

Peace and Stability

1. Introduction

- 1.1 This discussion document seeks to provide an account of the work that has been done by the Peace and Stability sub-committee and in particular it focuses on the measures taken by Government to:
- (a) intensify the fight against all forms of crime including the resurgence of attacks and threats of violence on non nationals and corruption; and
 - (b) Intensify the transformation of the judiciary to ensure universal and equal access to justice, in particular to give a report on the implementation of the Polokwane resolutions and to highlight aspects of court administration and rule-making that require a further debate.

2. Steps taken to intensify the fight against crime and corruption

- 2.1 The unacceptable levels of crime continue to threaten peace and stability and undermine economic growth and tarnish the image of the Republic. The sub-committee notes the following challenges that face the Justice Crime Prevention and Security (JCPS) cluster in its efforts to fight crime and corruption:
- (a) The insufficient capacity in areas of the forensic, detective, investigation and prosecution services that hamper the cluster's efforts to reduce the overall levels of crime particularly "trio" and "contact" crimes. The trio crimes include car hijacking, business and house robberies while contact crimes include assault, murder and rape. The lack of victim friendly facilities at police stations has a negative impact on people who are victims of crime.
 - (b) The prevalence of corruption in the justice system which erodes trust and confidence in the criminal justice system. The situation is aggravated by a weak implementation of the communication strategy in relation to the achievements/progress within the JCPS environment.
 - (c) The prevalent perceptions that the Criminal Justice System (CJS) is ineffective in dealing with crime and corruption.
 - (d) The court processes, case backlogs, undue length of remand detention, inadequate use of diversion programmes, overcrowding in correctional centres, limited rehabilitation and

welfare programs for first and young offenders are all issues requiring a more coordinated approach.

- (e) The integrity of the National Population Register is under threat and the cluster will put mechanisms in place to combat this threat. There is also a need to effectively manage immigration to ensure national security and contribute to development.
- (f) Cyber crime is a new generation crime which has a negative effect on the economy of the country. It requires a focussed strategy to address it. Investing in research to understand cyber crime as a business for those who commit it, will enable the State to counter cyber crime in addition to the normal crime fighting tactics. In other words, cyber crime requires more sophisticated interventions to get to the core of it.
- (g) The renewed threats and actual incidents of violence against non nationals undermine our Constitution, tarnish the reputation and image of the country against the backdrop of the successful staging of the most spectacular sporting event, the 2010 FIFA World Cup.
- (h) Regular high level meetings led by the Minister of Justice and attended by the JCPS Cluster DG's and the judiciary represented by the Chief Justice will be held to address effective ways to remove obstacles and blockages in the processing of cases from arrest, investigation, prosecution, trial, incarceration and reintegration into society.
- (i) The need to have a multi dimensional and integrated approach on dealing with management and control of our borders so that we are able to effectively curb and combat transnational and/or organised crime. To this end a national Border Management Agency will be established to secure and safeguard the Republic and its interests.

2.2 The JCPS cluster is taking drastic steps to address crime and uproot its causes. The short to immediate term interventions include:

- 2.2.1 Establishing, for each province, two dedicated regional courts to deal with corruption cases based on the good experiences and lessons learnt from the successful Dedicated 2010 FIFA World Cup courts. These courts will also deal with the case backlog which is significantly higher in the Regional Courts due to the increased jurisdiction of the court to deal with more serious offences.
- 2.2.2 Establishing a dedicated multi disciplinary task team whose sole mandate will be to deal with corruption related cases. The committee

would include the Directorate for Special Crimes (the Hawks), the National Prosecuting Authority and the Special Investigating Unit.

- 2.3 With regard to resurgence of the sporadic acts of violence or threat of violence against non nationals the following strong measures need to be taken:
- (a) the need for the Movement and Government to denounce any crime committed against non-nationals including the xenophobic related attacks and the deployment of security forces in identified flashpoints;
 - (b) where perpetrators of violence and crime against non nationals then these be prioritized and prosecuted and finalized timely to dispel the perceptions that these crimes are not dealt with effectively;
 - (c) where necessary introduce legislative amendments to strengthen the regulatory framework; and
 - (d) implement integrated immigration management strategies and systems, including the review of legislation.

3. Accelerating the transformation of the Judiciary

- 3.1 A radical transformation of the court system and institutional reforms are necessary if South Africans are to enjoy equal benefits and protection of the law guaranteed by the Constitution.
- 3.2 The following are some of the salient deficiencies of the court system which require attention:
- (a) The Constitutional Court and the Supreme Court of Appeal are both accorded Supreme status by the Constitution thus providing a dual centre (two centres) of jurisprudence.
 - (b) The High Courts, despite their names having been recently been changed to reflect the names of the provinces in which they are situated, still function in terms of the territorial jurisdictions of the pre-1994 boundaries of the defunct TBVC Homelands and RSA territory, hence the North Gauteng High Court exercises jurisdiction over the old Transvaal (which included Mpumalanga, Limpopo, Brits, Potchefstroom, Brits, all of which are, in terms of the Constitution, not part of Gauteng).
 - (c) Regional Courts, although their race and gender demographics have improved significantly since 1994, still carry their Apartheid baggage of excising only criminal jurisdiction through which

these courts were used as tools to deal harshly with offences emanating from the liberation struggle or resistance against the unjust policies of Apartheid government.

