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11 October 2007

**TRANSFORMATION OF THE JUDICIARY: OVERVIEW OF THE SOUTH AFRICAN JUDICIAL EDUCATION INSTITUTE BILL [B4 - 2007]**

**1. Background**

This brief provides a summary and analysis of the South African Judicial Education Institute Bill [B 4 – 2007], which is presently before the Portfolio Committee for Justice and Constitutional Development for consideration, as well as giving an overview of certain aspects of the debates that have accompanied efforts to transform the judiciary. There are many issues that have emerged, some of which are highly controversial. One aspect to these debates has been assertion for the control of the higher courts, which has taken many forms. Of relevance here is the increasingly apparent tension between the need for a sufficiently representative judiciary<sup>1</sup> and respect for the principle of separation of powers (to which judicial independence is integral).

[The Portfolio Committee is also considering the Judicial Service Commission Amendment Bill, which contains provisions aimed at increasing judicial accountability. However, although these Bills are related, as this Bill is in a more advanced stage of consideration by the Committee, it will be discussed in a separate brief to follow].

Despite being generally regarded as the least controversial of a package of Bills aimed at transforming the judiciary, the South African Judicial Education Institute Bill, which establishes an Institute to provide judicial education and training to aspiring and appointed judicial officers, has nevertheless fallen under the same controversy - even suspicion - that has attached itself to the other Bills that form part of this package. Despite widespread agreement as to the need for judicial education and training, the earlier version of this Bill attracted a great deal of opposition as it proposed that such training take place at Justice College, which is state-run. The view was that the judiciary, and not the Department, should take direct and control any such initiative and that a state-controlled college or Institute would undermine public perception of the judiciary's independence.

**2. South African Judicial Education Institute Bill [B 4 – 2007]**

Traditionally, judges were appointed from the ranks of senior counsel. This is no longer the case, as all that the Constitution requires for the appointment of a judicial officer is that the candidate be suitably qualified and that he or she be a fit and proper person. It should be noted that until recently,

<sup>1</sup> Seedat, S notes that 'in South Africa, there has been a fair amount of debate on whether the pace of transformation is too slow, whether white candidates have been overlooked for appointments, and whether adequate measure are being taken to facilitate the entry of black and female candidates'. Seedat, S. Debating the transformation of the judiciary: rhetoric and substance. Idasa, ePoliticsSA - Edition 03, 2005. Judicial education and training is important in this regard as it creates the opportunity to increase the pool of potential candidates, particularly Black and women candidates, for appointment to the bench.



the majority of high court judges were white, middle-aged, affluent men.<sup>2</sup> Carpenter notes that 'today it is realised that while persons holding judicial office may be considerably more objective than the mythical man in the street, and while they are, almost without exception, honourable, and upright citizens who make every effort to adjudicate competently, impartially, and without fear or favour as required by their oath of office, to deny personal and cultural differences is to deny reality'. It is precisely for this reason that the Constitution requires that our judiciary reflect broadly the racial and gender composition of South Africa.

Judicial education and training is important in facilitating changes in the composition of judiciary so that it is representative of our society. It also affords the opportunity to create interventions that address broader issues, such as that of diversity and attitude. In this regard, section 180 of the Constitution provides for the enactment of national legislation to provide for training of judges. The manner in which such training is undertaken is vital if it is to uphold, and not undermine, the principle of judicial independence.

Typically, judicial education and training fulfils a number of roles or purposes. One such purpose is to enhance the competence of judges in the performance of their work, as well as to increase the pool of properly qualified persons who would be ready to serve on the bench. Apart from this, judicial training and education is also beneficial as a refresher for judges who have considerable experience on the bench. It should be noted that while judicial training and education appears common practice in many other countries (for example, the United States, the United Kingdom, Canada and Australia), South Africa lags behind in this respect.

In our country, there is a further factor: The new constitutional order presents an additional context for training and education, namely that of creating opportunities for addressing issues of diversity and representivity within the judiciary. Allegations of racism and sexism within the judiciary have prompted much discussion of how to address this problem, particularly the role of judicial education as an effective vehicle for supporting transformation.

