister of Justice's assertion that the proposed reforms reflected best practice from the Commonwealth. This section includes a selection of experience from the larger, more developed commonwealth countries from various regions of the world, reflecting a diversity of approaches to this issue. It is hoped that this may be useful to inform the continuing process of reform in South Africa.

Australia

3.56 In Australia there are separate court systems at the state and federal level, with a final appeal to a single federal High Court, so each level of the court system has its own administration arrangements. At the federal level the High Court administers its own affairs and has the power to do 'all things that are necessary or convenient to be done for or in connection with the administration of its affairs', including entering into contracts, acquiring property, managing buildings and appointing staff.[42] A Chief Executive Officer and Principal Registrar, who are appointed by the Governor-General upon the nomination of the court,[43] assist and act on behalf of the Justices of the Court in the administration of the court.[44] With respect to budgetary arrangements, the Finance Minister directs parliament as to what funds should be appropriated for the court,[45] which is given a dedicated line within the overall budget. Similar arrangements exist for the Federal Court of Australia and the Family Court of Australia.[46]

42 Part III, High Court of Australia Act 1979.
43 *Ibid*, section 18.
44 *Ibid*, section 19.
45 *Ibid*, section 35.
46 See Part IVA, Family Law Act 1975 and Part IIA, Federal Court of Australia Act 1976.

3.57 At the state level a variety of systems exist, varying from control directly by the judiciary to the executive. In Queensland,[47] Victoria,[48] South Australia and Tasmania the judiciary is responsible for the administration of the court system and is usually assisted by an administrative officer, such as a Chief Executive Officer appointed by the judiciary. In South Australia, for example, the administration of the courts is governed by the Courts Administration Act 1993.[49] The purpose of this Act was:

- to establish the State Courts Administration Council as an administrative *authority independent of control by executive government*; and [emphasis added]
- to confer on the Council power to provide courts with the administrative facilities and services necessary for the proper administration of justice.[50]

5.58 Under the Act, a Judicial Council was established.[51] The Council consists of the Chief Justice of the Supreme Court, Chief Judge of the District Court and the Chief Magistrate of the Magistrates Court.[52] The Council is responsible for providing all the administrative facilities and services that are necessary to enable the participating courts[53] and their staff to carry out their judicial and administrative functions. The courts however remain responsible for their own internal administration. The Council has the power to establish administrative policies and guidelines to be observed by participating courts in the exercise of their administrative responsibilities.[54]

Canada

3.59 In Canada, the courts are administered by various agencies. For the Supreme Court, administration is carried out by the Registrar, who answers directly to the Chief Justice.[55]

3.60 In 2003, a Courts Administration Service was established by virtue of the Courts Administration Service Act 2002. The purpose of the Act is to:

- facilitate coordination and cooperation among the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada for the purpose of ensuring the effective and efficient provision of administrative services to those courts;
- enhance judicial independence by placing administrative services at arm's length from the Canadian Government and by affirming the roles of chief justices and judges in the management of the courts; and
- enhance accountability for the use of public money in support of court administration while safeguarding the independence of the judiciary.[56]

47 Section 13A, Supreme Court of Queensland Act 1991; section 28A, District Court of Queensland Act 1967.

48 For the Supreme Court see www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/About+the+Court/Court+Structure/Officers+of+the+Court./For the County Court see www.countycourt.vic.gov.au/CA256D8E0005C96F/page/About+the+Court-History?OpenDocument&1=10-About+the+Court~&2=0-History~&3=~.

49 See www.parliament.sa.gov.au/Catalog/legislation/Acts/c/1993.11.un.htm.

50 Section 3, Courts Administration Act 1993.

51 *Ibid*, section 6(1).

52 *Ibid*, section 7(1).

53 *Ibid*, section 4(a)–(f).

54 *Ibid*, section 10.

55 Section 15, Supreme Court Act 1985.

56 Section 2, Courts Administration Service Act 2002.

The Chief Administrator's job is to ensure the efficient management and administration of all court services, including court facilities, libraries, corporate services and staffing.[57]

3.61 For courts in the provincial levels, administration services are usually provided by the executive. For example, in Ontario, the Courts of Justice Act specifies that the Attorney-General is to supervise the administration of the courts except for matters that are assigned by law to the judiciary; matters related to the education, conduct and discipline of judges and justices of the peace; and any other designated matters.[58] The Chief Judge of a court is explicitly given the following powers: determining the sittings of the court; assigning judges to the sittings; assigning cases and other judicial duties to individual judges; determining the sitting schedules and places of sittings for individual judges; determining the total annual, monthly and weekly workload of individual judges; and preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.[59] Furthermore, the Chief Judge directs the exercise of judicial functions by subordinate staff, such as masters and case management masters.[60] In other matters which are assigned by law to the judiciary, the Chief Judge directs registrars, court clerks, court reporters, interpreters and other court staff.[61] The Act specifies five goals with respect to the administration of justice:

(a) maintain the independence of the judiciary as a separate branch of government;

(b) recognise the respective roles and responsibilities of the Attorney-General and the judiciary in the administration of justice;

(c) encourage public access to the courts and public confidence in the administration of justice;

(d) further the provision of high-quality services to the public; and

(e) promote the efficient use of public resources.[62]

3.62 The Act also creates an Ontario Courts Advisory Council, composed of: the Chief Justice and Associate Chief Justice of Ontario; the Chief Justice and the Associate Chief Justice of the Superior Court of Justice and the Senior Judge of the Family Court; the Chief Justice and the Associate Chief Justices of the Ontario Court of Justice; and the regional senior judges of the Superior Court of Justice and of the Ontario Court of Justice. It has a mandate to consider any matter relating to the administration of the courts that is referred to it by the Attorney-General or that it considers appropriate on its own initiative, and shall make recommendations on the matter to the Attorney-General and to its members.[63]

57 Section 7(2), Courts Administration Service Act 2002.
58 Section 72, Courts of Justice Act RSO 1990, C 43.
59 *Ibid*, section 75(1).
60 *Ibid*, section 75(2).
61 *Ibid*, section 76.
62 *Ibid*, section 71.
63 *Ibid*, section 76.

Ghana

3.63 The Constitution of Ghana provides one of the most impressive frameworks for the protection of the institutional autonomy of the judiciary. Article 127 of the Constitution of Ghana guarantees the independence of the judiciary both in its judicial and administrative functions, including financial administration:

> (1) In the exercise of the judicial power of Ghana, the judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority.
>
> (2) Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution.'

3.64 An independent Judicial Council,[64] comprised of a substantial majority of non-government members, was set up in order to ensure the efficient dispensation of justice[65] and any functions granted to the Chief Justice[66] under the Constitution, which include the administration of the judiciary.[67]

3.65 Article 158 regulates the appointment of court officials and staff. In order to enhance judicial independence, appointments 'shall be made by the Chief Justice'[68] without the need for Presidential approval.[69]

India

3.66 Section 146(1) of the Constitution provides that 'appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other judge or officer of the Court as he may direct'. With respect to the budget of the Supreme Court, section 146(3) provides that the administrative expenses of the court shall be charged on the Consolidated Fund of India. Section 229 of the Constitution contains similar provisions with respect to the High Courts at the state level.