- (d) The Magistrates' Courts, although they are the closest point of contact where the majority of our people engage with the legal system, were hugely under resourced in comparison with the High Courts and lacked legitimacy in the eyes of community it served.
- (e) The jurisdictional demarcations of the courts excluded the majority from equal participation in the legal system.
- (f) Obtaining legal redress remained elusive to the poor and the indigent and the courts lacked effective measures to address the needs of the vulnerable members of society.

3.3 The institutional and structural defects manifest themselves in a number of ways. Although the courts enjoy adjudicative and decisional independence under the Constitution, they lack institutional accountability and institutional independence which reflects in the following scenarios:

- (a) whereas the adjudicative accountability is inherent in the appeal and review of the decisions of the court of a lower level by a higher ranking court, the Chief Justice lack authority in law to take administrative control of the judiciary. There are no governance structures to assist him/her in his/her judicial leadership role; and
- (b) the budget determination and rule making, even in relation to aspects that are closest to judicial functions, remain the preserve of the Executive with no, or limited input from the judiciary;

4. Status of the Constitutional Amendment Bill and the Superior Courts Bill

4.1 The Constitution Amendment Bill, 2010 and the Superior Courts Bill, 2010 were revised to reflect the transformative goals sought to be achieved and both Bills were published for comments. Among others, the Bills provide for:

- (a) the affirmation of the Constitutional Court as the Apex Court and the Chief Justice as the head of the judiciary;

- (b) the affirmation of the Chief Justice as the Head of the judiciary and assigning on him or her the power to develop and monitor norms and standards for courts to enhance efficiency of the administration of justice;
- (c) the integration of the Labour Appeal Court and the Labour Court into the Supreme Court of Appeal and the High Court respectively; and
- (d) the substitution of magistrates' courts for the lower courts to make the magistracy part of the judiciary.

4.2 Substantive comments on the Bills were received by the deadline of 30 June 2010. Most of the comments relate to the planned relocation of the seat of the Eastern Cape High Court from Grahamstown to Bisho, which appears to have been misunderstood by the business community of Grahamstown. The intended move is not to close the Grahamstown High Court. Government has invested in the infrastructure of the court and it will be insensible to close down the court. What is sought to be achieved is that the majority of the areas in the Eastern Cape province, in particular from the remote poverty stricken areas, are closer to Bisho than Grahamstown. The community of these areas continue to endure hardship created by the demarcations of the past which were based on the segregation policy of the Apartheid government. The Superior Courts Bill seeks to address the effect of this legacy so that people can have true access to justice. The Bisho High Court will be upgraded to provide decent services to the community who are closer, and have easy access to the Bisho High Court, and thereby reduce the huge costs associated with the current seat in Grahamstown.

4.3 The Constitution also requires each Provincial legislature to debate the Constitution Amendment Bill and submit its views thereon. The views of the Provincial legislatures are still awaited and will be captured in the evaluation report that will be submitted to Parliament soon to facilitate the Parliamentary process

5. Legislation enacted recently and other programmes geared to advance the transformation of the judicial system

5.1 To further promote judicial accountability, the Judicial Service Amendment Act, 2008 enacted by Parliament in 2009 came into operation on 01 June 2010. Among others, the Act provides for:

- (a) the establishment of comprehensive complaints mechanism to strengthen the capacity of the JSC and the Chief Justice to deal with all forms of complaints against judicial officers, including complaints related to the denial of access to justice to citizens;

- (b) the drafting of the Code of judicial conduct to set acceptable behavioural standards for the judiciary. (The Chief Justice has recently compiled a draft Code, which I will table before Parliament as required by the Act); and
 - (c) The disclosure of financial interest by judges to enhance judicial independence and impartiality.
- 5.2 Other Acts that were passed by Parliament recently include the Child Justice Act, 2008. the amendment to the Children's Act 2005 to provide for the needs of children in conflict with the law and those in need of care respectively. The Child Justice Act and the Amendments to the Children's Act were implemented with effect from 01 April 2010. Another significant Act is the Jurisdiction of Regional Courts Amendment Act, 2008 which extends civil jurisdiction to the regional courts as part of the transformation of the lower courts. The latter Act was enacted in 2008 and is due to come into operation in August 2010.
- 5.3 Government continues to build courts in rural and traditionally Black areas, and Branch Courts in the these areas are being upgraded and converted into proper courts to provide full services to the local communities served by these courts. The Branch Courts were established by the old regime in townships and rural areas to provide limited criminal-law services. The conversion of these courts into full services courts is with a view to correct the anomaly of the magisterial districts drawn by the old regime which excluded and marginalised the majority from justice system.