To summarise, judicial education and training provides the opportunity to accomplish the following:

- The improvement of judicial performance. Traditionally judicial education programmes focus on the preparation of new appointees to the Bench; achieving uniformity and predictability in decision-making; equipping judges with knowledge of laws and procedures; and updating judges in new methods, laws and related areas of knowledge.
- Enhancement of judicial independence and integrity. The purpose of guaranteeing judicial independence is to ensure not only impartiality but the perception of impartiality.
- Transformation. Judicial education can be used as an effective instrument in a broader judicial reform programme. In South Africa, this has tended to focus on issues of race and gender.

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<sup>2</sup> Carpenter, G. Without fear or favour: ensuring the independence and credibility of the weakest and least dangerous branch of government. *Tydskrif vir Suid-Afrikaanse Reg*, Vol. 14, Issue 3, May 2005.



At present, Magistrates are compelled to undergo a formal judicial training course at Justice College. In addition, aspirant Magistrates must successfully complete a six-month period as a judicial officer in a temporary or acting capacity. In the Superior Courts, however, there is no statute that compels either aspirant or new judges to attend formal judicial training or any other education programme. In 2003, a committee that had been set up under by the previous Minister of Justice reported on the current judicial education trends. This Committee consulted widely and took into account trends in judicial education elsewhere in world, concluding that the present system of judicial training and education required 'urgent and fundamental adaptation'.<sup>3</sup>

While there appears to be agreement on the desirability of judicial education and training, there has been strong opposition to the Department's initial legislative proposal in this regard. In 2005, the Department proposed legislation that placed judicial training in a separate faculty at Justice College, which is a state-managed institution. Justice College is managed by a Chief Directorate in the Department of Justice and is mandated to provide practical legal training primarily to court officials in the employ of the Department. In other words, the proposed legislation placed judicial education and training in the hands of the Department and not the judiciary.<sup>4</sup> This, however, was met with strong objection, as it was felt that there were insufficient checks against intrusion by the Executive or other parties in the content of the curriculum and in the provision of training. 'To be truly successful and effective, the justice college should be controlled by judges and the South African judiciary should feel it owns the college, even if administrative functions are carried out by the Department'.<sup>5</sup> An Advisory Committee on Judicial Education, established by the Chief Justice,<sup>6</sup> decided on a draft Bill and referred it to the Minister for consideration. A consultation process took place in which the draft Bill was adapted. In February 2007, the Minister introduced the Bill presently before the Portfolio Committee that deals with judicial training and education.

### 3. Overview of the Bill's contents

- **Mandate and status of the Institute (clauses 2 and 3):** The Bill proposes that a South African Judicial Education Institute is established as a juristic person responsible for the judicial education and training of judicial officers and aspiring judicial officers.
- **Objects (clause 5):** The purpose of establishing such an institution is to enhance judicial accountability and the transformation of the judiciary by:
  - Providing 'proper, appropriate and transformational judicial education having due regard to our inherited legacy and our new constitutional dispensation'
  - Offering judicial education/training to aspiring and newly appointed judges.

<sup>3</sup> See Memorandum to South African Judicial Education Bill [B4 – 2007].

<sup>4</sup> South African National Justice College Bill.

<sup>5</sup> Seedat, S. Debating the transformation of the judiciary: rhetoric and substance. ePoliticsSA- Edition 03, 2005

<sup>6</sup> This advisory committee included representatives of the following: Judges, magistrates, the Judicial Services Commission, the Magistrate's Commission, the Justice Ministry, the Director-General: Department of Justice and Constitutional development, the General Bar Council, the Law Society, the National Prosecuting Authority, magistrates' organisations, the Justice College and the Society of Law Deans.