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64 The composition of which is set out in Article 153 of the 1992 Ghana Constitution.
65 *Ibid* at Article 154 (1) (a).
66 *Ibid* at Article 154 (1) (b).
67 *Ibid* at Article 125 (4). 'The Chief Justice shall… be responsible for the administration and supervision of the Judiciary.'
68 *Ibid* at Article 158 (1).
69 However, the appointed official's terms and conditions of service shall be dictated by the Judicial Council in consultation with the Public Services Commission and with prior approval of the President; Article 158 (2).

Nigeria

3.67 Section 6(1) of the Supreme Court Act[70] provides that 'the Federal Judicial Service Commission (FJSC) may appoint a Chief Registrar of the Supreme Court and such registrars, deputy registrars and other officers as may be deemed necessary'. Section 6(2) specifies that individuals appointed under subsection (1) shall exercise such powers and perform such duties as may be conferred or imposed upon them by any Act or rules of court, and subject thereto, by any directions of the Chief Justice of Nigeria.

3.68 For other courts in the federal hierarchy, the Court of Appeal Act[71] specifies that there shall be appointed for the Court of Appeal, a Chief Registrar and such number of registrars and other officers in the registrar grades as may be deemed necessary. The Chief Registrar and other officers appointed under the section are required to exercise their powers and duties as may be conferred or imposed upon them by the Act or rules of court, and subject thereto, by any direction of the President. The Federal High Court Act provides the FJSC may appoint a fit and proper person to be the Chief Registrar of the court who shall perform such duties in execution of the powers and authorities of the court as may, from time to time, be assigned to him by the rules of court and, subject thereto, by any special order of the Chief Judge.[72] The FJSC may also appoint any other officers to perform duties with respect to the business of the court, as may be directed by the rules of court and any order of the Chief Judge.[73]

3.69 The Federal Judicial Service Commission is composed of the Chief Justice, the President of the Court of Appeal, the Federal Attorney-General, the Chief Judge of the Federal High Court, two persons nominated by the Nigerian Bar Association and two other persons who are not legal practitioners, but who, in the opinion of the President, are of unquestionable integrity.[74] The FJSC is required to exercise its powers of appointment and removal independently.[75]

3.70 In Lagos State, court administration is headed by the Chief Registrar of the High Court, who is also the accounting officer. The Lagos State level Judicial Service Commission is responsible for the appointment of the Registrar and other non-judicial staff.[76]

3.71 With respect to budgetary arrangements, the National Judicial Council has the power to collect, control and disburse all moneys, capital and recurrent, for the judiciary.[77] The Council is composed of representatives of all levels of the judiciary, the legal profession and civil society.[78] The Council also prepares the budget for the federal judiciary and parts of the budget for the state level courts.[79]

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70 Nigeria Supreme Court Act, Chapter 424 Laws of the Federation of Nigeria 1990.
71 Section 5, Court of Appeal Act, Chapter 75 Laws of Nigeria 1990.
72 Section 46(1), Federal High Court Act, Chapter 134 Laws of Nigeria 1990.
73 *Ibid*, section 46(2).
74 Section E, Part I, Third Schedule, Constitution of the Federal Republic of Nigeria 1999.
75 Section 158(1), Constitution of the Federal Republic of Nigeria 1999.
76 See www.nigeria-law.org/LagosStateJudiciaryInBrief.htm.
77 Paragraph 21(e), section I, Part III, Third Schedule, Constitution of the Federal Republic of Nigeria 1999.
78 *Ibid*, paragraph 20.
79 See http://njc-ng.org/Abtus.php.

United Kingdom

3.72 The Courts Act 2003 reformed the system of court administration for England, Wales and Northern Ireland, in order to create a more unified court structure. It created the statutorily based Her Majesty's Court Service (HMCS), which replaced the previous Court Service and Magistrates Court Committees. HMCS is an executive agency under the direction of the Lord Chancellor, and is responsible for the administration of all courts except for the House of Lords. The Act creates a general duty[80] for the Lord Chancellor to ensure that there is an efficient and effective system to support the carrying on of the business of the courts and that appropriate services are provided. The Lord Chancellor is required to appoint officers and staff to the courts although he may not do so with respect to staff making judicial decisions or exercising judicial discretion.[81] When appointing external, ie, non civil service, individuals to work in the courts, the Lord Chancellor must consult with the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor, as to what effect it may have on the proper and efficient administration of justice.[82] Section 3 requires the Lord Chancellor to equip and maintain the courts in line with his general duty.

3.73 The Act also establishes Courts Boards whose function it is to scrutinise, review and make recommendations about the way in which the Lord Chancellor discharges his general duty in relation to the courts with which the board is concerned, and to consider draft and final business plans relating to those courts. The Lord Chancellor must give due consideration to the recommendations of the Courts Boards and if he rejects a recommendation made by a board, he must give written reasons for doing so. Members of a Courts Board are appointed by the Lord Chancellor and each board must have at least one member who is a judge; at least two members who are lay justices; at least two other members who have appropriate knowledge or experience of the work of the courts in the area for which the board acts; and two other members who appear to be representative of people living in that area.[83]

3.74 The administration of the Appellate Committee of the House of Lords is currently undertaken by the House of Lords itself, under the Clerk of the Parliaments. However, the Constitutional Reform Act 2005, which will establish a new Supreme Court to replace the House of Lords, provides greater independence to the administration of the court in line with the objective of the reform to strengthen the separation of powers. Section 48 of the Act provides, in relation to court administration, that a Chief Executive will be appointed to carry out the following functions if delegated to him/her by the President of the Supreme Court: the appointment of officers and staff of the court; and the carrying out of any non-judicial functions of the court.[84] The Chief Executive must carry out his/her functions in accordance with any directions given by the President of the Court.[85] The numbers of officers and staff and their conditions of service are determined by the

80 Section 1, Courts Act 2003.
81 *Ibid*, sections 2(1) and (5).
82 *Ibid*, section 2(7).
83 *Ibid*, section 2, schedule 1.
84 Section 48(3), Constitutional Reform Act 2005.
85 *Ibid*, section 48(4).

Chief Executive with the agreement of the Lord Chancellor.[86] The Chief Executive will be appointed by the Lord Chancellor, after consulting the President of the Supreme Court.[87]

3.75 The Lord Chancellor is required to ensure that the Supreme Court is provided with such court-houses, offices, other accommodation and other resources as the Lord Chancellor thinks are appropriate for the court to carry on its business.[88]

3.76 With respect to the budget of the court the procedure is as follows: the President of the Supreme Court and the Chief Executive will determine the bid for resources for the Court in line with governmental spending review timescales; the bid will be passed to the Lord Chancellor, who will include it as a separate line in the overall Department for Constitutional Affairs (DCA) bid submitted to the Treasury; the Lord Chancellor will be responsible for directly dealing with the Treasury to secure resources for the court during the spending review process; the Treasury will scrutinise the overall DCA bid and approve the overall financial expenditure for the DCA group in the spending review period including the Supreme Court; following the settlement DCA will give a separate Departmental Expenditure Limit (DEL) to the Supreme Court; the Chief Executive of the Supreme Court will submit an estimate to HM Treasury which will then be presented before the House of Commons as part of the overall estimates; the House of Commons will approve the overall estimates and transfer resources accordingly; and finally the funds approved will be transferred to the Court direct from the Consolidated Fund, not via the DCA.[89]

3.77 The Chief Executive will be the Accounting Officer for the Supreme Court and so directly accountable to the court and to parliament, rather than being subject to the DCA Permanent Secretary as Principal Accounting Officer.