6. Court Administration

- 6.1 South Africa, similarly to most commonwealth countries follows an executive-controlled court administration system which places the administration of courts and control of their budgets under the control of the Minister of Justice and Constitutional Development.
- 6.2 However, when the Constitutional Court was established in 1995, there was deviation from the traditional executive-controlled court administration. The Constitutional Court Complementary Act, 1995 (CCC Act) introduced a shared court administration model which gives the Chief Justice certain administration powers and functions. It is important to consider the circumstances which prevailed at the time the Constitutional Court was established to find the basis for the departure from the traditional executive-led court administration. At the time of the establishment of the Constitutional Court in 1995 the public administration, like courts, was untransformed and it was found appropriate to establish a court administration model that would

enable the Constitutional Court to function efficiently and differently from the other courts in its the transformative role and thereby to free the court from the bureaucratic processes within the executive-led administration.

- 6.3 In terms of the CCC Act, the administration powers and functions assigned to the Chief Justice include the determination of the budget and the appointment of staff for the court and the power to make rules for the court. To provide checks and balances for the limited administration autonomy of the court, in terms of the CCC Act the Chief Justice exercises the administration powers with concurrence of the Minister. The budget determined by the Chief Justice is part of the budget voted by Parliament for the DoJ&CD and financial accountability is placed on the Director-General.
- 6.4 The versions of the Constitution Sixteenth Amendment Act Bill and the Superior Bill which were introduced in 2005 by the previous administration led to a public outcry resulting in the then President withdrawing the Bills, not because the Bills introduced anything new in relation to the executive-controlled court administration, but mainly for the following reasons:
 - (a) the Bills sought to “constitutionalise” court administration by placing the Minister’s court administration powers and functions in the Constitution, when presently such powers are contained in national legislation (Supreme Court Act of 1959 and the Magistrates Court Act, 1944); and
 - (b) the Bills sought to erode the shared-court administration model established for the Constitutional Court by placing the administration of the court solely under the Minister.
- 6.5 The Polokwane resolution, in relation to court administration and rule making, restate the policy position in the Constitution Sixteenth Amendment Act Bill and the Superior Bill as they were published in 2005 and depart from the limited administration autonomy of the Constitutional Court. The Polokwane resolution provides that Court Administration and Rule making are the ultimate responsibility of the Minister responsible for the administration of justice. Polokwane further acknowledged that the Chief Justice is the head of the judicial authority and is responsible for the development and implementation of norms and standards for the exercise of judicial functions.
- 6.6 The trends emerging in other democracies indicate the need for the judiciary to take control of their courts if the quest for an efficient and accessible administration of justice is to be realised. It has shown that a judicial officer will have ability of taking control of the court if the judiciary has greater involvement in the administration of aspects that are closely related to the performance of judicial functions, such as arrangement of the sitting of courts and case flow management

functions. The Executive-controlled court administration does not provide adequate opportunities for the involvement of the judiciary in the management of the court.

- 6.7 There is therefore a need for a debate on these two contested areas of judicial reform and the broader issues on the interpretation of the Constitution within the Movement. At present the debate on the judicial reform on the Constitution occurs outside the political space. The lack of debate within and led by the Movement has not only led to the neo liberal ideologies and the dominant views of the elites influencing the unintended constitutional gains at the expense of social justice and the developmental nature of our democratic State, but reflects a gradual erosion of the tradition of discourse on these fundamental topics within the Movement. We need to remind ourselves that the Constitution is the aftermath of the policy documents generated by the Movement which include –
- (a) the African Claims of 1943 where aspects of equality and social justice featured prominently
 - (b) the Freedom Charter of 1955 which demanded all to be equal before the law
 - (c) The Constitutional Principles for a Democratic South Africa adopted in 1991 which provided, among others, that *all government structures and institutions shall be based on democratic principles, popular participation, accountability and accessibility. A unified South Africa shall not be an over-centralised, impersonal and over bureaucratized country*
- 6.8 The concept of court administration and judicial independence within the context of separation of powers have evolved (a fact acknowledged in several court judgments by foreign and our Constitutional Court, some of which had influenced the development of this concept significantly) and jurisdictions which have adopted a constitutional framework similar to ours have redefined and adopted court administration models suited to their circumstances. In the South African context the following major policy developments will have a significant impact on judicial reform, in particular on the choice of the court administration system:
- (a) the model of our constitutional democracy in which the Constitution reigns supreme has radically changed the role of the courts. While traditionally courts exist to resolve disputes on the basis of law and fact, the power of the courts to strike down legislation made by Parliament (power of judicial review) and the power to review the conduct of the President and the Executive place the courts in delicate relationship with the two Branches of Government;