- Providing continuing education for experienced judicial officers.
- **Functions (clause 5):** The Bill lists the Institute's functions, which include:
  - Establishing, developing, maintaining and providing judicial education and professional training for judicial officers.
  - Providing entry level education and training for aspiring judges to enhance their suitability for appointment.
  - Conducting research into judicial education and professional training and liaising with similar training institutions.
  - Promoting, through education and training, the quality and efficiency of the administration of justice.
  - Promoting the independence, impartiality, dignity, accessibility and effectiveness of the courts.
  - Providing services to foreign juridical institutions and courts.
  - Publishing contributions to matters of relevance to the Institute.
- **Functions (Clause 5):** In order to perform its functions the Institute must employ:
  - A Director to head the Institute.
  - A Registrar to head the Institute's administration.
  - An Operations Officer to prepare the quarterly management reports to the Director-General.
  - Academic staff and procure the services of suitably qualified judicial educators.
  - The necessary administrative staff.

#### **Governance and operational matters (clauses 7 ff)**

- **Establishment, composition, and term of office of Council (clause 7):** The Bill establishes a Council which is responsible for the Institute's governance. The Bill stipulates that demographic and gender considerations must be taken into account in the Council's composition. It should be noted that the Judiciary is to be well-represented on the Council. The 21 member Council is composed as follows:
  - Chairperson: Chief Justice.
  - Deputy Chairperson: Deputy Chief Justice.
  - The Minister (or her nominee).
  - Constitutional Court Judge.
  - A person or judge nominated by the Judicial Service Commission from its ranks.
  - The President of the Supreme Court of Appeal.
  - 2 Judges Presidents (JPs) and 2 other judges (one of whom must be a woman) (nominated by the CJ after consultation with the JPs).
  - 3 Magistrates, one of whom must be a woman, appointed by the Magistrates Commission. Also one must be a Regional Court Magistrate.
  - A retired judge.
  - The Director of the Institute.
  - An Advocate nominated by the general Council of the Bar of South Africa.
  - An Attorney nominated by the Law Society of South Africa.
  - 2 university teachers of law, nominated by the South African Deans Association.



- 2 other members, who are members of the public not involved in the administration of justice.
- **Term of office:** Council members' are appointed for a period of five years and may be reappointed on expiry of their term of office.
- **Remuneration of Council members:** Except for expenses incurred, Council members are not remunerated for their services on the Council.
- **Standing committees (clause 8):** The Council must create standing committees to take responsibility for the each of the following areas of the Institute's activities:
  - Curriculum planning and development.
  - Oversight of particular aspects of juridical training.
  - Budget and finance.
  - Personnel management.
  - General administration.
- **Powers and duties (clause 10):** The Bill sets out the various powers and duties of the Council. The Bill stipulates (it uses the word must) the following duties: The Council must appoint staff; engage in research and contract suitably employed persons/institutions to do so on its behalf; establish and maintain contact with the Judicial Services Commission, the Magistrates' Commission, Heads of Court, the organised legal profession, and other entities with an interest in judicial education.
- **Appointment of Director (clause 6):** The Director is employed as the Institute's head and Chief Executive Officer. As such he or she is responsible for the Institutes' administration. He or she manages and directs the Institute's activities subject to the direction of the Council and appoints and supervises staff. The Director's salary is determined by the Minister with the concurrence of the Council and after consultation with the Minister of Finance. If the Director is a judicial officer his or her remuneration must be on such conditions as are determined in terms of the legislation dealing with the remuneration of judicial officers.
- **Finances (clause 10)**
  - *Appropriation on Departmental Vote.* The Institute is to be funded by monies appropriated by Parliament to the Departmental Vote for that purpose. The funds are to be earmarked, and may not be used for any other purpose (without the approval of National Treasury).
  - *Accounting officer.* The Director-General is responsible for the accounting of monies received or paid out on account of the Institute. The usual accounting and related records must be kept, financial statements prepared and audited.
- **Remuneration of the staff (clause 12):** The Council may determine, with the concurrence of the Minister, the remuneration, allowances, benefits etc of each member of staff.