Zambia

3.78 The Judicature Administration Act[90] regulates the administration of the court system in Zambia. Section 3 of the Act provides that there shall be a Chief Administrator of the Judicature who shall be responsible for the day-to-day administration of the courts and the implementation of any resolutions of the Judicial Services Commission (JSC) relating to administration. These duties include being responsible for court finances and reporting and the appointment of staff. The Chief Administrator is appointed by the President on the recommendation of the JSC. The Act also delineates some responsibilities which are not to be considered administrative and will remain the responsibility of the Chief Justice. For example, with respect to the allocation of cases, section 10 provides that the Chief Justice will delegate a judge in each place where the High Court sits, who will be responsible for that work.

3.79 The JSC is composed of: the Chief Justice; the Attorney General; the Chairman of the Public Service Commission; the Secretary to the Cabinet; a judge nominated by the Chief Justice; the Solicitor-General; a member of the National Assembly appointed by the Speaker; a representative

86 *Ibid*, section 49(2).
87 *Ibid*, section 48(2).
88 *Ibid*, section 50(1).
89 Paragraph 184, Explanatory Notes to the Constitutional Reform Act 2005. Available at www.opsi.gov.uk/ACTS/acts2005/en/ukpgaen_20050004_en_1, accessed 28 May 2008.
90 Chapter 24, Laws of Zambia 1996.

of the Law Association of Zambia nominated by the Association; the Dean of the law school of the University of Zambia; and one member who has held or holds high judicial office appointed by the President.[91]

Conclusions

3.80 Judicial independence is composed of the individual independence of judges as well as the institutional independence of the judicial branch. It is therefore important that the administration of justice does not impinge upon the independent and impartial dispensation of justice. While international law does not specify a particular model of court administration, it does require an assessment of the implications for judicial independence of any model and the establishment of safeguards against negative impacts.

3.81 As illustrated, there are a variety of approaches to court administration, however international best practice reflects a growing move to provide greater safeguards for judicial independence with respect to court administration. This can take several forms: entrusting the administration of the courts to the judiciary themselves; establishing an independent administering body; or while maintaining executive control, having an independent, external oversight body or judicial input.

3.82 Given the international movement away from executive control towards more judicial control, the IBAHRI believes that the government should adopt, at a minimum, a model with substantial judicial input. The IBAHRI is not suggesting that court administration should be undertaken by the judges themselves in addition to their judicial duties, rather that administration is directed by and responsive to the needs of the judiciary and the interests of justice. Adequate accountability for the manner in which the judiciary administers the courts can be introduced in the same manner as other independent statutory agencies and by requiring that the courts are administered with a view to achieving certain goals such as efficiency, high quality public service and access to justice.

3.83 With respect to the Constitutional Court of South Africa, the IBAHRI concludes that in line with international practice for other apex courts, it should maintain control over its administration, staffing and budget. This is due to the central role it plays in upholding the Constitution, the separation of powers, and rule of law and in ensuring the legality of the actions of the other branches of government.

91 Section 3(1), the Service Commissions Act, Chapter 259, Laws of Zambia 1996.

Recommendations

- While the IBAHRI acknowledges that the South African Government has taken necessary steps to transform the judiciary from an instrument of the apartheid regime to an institution which upholds democracy, the rule of law and respect for human rights, the IBAHRI believes that the Constitutional Court of South Africa should, nevertheless, retain the power to administer its own operations in order to properly promote and protect judicial independence.
- For the lower courts, the IBAHRI encourages the government to consider judicial control or a model of an independent agency responsible for the administration of the courts that effectively balances issues of independence, accountability and effectiveness.
- If the government chooses to maintain control over court administration, the IBAHRI recommends that the government delineates more specifically the areas where the judiciary has responsibility, with respect to both judicial and administrative functions, and institutionalises a process of consultation and supervision by the judiciary at all levels of the court system.

Rule-making power

3.84 The Superior Courts Bill also proposed changes to the rule-making power of the courts. Court rules are essential to the effective and efficient functioning of the court system and impact significantly on the right to a fair trial and access to justice. Court rules generally cover technical issues such as: the forms of process, pleadings and petitions; the taking of evidence; fees and costs; time limits; certification of experts and translators/interpreters; and hours of court and other procedural matters. Currently, rule-making power in South Africa is regulated by the Constitutional Court Complementary Amendment Act 1997, for the Constitutional Court, and by the Rules Board for Courts of Law Act 1985 for the other courts in the judicial system.

3.85 At the Constitutional Court level, section 16(1)(b) of the Constitutional Court Complementary Amendment Act 1997 specifies that the President of the Court (now the Chief Justice) by notice in the Gazette, may make rules relating to the manner in which the court may be engaged in any matter in respect of which it has jurisdiction. Every rule, and every amendment or repeal, shall be submitted to parliament before its promulgation and tabled as soon possible.[92]

3.86 For other courts, the 1985 Act establishes a rules board composed of: three judges; a magistrate; two practicing advocates; two practising attorneys; a law lecturer; an officer of the Department for Justice; and three other individuals who, in the opinion of the Minister, have the necessary expertise to serve as members of the board. All members are appointed by the Minister for Justice.[93] With a view to the 'efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Courts and the lower courts', the Rules Board may review existing rules of court. Subject to the approval of the Minister, the Rules Board may also make,

92 Section 16(1)(b), Constitutional Court Complementary Amendment Act 1997.
93 Section 3, Rules Board for Courts of Law Act 107 of 1985.

amend or repeal rules for the Supreme Court of Appeal, the High Courts and the lower courts.[94] Rules must be published in the Gazette at least one month before their commencement, and every rule shall be tabled in parliament within 14 days of its commencement.[95]

3.87 When considering the issuance, amendment or repeal of a rule, the Rules Board engages in a process of consultation with relevant stakeholders, including the courts, judges, magistrates, attorneys, advocates and other organisations. After consultation, a document containing all the submissions is prepared and submitted to a subcommittee for consideration, which then decides on the most appropriate course of action. If a change is recommended by the subcommittee, the amendment is submitted to the Rules Board for ratification which, if agreed upon, is then distributed to role players for further consultation. After this consultation, the amendment is discussed by all the subcommittees and submitted to the board once again for ratification.[96]

3.88 The Superior Courts Bill gives the Minister for Justice and Constitutional Development the power to review, make, amend and repeal rules of court with a view to the efficient, expeditious and uniform administration of justice for all courts in South Africa.[97] The Minister is obliged to table every new, amended, or repealed rule before parliament, and any such rule cannot take effect unless: the Rules Board has been given a reasonable opportunity to comment; the Minister has considered the Board's advice; and the rule has been tabled in parliament and has been published in the *Gazette* at least one month before it is due to commence.