- (b) the progressive and enforceable Bill of Rights in our Constitution which describes the character of our developmental State and social justice entrusts upon courts the power to review the programmes of the Executive Branch of government which seek to advance the improvement of the quality of life of people. The example of the decisions of the Constitutional Court in *Grootboom* (right to housing), *TAC Treatment* (right to HIV antiviral treatment) and *Nyathi* (enforceability of claims Government) are some of the examples of the extensive power of the courts to encroach into the policy terrain of the Executive within the confines of the Constitution. This places the judiciary in delicate position in relation to the Executive; and
 - (c) the trends internationally indicate that institutional reform is necessary if the judiciary is to be accountable. In the South African context, the judiciary as an institution does not have an effective governance framework to exercise accountability which is an essential element of access to justice. It has become a global trend to define the rules of governance by way of a Statute for an effective and efficient judicial administration.
- 6.9 The forum of Heads of Courts, a practice established in the eighties and which the post 1994 leadership of the judiciary continue to use, does not subscribe to any written norms that make the judiciary accountable to the people it serve.
- 6.10 The current model of court administration in terms of which the Executive accounts on behalf of the judiciary has shortcomings. It does not provide any norms or standards in terms of which the Executive exercises its administrative accountability in respect of aspects that are within the preserve of the judiciary;
- 6.11 The current rule making dispensation is fragmented and disjointed. Although in terms of the Constitution the rules of courts are a form of subordinate legislation, Parliament and the Executive have no role in the rule-making for the Constitutional Court assigned by the CCC Act to the Chief Justice. Some of these rules have a huge impact on access to justice. The 1984 legislation (Act on the Rules Board for Courts) assigns the power to make rules for the Magistrates' Courts and High Court on the Rules Board for Courts of Law subject to approval by the Minister. When the Labour Court and the Land Claims Court were established in 1995, they too were given autonomy to make their own rules without the participation of the Executive and the legislature, which is anomalous.

- 6.12 Therefore placing court administration and rule making authority under the Minister as was envisaged in the 2005 Bills and endorsed by the Polokwane resolutions regarding these matters may not be entirely consistent with the separation of powers and the independence of the judiciary principles.

7. The existing precedents and models of court administrations

- 7.1 There are ample precedents within the South African governance framework and internationally which may be used as a reference point in designing a court administration model suited to our revolutionary and progressive Constitution. Some of the principles applicable to the separate institutional governance model established for Parliament as a separate Branch of Government and the Constitutional Commissions in Chapter 9 of the Constitution may be adapted to fit the desired court administration framework. The unique and delicate position of the judiciary is, in certain respect, similar to Constitutional Commissions whose independence is entrenched in the Constitution. The Auditor-General has, in view of its unique audit oversight over both the Executive and Legislative Branches of Government, underwent a similar transformation process which led to the enactment of the Public Audit Act of 2004 which gives the institution a separate institutional identity and a special mechanism for accounting to Parliament. The A-G model is capable of adaptation to the court administration environment.

8. The court administration model preferred by the South African judiciary

- 8.1 The views of the judiciary on the subject is well documented. The conference statements and declarations by judges during the Judges Colloquia of 2000 and 2005, the Judicial Symposium of 2003 and the Judges Conference of 2009 proposes a judicially controlled administration modelled along the US Judicial Administration model, where the judiciary accounts directly to the Congress. The magistrates expressed the same sentiments during the Magistrates' Conference of 2007.
- 8.2 The Chief Justice has recently written a proposal on the subject where he explored different models and suggests a model which suggest substantial changes to the current court administration framework. The proposal gives a useful insight and will enrich the process of developing a model suited to our own environment.
- 8.3 It is important to note that there is no model adopted by any country that will suit the South African circumstances without any adaptation. The nature of the South African constitutional framework and the peculiar position of the judiciary in view of its power of judicial review

and enforceable Bill of rights does not, for example, suit the US court administration model.

- 8.4 A form of court administration model through a Court Administration Agency which requires a different form of administrative accountability (like, but not identical to the AG's model) may be a viable option for the South African situation.

Conclusion

In conclusion the NGC is requested to:

- note the measures which are being put in place to deal effectively with violence and crimes committed against non national;
- note the progress made with regard to the implementation of the Polokwane resolutions to accelerate judicial reform;
- sanction the process of the development of an Alternative Judicial Administration Framework for South Africa which would enable the judiciary to have a meaningful contribution in the administration of courts; and
- the development of appropriate mechanisms and systems to give effect to the desired policy be undertaken.