- **Accountability (clause 13):** The Council must prepare and submit its annual report to the Minister, which must be accompanied by the audited financial statements, the auditor's report, as well as a report on the activities undertaken and a progress report on achievements in realising the objects of the legislation. The Minister must table the report in Parliament.
- **Guidelines (clause 14):** The Chief Justice may issue guidelines, with the concurrence of the Minister, in respect of any matter concerning the exercise of power and the performance of any function of the Institute.
- **Transitional provisions (clause 17):** Training provisions must commence as from a date to be fixed by the Minister in the Gazette. However, this date cannot be announced before the necessary arrangements are made for the Institute to be accommodated, equipped and staffed.

#### **4. Concluding remarks: Issues for consideration**

##### **4.1. Concerns regarding the independence of the new Institute**

The Institute is given juristic (legal) personality. Whether this can be equated with independence is debateable. On the one hand, the Council is a distinct entity, with a seat to be determined by the Council. Also, the Bill addresses earlier concerns regarding the judiciary's role in determining the curricula. This is clearly the Council's responsibility. In this regard, the composition of the Council clearly favours judicial participation and control. Although the Minister or her nominee has a place on the Council, members are drawn largely from the judiciary, magistracy or from the ranks of the legal profession.

##### **4.2. Financial accountability.**

On the other hand is the issue of financial accountability. The Institute's monies are placed within the Department's Budget allocation (probably under Programme 5: Auxiliary and related services (or its equivalent)), although they are 'ringfenced' for sole use by the Institute. In other words, the Department will act as a conduit for the funds. While this is an arrangement that is applicable to many institutions, it has nonetheless created confusion regarding the degree of independence enjoyed by such institutions (even those whose independence is entrenched by the Constitution). A further consideration is the public's perception of such an arrangement. Is this the only arrangement that can be employed to ensure the allocation of funds?

The Bill provides that the Director-General for the Department, and not an official employed by the Institute, is responsible for accounting for monies spent and received. The question arises as to the extent to which such an arrangement allows for the Director-General, as the accounting officer, to interfere in the manner in which the Institute spends its funds?

In addition, the Institute must submit its annual report to the Minister. She, in turn, is responsible for tabling the report in Parliament (providing Parliament the opportunity to exercise oversight). All of the





above have implications for the degree of independence enjoyed by the Institute. Is the Institute accountable to the Minister?

**4.3. Use of existing resources.**

The earlier version of the Bill was unsatisfactory as it proposed using Justice College, which is the state run training institution for Magistrates and other officials within the Department of Justice and Constitutional Development. No costing has been undertaken for the Bill, although it is clear that it will require considerable resources. How is the Bill to be implemented? Is there any plan to make any use the existing facilities at Justice College or, indeed, the facilities of any other existing education or training institutions? This links to the issue of the Institute's location. Has this been decided? In other words, are there any proposals/plans regarding how this Institute is to be built/established?

**4.4. Staff issues.** Staff are to be employed by the Council? How, in practical terms, are their salaries and conditions of employment to be decided? Will they fall under the public service?

**4.5. Costing.** The memorandum indicates that this Bill has not been costed. Why not?



#### **4.6. Guidelines.**

The Bill empowers the Chief Justice to make guidelines on any matter with the concurrence of the Minister. What precisely is envisaged by this clause? The making of guidelines requires the concurrence of the Minister. Is it not possible that this might create for a situation where there are lengthy delays in the making of such guidelines? To what extent can this provision be regarded as creating the potential for/possibility of executive interference in the Institute's activities?

#### **4.7. White paper on transformation of the judiciary. What is the progress in this regard?**

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#### **Sources**

Carpenter, G. Without fear or favour: ensuring the independence and credibility of the weakest and least dangerous branch of government. *Tydskrif vir Suid-Afrikaanse Reg*, Vol. 14, Issue 3, May 2005.

Hoffman, P. The strategy and tactics for reforming the Judiciary. FW de Klerk Foundation June 2007.

Seedat, S. Debating the transformation of the judiciary: rhetoric and substance. *Idasa, ePoliticsSA - Edition 03*, 2005.

Tien Dung, L. Judicial Independence in Transitional Countries. UNDP Oslo Governance Centre. January 2003.

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