3.89 The Rules Board proposed in the Superior Courts Bill will be composed of: three judges; two magistrates; one attorney; one advocate; one senior law lecturer; three persons who are not ordinarily involved in the administration of justice; and an officer of the DOJCD. All members will be appointed by the Minister of Justice, in consultation with the Chief Justice in relation to the judges, magistrates, lawyers and advocates (with respect to the latter two members their respective professions are also consulted) and in consultation with the deans of law for the appointment of the senior law lecturer.[98]

3.90 Several individuals expressed concern that in recent years the current Rules Board had not been functioning properly. For several years under the previous Minister of Justice, appointments to the Rules Board were not made, paralysing its activities and impinging on the effective functioning of the courts. Under the current Minister, this situation had been partially alleviated as the Rules Board was now found to be functioning. However, there was concern that rules passed by the board were not being approved in a timely fashion by the DOJCD, and that in some cases rules were amended and tabled before parliament by the DOJCD without consulting the Rules Board. It was felt that the DOCJD considered the Rules Board to merely play an advisory function, and that responsibility for the rules rested ultimately with the Department. There were also ongoing concerns about the adequacy of the resources allocated to the board and the appropriateness of some amendments to the Rules made by the DOJCD, which several interlocutors stated were outdated and not in tune with making the justice system more effective, efficient and available. It was also reported

94 Section 6, Rules Board for Courts of Law Act 107 of 1985.
95 Sections (4) and (5), Rules Board for Courts of Law Act 107 of 1985.
96 See www.doj.gov.za/rules_board/rules_board.htm.
97 Section 41(1), Superior Courts Bill (October 2005).
98 *Ibid*, section 42.

to the delegation that there was a perception that the DOJCD considers that rules are legislation and, therefore, they are more properly promulgated by parliament.

3.91 The Ministry for Justice and Constitutional Development stated that part of the need to change the situation was that there was no policy underlying the promulgation of legislation and that it was necessary to make sure that the rules are consonant with the achievement of justice. The Ministry also informed the delegation that it was important to ensure that the promulgated rules did not operate to the material disadvantage of less economically stable sections of society.

Comparative approaches

Australia

3.92 The Judiciary Act 1903 provides that the Justices of the High Court of Australia may make rules necessary or convenient to be made for carrying into effect its duties under the Act and for regulating the practice and procedure of the court.[99] The other federal courts, the Federal Court of Australia,[100] the Family Court of Australia[101] and the Federal Magistrates Court of Australia,[102] have similar powers. The Legislative Instruments Act 2003 applies to the courts rule-making power, requiring that judges consult in the preparation of rules; requiring that the rules are laid before parliament; and permitting the disallowal of the tabled rules by parliament, but not their amendment.

Canada

3.93 In Canada, the judges of the Supreme Court of Canada have the power to make rules and orders for regulating the procedure of that court.[103] For other federal courts, the Federal Court Act establishes a Rules Committee composed of representatives of the federal judiciary, the Chief Administrator of the Courts Administration Service, five members of the Bar and the Attorney-General of Canada.[104] The Rules Committee has the power to make rules regulating the practice and procedure of the Federal Court of Appeal and the Federal Court, subject to the approval of the Governor-General in Council. If the committee seeks to amend a rule, it is required to give notice of the proposal by publishing it in the Gazette and inviting interested persons to make representations. Copies of rules must be laid before parliament within 15 days of approval by the Governor-General.[105]

3.94 At the provincial level in Ontario, rules are made by committees composed of representatives of the judiciary, the executive and the legal profession. The committees have a general power to make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts, subject to the approval of the Attorney-General.[106]

99 Section 86(1), Judiciary Act 1903.
100 Section 59, Federal Court of Australia Act 1976.
101 Section 123, Family Law Act 1975.
102 Section 81, Federal Magistrates Court Act 1999.
103 Section 97, Supreme Court Act RSC 1985, c S-26.
104 Section 45.1, Federal Courts Act RSC 1985, c F-7.
105 *Ibid*, section 46.
106 Sections 65–70, Courts of Justice Act RSO 1990, c C.43.

Ghana

3.95 The Ghanaian Constitution sets out a detailed framework for court rule-making. Under Article 157,[107] a Rules of Court committee shall 'by constitutional instrument, make rules and regulations for regulating the practice and procedure of all courts in Ghana'.[108] The composition of this committee is covered by Article 157 (1) (a)–(c), which requires the Chairman to be the Chief Justice, who is to be assisted by six members of the Judicial Council[109] and two lawyers nominated by the Ghana Bar Association.

Nigeria

3.96 In Nigeria, the Constitution provides the heads of the various court levels with the power – subject to the provisions of any Act of the National Assembly – to make rules for regulating the practice and procedure of the Supreme Court.[110] The Federal High Court Act further states that the Chief Judge of the High Court may, with the approval of the National Council of Ministers, make Rules of Court for carrying this Act into effect.[111] The Constitution also provides Chief Judges of state courts with a general power to make rules for regulating the practice and procedure of their courts, subject to the provisions of any law made by the House of Assembly of a State.[112]

India

3.97 In India, section 145 of the Constitution gives the Supreme Court of India the power to make rules regulating the practice and procedure of the court, subject to the provisions of any law made by parliament. Section 227 gives a more expanded power to the High Courts of each state which includes the power to make rules and prescribe forms for regulating the practice and procedure of the courts and also gives that court a general role of superintendence over all courts and tribunals within its jurisdiction.

United Kingdom

3.98 In England, the Heads of Division (the Lord Chief Justice, Master of the Rolls, President of the Family Division and Vice-Chancellor) have power under the High Court's inherent jurisdiction to make directions as to practice and procedure. Section 74A of the County Courts Act 1984 gives the Lord Chancellor overall control over practice directions to be followed in county courts. Under the Courts Act 2003, a Criminal Procedure Rules Committee was established to develop a set of rules to ensure consistency in approach in criminal proceedings across all courts. The committee consists of a variety of individuals from the judiciary, the legal profession, the executive, the prosecution, the police and civil society.[113] The Lord Chancellor may, with the concurrence of the Secretary of State, allow, disallow or alter rules so made but before altering a rule the Lord Chancellor must consult the

107 Ghana Constitution 1992.
108 *Ibid*, at Article 157 (2) Ghana Constitution 1992.
109 The six members are nominated by the Judicial Council. Article 157 (1) (b) of the Ghana Constitution.
110 See sections 236, 248, 254 and 259. Constitution of the Federal Republic of Nigeria 1999.
111 **Section 44(1), Federal High Court Act, Chapter 134, Laws of Nigeria 1990.**
112 Section 274, Constitution of the Federal Republic of Nigeria 1999.
113 Sections 70(1) and (2), Courts Act 2003.

Committee.[114] The rules are laid before parliament and take affect unless annulled by a resolution of the parliament. Rules altered by the Lord Chancellor must be affirmed by a resolution of the parliament for them to enter into force.[115] Similar committees are also established to prepare rules for family proceedings[116] and other civil proceedings.[117]

3.99 For the Supreme Court (replacing the House of Lords), section 45 of the Constitutional Reform Act gives the President of the Court the power to make rules governing the practice and procedure to be followed in the court. The President must exercise his power with a view to ensuring that the court is accessible, fair and efficient, and that the rules are simple and simply expressed. The President must consult the Lord Chancellor and the legal profession before making a rule. The rules are promulgated by the Lord Chancellor and are subject to annulment, but not amendment, by the parliament.[118]

Zambia

3.100 For the Supreme Court, rule-making power is entrusted to the Chief Justice by section 28 of the Supreme Court of Zambia Act,[119] which allows for the making of rules:

> 'for regulating generally the practice and procedure of the Court and with respect to appeals to or reviews by the Court including rules as to the time within which any requirement of the rules is to be complied with, as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein and generally in regard to any other matter which appears to the Chief Justice to be necessary or desirable'.

3.101 Rules for the High Court are made by the High Court Rules Committee, composed of the Chief Justice, two High Court judges and two legal practitioners nominated by the Law Association of Zambia.[120] For other subordinate courts, the Chief Justice makes rules.[121]

Conclusions

3.102 Court rules are an important instrument for ensuring the effective, efficient and fair functioning of courts, and are crucially important for ensuring access to justice. As a result, a broad range of players, including the executive and legislature – in addition to the judiciary and the legal profession – have a legitimate interest in their content.

3.103 Traditionally, court process was the responsibility of court itself, in line with its responsibility to regulate its practice and procedure. As the work of the court system has increased, other players, most importantly the legislature, have prescribed matters which affect the way in which courts operate. Courts have also adopted a broader consultation process in developing their rules to ensure a wider variety of stakeholder views are represented.

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114 *Ibid*, sections 72(3) and (4).
115 *Ibid*, sections 72(5), (6) and (7).
116 *Ibid*, sections 75–81.
117 *Ibid*, sections 82–85.
118 Section 46, Constitutional Reform Act 2005.
119 Chapter 25, Laws of Zambia 1996.
120 Section 45(1), The High Court Act, Chapter 27, Laws of Zambia 1996.
121 Section 57, The Subordinate Courts Act, Chapter 28, Laws of Zambia 1996.

3.104 The IBAHRI is concerned about the current problems with the rule-making system in South Africa, in particular the disagreement that seems to exist between the Ministry of Justice and the judiciary as to the rule-making process.

3.105 The IBAHRI believes that, in line with international practice, the rule-making process should be left to the courts themselves, without impinging on the ability of the legislature to prescribe certain procedures itself. It is felt that, given its central role in upholding the constitution and ensuring the legality of the actions of the other branches of government, the Constitutional Court of South Africa should retain its rule making-power. This would be in line with the practice of other apex courts.

3.106 For the lower courts, the current process of extensive consultation by a Rules Board consisting of representatives of relevant stakeholders is an appropriate mechanism for the generation of rules. Based upon the practice of other countries, the IBAHRI believes that, while the Minister of Justice may be granted the ability to reject rules in total and return them for further consideration, the Minister should not be able to amend rules unilaterally. In fact, the IBAHRI finds it difficult to comprehend why rules are currently not being passed promptly by the DOJCD, after such an extensive consultation process in which the DOJCD participates. The IBAHRI feels that policy inputs by the DOJCD are more appropriate during the rule making process by the Rules Board, where their implications for court procedure can be fully discussed, rather than at the end of the process when they have been agreed upon by the Board.

Recommendations

- The IBAHRI recommends that rule-making should remain the responsibility of the courts.
- The IBAHRI further recommends that the Constitutional Court should remain responsible for regulating its own practice and procedure.
- For other courts, in line with international best practice, a separate body composed of various stakeholders, including the judiciary, the legal profession and the DOJCD, is an appropriate process for the generation of rules and ensuring a broad consultation process.
- The Minister of Justice should not have the power to amend rules.
- To ensure that the courts operate effectively, and that rules are issued promptly, the IBAHRI believes that legislation should provide that rules issued by the board shall take effect within a set period of time (for example 30 days), after being laid before parliament unless the Minister, or a resolution of the parliament, rejects them, giving reasons.

Judicial appointments

3.107 The procedure for the making of appointments to the judiciary form one of the key safeguards of judicial independence and the effective functioning of the courts. With respect to judicial appointments, the UN Basic Principles on the Independence of the Judiciary provide that individuals 'selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial

appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status'.[122]

3.108 For a description of the appointment process of judges in South Africa see paragraph 2.13.

3.109 Section 9 of the 14th Amendment Bill to the Constitution seeks to amend the manner of appointment of Judges President and Deputy Judges President of the High Court. Currently, they are appointed by the President on the advice of the JSC under section 174(6) of the Constitution. The bill would insert a new subsection into section 174 providing that:

> (5) The Judges President and Deputy Judges President of the Divisions of the High Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the Cabinet member responsible for the administration of justice, in accordance with the procedure set out in subsection (4)(a) to (c).

3.110 The precise motivation for the proposed amendment, in particular the reason for the diminishment of the role of the Judicial Services Commission, was not clear although it was suggested by several interlocutors that it was connected with the government's transformation agenda. Most concerns regarding the proposed amendment relate to the fact that it represents a move away from an independent decision-making body to one that is controlled by the executive, for apparently no principled reason.

3.111 Similarly, section 10 of the bill seeks to amend the provisions regarding the appointment of acting judges. Currently, section 175 of the Constitution provides that the President may appoint an individual to be an acting judge of the Constitutional Court if there is a vacancy or a judge is absent. The appointment must be made on the recommendation of the cabinet minister responsible for the administration of justice with the concurrence of the Chief Justice.

3.112 The bill broadens the President's power to appoint acting judges to the positions of Deputy Chief Justice, Deputy President of the Supreme Court of Appeal, and Deputy Judge President of a division of the High Court, whenever there are vacancies in the position or the incumbent judge is absent. Furthermore it limits judicial involvement, by providing that the relevant cabinet minister only has to consult with the Chief Justice.

Conclusions

3.113 Judicial appointments must be made in a transparent manner that safeguards the independence of the judiciary and ensures selection based upon merit in accordance with the requirements of the UN Basic Principles on the Independence of the judiciary.

3.114 The proposed amendment to the appointment process of Judges President and Deputy Judges President of the High Courts is of concern to the IBAHRI as it could be perceived to represent a more politicised appointment process for the Heads of Court. While international standards do not specify a particular process of appointment – only requiring that appointments

122 Principle 10.

are based upon merit – the proposed amendment makes it more difficult to evaluate the basis for appointment. The concern regarding politicisation is of particular importance in the case of heads of court, given their role in the allocation of cases and the overall supervision of their courts.

3.115 The appointment of acting judges, while they may be necessary to fill temporary judicial vacancies or for temporary increases in the work of the courts, have significant implications for judicial independence. The temporary appointment of a judge violates one of the fundamental safeguards of judicial independence – that of security of tenure. The risks to judicial independence are decreased if a judge is appointed for one non-renewable term (and therefore not eligible for future judicial appointment) or from a list of pre-approved individuals, prepared for example by a Judicial Services Commission. The proposed amendment seeks to increase the ability of the executive to appoint acting judges in the court system, in particular to leadership positions in the judiciary who have significant powers by virtue of their position.

3.116 A central concern in both these proposals relates to the fact that individuals can be appointed to the position of Judge President or Deputy Judge President, whether acting or permanent, from outside the current bench of the court. It is difficult to see a rationale for the appointment of an acting judge to a Deputy Judge President position when the incumbent is merely absent from his position, as those functions should be exercised by another judge, with security of tenure, temporarily from within the court. Similarly, when there is a vacancy in that position, it should be filled by a permanently appointed judge. In many countries judges are appointed to positions at the Head of Court on the basis of seniority within the court, ensuring that these appointments are not politicised.

Recommendations

- The IBAHRI urges the government to reconsider the amendments and strengthen the role of the Judicial Service Commission in any appointments.
- The IBAHRI urges the government to reconsider the way in which acting judicial appointments are made given the inherent risk that these appointments pose for judicial independence.

Judicial education

3.117 Prior to the new constitutional order, continuing judicial education was not institutionalised in South Africa. Section 180(a) of the Constitution provided that national legislation may create training programmes for the judiciary. Since then the judiciary has pushed for the establishment of an independent judicial training institute that would be responsible for providing training to judges and which enhance judicial accountability and assist in transforming the judiciary. Ongoing discussions between the judiciary and the DOJCD had generated a number of proposals, one of which was agreed upon and put forward in the Judicial Education Institute Bill. The bill will create an independent institution:

(a) to establish, develop, maintain and provide judicial education and professional training for judicial officers;

(b) to provide entry level education and training for aspiring judicial officers to enhance their suitability for appointment to judicial office;

(c) to conduct research into judicial education and professional training and to liaise with other judicial education and professional training institutions, persons and organisations in connection with the performance of its functions;

(d) to promote, through education and training, the quality and efficiency of services provided in the administration of justice in the Republic;

(e) to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts; and

(f) to render such assistance to foreign judicial institutions and courts as may be agreed upon by the Council.[123]

3.118 The Institute will be governed by a Council composed of: the Chief Justice; the Deputy Chief Justice; the Minister of Justice; a judge of the Constitutional Court; a representative of the Judicial Services Commission; the President of the Court of the Supreme Court of Appeal; two Judge Presidents and two other judges; five magistrates; a retired judge; the Director of the Institute; one advocate and one attorney; two university law teachers; and two members of the public.[124]

Conclusions

3.119 Judicial education is an important part of ensuring the continuing quality of judicial decision-making and therefore of the judiciary's ability to uphold justice. The IBAHRI welcomes the proactive approach taken by the judiciary on this issue and its commitment to ensuring the quality of judicial decision-making. The IBAHRI also welcomes the extensive consultation and subsequent agreement on the structure and organisation of the Judicial Education Institute and looks forward to its establishment after the passage of the legislation.

Judicial conduct

3.120 The Constitution provides that a judge may be removed from office only if the JSC finds that the judge suffers from incapacity; is grossly incompetent or is guilty of gross misconduct; and if the National Assembly passes a resolution to that effect by a two-thirds majority.[125] For judicial misconduct which does not reach that threshold there are no formal regulatory or disciplinary provisions, however since its inception the JSC has developed a series of informal mechanisms for dealing with complaints.

123 Section 5, Judicial Education Institute Bill [B4B – 2007].
124 *Ibid*, Section 7.
125 Section 177, the Constitution of South Africa.

3.121 In 1996, the JSC initiated a process for the development of a formal complaints and disciplinary mechanism to enable it to deal with complaints it was receiving about judges. The Ministry of Justice was requested to prepare a draft bill, which was found unsatisfactory, resulting in the creation of a committee of four judges to reconsider the draft and comments received from other stakeholders. A draft bill was submitted to the JSC in 2000 and then to parliament for its consideration. The proposed disciplinary and complaint procedures are now contained in the Judicial Services Commission Amendment Bill (JSCA Bill) which is currently in its second stage before the National Council of Provinces.

3.122 At the same time as the discussions concerning the development of the complaints mechanism, the judiciary initiated discussions on the preparation of a judicial code of conduct. At a meeting of senior judges in 2000, the judiciary adopted a code of conduct entitled 'Guidelines for Judges in South Africa'. The guidelines are purely advisory and do not contain a mechanism to ensure their legal enforcement. The judiciary wanted the guidelines to be endorsed by parliament, however that was not done. In addition to its disciplinary procedures, the JSCA Bill also seeks to introduce a formal code of conduct.

3.123 The JSCA Bill[126] seeks to establish a formal complaints mechanism as part of the JSC called the Judicial Conduct Committee. This would be composed of the Chief Justice, the Deputy Chief Justice and four other judges designated by the Chief Justice in consultation with the Minister. The committee would have the jurisdiction to consider complaints against judges: on the grounds set out for impeachment in section 177(1)(a) of the Constitution; for a wilful or grossly negligent breach of the Code of Judicial Conduct; for accepting, holding or performing any office of profit or receiving any fees, emoluments, remuneration or allowances; for any wilful or grossly negligent failure to comply with any remedial step imposed by the committee; and for any other wilful or grossly negligent conduct that is incompatible with or unbecoming the holding of judicial office – including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts. Complaints that are hypothetical or solely related to the merits of a judgment or order can be dismissed by the Chair of the committee.

3.124 For impeachable offences, if the committee establishes a prima facie case that a violation of section 177(1)(a) of the Constitution has occurred, or the JSC believes that there are reasonable grounds for believing that to be the case, the JSC must request the Chief Justice to establish a Judicial Conduct Tribunal which will investigate the complaint fully and report back to the JSC. The tribunal is composed of two judges and one non-judicial member nominated from a list of persons maintained by the Executive Secretary of the Chief Justice, who have been approved by the Chief Justice with the concurrence of the Minister.

3.125 The sanctions that may be imposed for non-impeachable offences are: apologising to the complainant in a manner specified; a reprimand; a written warning; any form of compensation; appropriate counselling; attendance of a specific training course; and any other appropriate corrective measure.

126 Version as at 19 November 2007.

3.126 The bill does not specify the contents of the Code of Judicial Conduct referred to in section 14(4), but requires the Chief Justice, acting in consultation with the Minister of Justice, to compile a code for approval by the National Assembly within four months of the commencement of the Act. If the Chief Justice and the Minister cannot achieve consensus on the code, both versions are to be tabled in parliament. The National Assembly can approve the code as is, or can make its own changes. The bill also requires the Minister, acting in consultation with the Chief Justice, to appoint a Registrar of Judges Registrable Interests as a senior official in the Office of the Chief Justice. The Registrar will keep a record of various interests that the judge and their immediate family members have. The register will have public and confidential components.

Conclusions

3.127 There is a growing international recognition of the need to strengthen judicial accountability. In many parts of the world, as is the case in South Africa, this initiative is being led by the judiciary itself. In 2002, the Bangalore Principles of Judicial Conduct[127] were promulgated by a group of judges representing the major regions and legal traditions of the world. Given the tension that exists between independence and accountability, efforts to improve judicial accountability need to be sensitive to these concerns.

3.128 The IBAHRI welcomes the moves to improve judicial accountability in South Africa, but is concerned about the ongoing disagreement regarding the content of a Judicial Code of Conduct. The IBAHRI is also concerned at the failure to endorse the Guidelines for Judges adopted by the judiciary in 2000.

Recommendations

- The delegation recommends that a consensus agreement between the executive, legislature and judiciary be reached on the contents of the Judicial Code of Conduct before the adoption of the JSCA Bill.

Criticism of judges

3.129 In recent months there have been two high profile instances of public criticism of judges and the operation of the judicial system. In January 2008, Deputy Chief Justice Dikgang Moseneke made a speech at a private party celebrating his 60th birthday, during which he reportedly stated: 'I have another 10 to 12 years on the bench and I want to use my energy to help create an equal society. It's not what the ANC wants or what the delegates [to the Polokwane conference] want; it is about what is good for our people.'

3.130 In response, the African National Congress National Executive Committee issued a press statement which stated: 'His reported comment shows disdain for the delegates to the ANC National Conference, and highlights the difficulty that many within the judiciary appear to have in shedding

127 The Bangalore Principles of Judicial Conduct are available at www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

their historical leanings and political orientation.'[128] The ANC also addressed a letter to the Chief Justice expressing its concern about this matter.

3.131 A meeting between the Chief Justice, Deputy Chief Justice and the African National Congress Deputy President Kgalema Motlanthe was held on 15 January 2008 to discuss the matter. Subsequent to the meeting, the ANC issued a statement confirming that it accepted that the Deputy Chief Justice meant no ill by the comments and reiterated 'its confidence in the integrity of the Deputy Chief Justice, and reaffirms its confidence in the courts to uphold the law and safeguard the rights of all citizens'.[129]

3.132 Furthermore, in January 2008, Patrick Craven, the spokesman of the Congress of South African Trade Unions (COSATU) was reported to say that 'it does not matter who the judge is, we do not believe the judiciary will be able to be objective' in relation to the trial of the ANC President Jacob Zuma. Also the COSATU KwaZulu-Natal Provincial Secretary, Zet Luzipho, was reported to have said that violence would take place if the trial proceeded, in particular that 'this time there will be blood spilt in the courtroom'.[130]

3.133 The statements prompted the former Chief Justice Arthur Chaskalson and the Advocate George Bizos to release a statement expressing concern about the tone of the debate around the trial of Mr Zuma. The statement said:

> 'Putting pressure on the courts by making serious allegations of partiality, uttering threats of massive demonstrations, and expressing opinions in intemperate language, are harmful to the judicial process, to our constitutional democracy and to our country's reputation.
>
> We appeal to all political leaders and their supporters, to opinion makers, commentators and the media, to let the courts decide on these issues. We are confident that they will do so without fear or favour. That is their constitutional duty and there is no reason to believe that it will not be discharged.'[131]

3.134 COSATU's spokesman responded by saying that COSATU fully supported an independent judiciary and shared the judges' fears that it was under threat. However, they added that they should not be criticising COSATU but instead, the people who were manipulating the judicial system for their own political ends.[132]

Conclusions

3.135 Public faith and trust in the judicial system – its independence, integrity and fairness – are important elements in building a state based upon the rule of law. The work of the courts is therefore of significant public interest and the transparency of court activities is important to the maintenance of this trust. The public has a legitimate interest in court decisions, which should not be immune from public debate or criticism. However, engaging in public criticism or personal

128 See www.anc.org.za/show.php?doc=ancdocs/pr/2008/pr0115.html.
129 See www.anc.org.za/show.php?doc=ancdocs/pr/2008/pr0117.html.
130 See www.mg.co.za/articlePage.aspx?area=/zuma_report/zuma_news/&articleId=329546.
131 See www.legalbrief.co.za/article.php?story=20080106174547952.
132 See www.cosatu.org.za/press/2008/jan/press3.htm.

attacks upon members of the judiciary undermines public faith in the independence of the judiciary and the rule of law. This is particularly damaging to the judiciary as individual judges are unable to respond directly to criticism, or engage in public debates, in order that they do not bring the judiciary into further disrepute. They, therefore, rely upon other actors in society to safeguard and defend their integrity and independence. Given this inability to respond, the other branches of government need to be particularly careful in criticising individual judges or the judiciary.

3.136 Legitimate concerns about judicial conduct should be dealt with through appropriate complaints mechanisms, in line with promulgated standards of judicial conduct. These mechanisms provide a fairer means for evaluating judicial conduct and respecting standards of due process.

Recommendations

- The IBAHRI encourages the government, political parties and the press to be temperate in their criticism of judicial decisions. Legitimate concerns about judicial conduct should be addressed through formal complaints procedures.

Chapter 4: Other issues

4.137 The building of a state based upon the rule of law and the protection of human rights requires the principle of equality before the law as one of its founding bases. In addition to the prohibition of all forms of discrimination, this requires, at a minimum, securing the compliance of all actors in society – both the general populace and the government – to the same standards. Inequality of treatment undermines the building of a fair, efficient and effective administration of justice and public confidence in the rule of law. In addition to an independent judiciary, of key importance in this area is the creation of an effective, efficient and impartial prosecution service exercising its functions in the public interest.

4.138 The UN Guidelines on the Role of Prosecutors specifies in Principle 12 that 'prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system'. Principle 15 emphasises the importance of accountability by requiring prosecutors to 'give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences'.

Suspension of the National Director of Public Prosecutions

4.139 On 24 September 2007, President Thabo Mbeki suspended the National Director of Public Prosecutions (NDPP), Vusi Pikoli, under section 12 (6)(a) of the National Prosecution Act 32 of 1998 (NP Act). The President stated that the decision to suspend the NDPP was based upon an irretrievable breakdown in the working relationship between the Minister of Justice and Constitutional Development and the NDPP, which the President considered central to the effective administration of justice and the smooth functioning of the National Prosecuting Authority (NPA). Section 179(6) of the Constitution entrusts the Minister with the final responsibility and oversight over the NPA. Therefore the relationship breakdown had adverse implications for the NPA and the functioning of the criminal justice system.[133]

4.140 Section 12(6)(a) of the NP Act provides that the President may provisionally suspend the NDPP, pending an enquiry into his or her fitness to hold office as the President deems fit, and may remove the individual from the office: for misconduct; on account of continued ill-health; on account of incapacity to carry out his or her duties of office efficiently; or on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

4.141 The enquiry was established under Dr Ginwala, former Speaker of the National Assembly, with the following terms of reference: to determine whether the NDPP in exercising his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organised crime to the national security of the Republic; and to determine whether the NDPP, in taking decisions to grant immunity from prosecution to or enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime, took due

133 See www.gcis.gov.za/media/releases/2007/071001b.htm.

regard to the public interest and the national security interests of South Africa. The enquiry was also mandated to look into whether the National Director had failed to appreciate the nature and extent of the constitutional and legal oversight powers of the Minister over the prosecuting authority.[134] The hearing was ongoing at the time of the preparation of the report.

4.142 The lawyers of Mr Pikoli argued at the Commission that the Minister of Justice had ordered the NDPP not to pursue arrest warrants for the National Commissioner of Police, Mr Selebi, on corruption charges until the Minister determined that it was in the public interest to do so. Mr Pikoli had refused to comply with the order as he viewed it as an interference with his duties. The DOJCD argued that it needed to know the full rationale for the decision of Mr Pikoli to grant immunity to several organised crime figures so that it could prepare a report for the President, as the matter was one of national security.[135] The government emphatically denied that the suspension was to protect Mr Selebi. The enquiry was ongoing at the time of publication.

4.143 Section 179(4) of the Constitution requires the NPA to exercise its functions without fear, favour or prejudice.

Dissolution of the Department of Special Operations

4.144 The Department of Special Operations (DSO), also known as the Scorpions, was established in 1999, as a specialised unit within the NPA with both investigative and prosecutorial functions. It was responsible mostly for investigating corruption, serious economic offences and other forms of organised crime, and was recognised for having a high success rate. It was established under the auspices of the NPA, as it was felt that corrupt elements in the police services and other inadequacies would not enable it to perform its role within the police appropriately. The DSO was involved in the investigation and prosecution of several high profile individuals in South Africa, including the National Commissioner of Police, Mr Selebi, and the current African National Congress President, Jacob Zuma.

4.145 In April 2005, the President of South Africa ordered the opening of a Commission of Inquiry, chaired by Justice Khampepe, into the operations of the DSO, its mandate, its constitutionality, the degree and forms of cooperation between the DSO and the South Africa Police Service (SAPS) and to make any recommendations for actions to remedy any identified deficiencies and to advise on where the DSO should be institutionally located in the future.

4.146 One of the main concerns about the operations of the DSO was that it was unconstitutional, as section 199(1) of the Constitution states 'the security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution'. It was felt that locating the DSO in the NPA violated that provision. The Khampepe Commission found this argument to be without merit and that there was no conflict between the SAPS and the DSO, nor was there any constitutional issue with locating the DSO within the NPA. The Commission was critical however of the fact that the law enforcement capabilities of the DSO were effectively unsupervised, as the Minister of Justice (under whose authority the NPA fell) was not

134 See www.gcis.gov.za/media/releases/2007/071003.htm accessed on 2 June 2008.

135 See www.news24.com/News24/South_Africa/News/0,,2-7-1442_2319028,00.html.

required to account to parliament for the law enforcement activities of the DSO, and the Minister of Safety and Security, who reported on the activities of the SAPS, had no authority with respect to the DSO.

4.147 At the 52nd ANC National Conference at Polokwane in December 2007, the ANC called for the dissolution of the DSO and individuals performing police functions be placed under the SAPS. In May 2008, the President of South Africa decided that the DSO should be dissolved. At the time of the mission, the exact manner in which the activities of the DSO would be reconstituted was not known. Subsequent to the mission, the NPA Amendment Bill 2008 and the SAPS Amendment Bill were introduced into parliament to relocate the investigative authority of the DSO in the SAPS in a new Directorate of Priority Crime Investigation.

4.148 Several interlocutors expressed concern as to what the dissolution of the DSO would mean for the rule of law in South Africa. Concern was also expressed as to the message it would send in light of the controversy surrounding several cases involving politicians investigated by the DSO. Others also expressed concern that the incorporation of its operations in the SAPS would end prosecutor-led investigations, thus having a negative impact on investigations and meaning that the decision to arrest would be subject to the final approval of the SAPS. The uncertainty as to whether current DSO staff would be retained, and if not, the impact that the loss of their expertise would have on future and ongoing prosecutions, was also of concern.

Conclusions

4.149 Prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their functions should promote respect for and compliance with the principles of equality before the law and the right to a fair trial, and thus contribute to a fair and equitable criminal justice system and the effective protection of citizens against crime. In that regard it is important to safeguard and respect the impartial exercise of the prosecutorial function as a foundational element to the fair functioning of the administration of justice.

4.150 Given its political context, the IBAHRI is concerned about the recent events resulting in the suspension of the NDPP and the disbanding of the DSO, in particular its impact upon the fight against organised crime and upholding and protecting the rule of law.

Chapter 5: Conclusions and recommendations

Conclusions

5.151 The independence of the judiciary is universally recognised as of fundamental importance to the rule of law and the protection of human rights. Judicial independence is comprised of the institutional independence of the judicial branch from the other branches of government and the individual independence of judges, enabling them to exercise the judicial function in accordance with the law, free from any form of harassment, interference or intimidation. Any interference with judicial independence has significant implications for the rule of law, good governance and for public confidence in the operation of the legal system.

5.152 The South African Constitution, with its placing of respect for human rights and the rule of law at its core, is internationally regarded as being a model for a modern constitutional democracy. The people of South Africa placed trust in the court system to safeguard the process of formulating a new constitutional order and the new basis for the country. The Constitutional Court of South Africa is renowned for its ground-breaking decisions on human rights, particularly economic, social and cultural rights, and serves as an example to the rest of Africa and the world.

5.153 The continuing process of transformation was frequently cited to the delegation as underpinning the proposed reforms currently being debated in South Africa which are the subject of this report. The IBAHRI supports the South African Government's efforts in reforming and transforming the judiciary as it moves away from its past as an instrument of repression to one which stands clearly for the rule of law and the respect of human rights. Indeed, the government is to be commended for its efforts to create a justice system that has the protection of human rights at its heart. However, while the transformation of judiciary is essential, it must take place with appropriate respect for the independence of the courts.

5.154 The IBAHRI welcomed the frequent confirmations of the importance of the independence of the judiciary and the strengthening of the judicial system by the government, and its openness to consultation on the matter. It is important to emphasise in this regard that the conclusions and recommendations set out in the report do not imply that the South African Government is trying to deliberately undermine the independence of the judiciary. Also, the delegation received no information that the government had ever attempted to influence the decision-making process of a judge. Rather, our concerns relate to the fact that some of the reforms will expose the judiciary to the potential for real, not hypothetical, interference at a later date, and represent a step away from previous reforms which strengthened the independence of the judiciary.

5.155 The IBAHRI is concerned that the overall tenor of the reforms proposed in the Superior Courts Bill and the 14th Amendment to the Constitution Bill is one of increased executive control and influence over the judiciary. Even if this is motivated by a desire to improve the effectiveness and efficiency of the courts, it is perceived by some to represent a regression away from judicial

independence and a decrease in commitment to working with the judiciary themselves to strengthen judicial independence.

5.156 The IBAHRI believes that all members of the judiciary met by the delegation during the visit were strongly committed to the process of transformation and the need to reform judicial processes. The IBAHRI is convinced that the judiciary, as led by the Constitutional Court, is an important partner in the reform process, and is only motivated by a desire to strengthen judicial independence in order to improve the effectiveness of the courts, and not simply to protect its privileged position.

5.157 The IBAHRI welcomes the Minister of Justice's commitment to the preparation of a policy paper, and consultation with the judiciary on the issues contained in the bills before their consideration by parliament. The IBAHRI also welcomes a similar commitment by the Chair of the Portfolio Committee on Justice and Constitutional Development. The IBAHRI recommends that the government also consults a wider range of other stakeholders in the administration of justice. The IBAHRI makes itself available to discuss any of the issues raised in this report at a later date.

Recommendations

Court administration and budget

- While the IBAHRI acknowledges that the South African Government has taken necessary steps to transform the judiciary from an instrument of the apartheid regime to an institution which upholds democracy, the rule of law and respect for human rights, the IBAHRI believes that the Constitutional Court of South Africa should, nevertheless, retain the power to administer its own operations in order to properly promote and protect judicial independence.
- For the lower courts, the IBAHRI encourages the government to consider judicial control or a model of an independent agency responsible for the administration of the courts that effectively balances issues of independence, accountability and effectiveness.
- If the government chooses to maintain control over court administration, the IBAHRI recommends that the government delineates more specifically the areas where the judiciary has responsibility, with respect to both judicial and administrative functions, and institutionalises a process of consultation and supervision by the judiciary at all levels of the court system.

Rule-making powers

- The IBAHRI recommends that rule-making should remain the responsibility of the courts.
- The IBAHRI further recommends that the Constitutional Court should remain responsible for regulating its own practice and procedure.
- For other courts, in line with international best practice, a separate body composed of various stakeholders, including the judiciary, the legal profession and the DOJCD, is an appropriate process for the generation of rules and ensuring a broad consultation process.
- The Minister of Justice should not have the power to amend rules.

- To ensure that the courts operate effectively, and that rules are issued promptly, the IBAHRI believes that legislation should provide that rules issued by the board shall take effect within a set period of time (for example 30 days), after being laid before parliament unless the Minister, or a resolution of the parliament, rejects them, giving reasons.

Judicial appointments

- The IBAHRI urges the government to reconsider the amendments and strengthen the role of the Judicial Service Commission in any appointments.
- The IBAHRI urges the government to reconsider the way in which acting judicial appointments are made given the inherent risk that these appointments pose for judicial independence.

Judicial conduct

- The delegation recommends that a consensus agreement between the executive, legislature and judiciary be reached on the contents of the Judicial Code of Conduct before the adoption of the JSCA Bill.

Criticism of judges

- The IBAHRI encourages the government, political parties and the press to be temperate in their criticism of judicial decisions. Legitimate concerns about judicial conduct should be addressed through formal complaints procedures.