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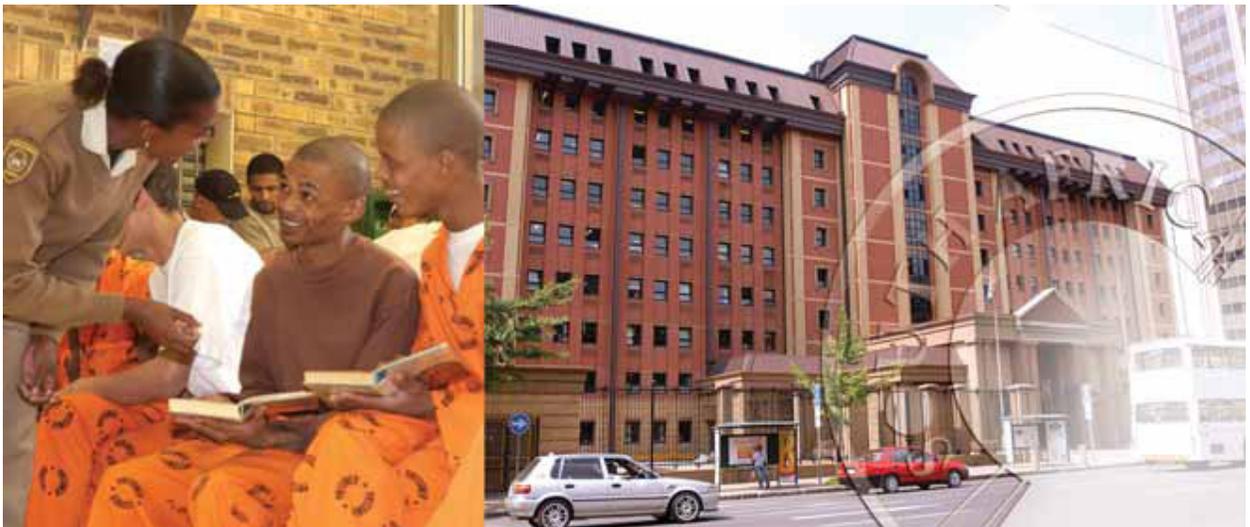
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Research Report for the Centre of Rhetoric Studies

University of Cape Town

A Rhetorical Overview of the South African Judicial System since 1994

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1. Introduction

When the new democratic era came into being, the Department of Justice was to inherit a department that had upheld exploitative racial segregation in all aspects of the law. Prior to 1994 ¹the apartheid era judiciary acted as an extension of Executive power through its regular enforcement of repressive and racially biased legislation. South African citizens were not equal before the law. Laws kept the ²racess separate in everyday interactions and geographically. The rhetoric accompanying apartheid emphasized the “superiority” of the white race. For the Department of Justice and Constitutional Development (Doj & CD) ³transformation began with the fusion of the so called Bantustan Departments of Justice as well as the Apartheid Department of Justice, into a new Doj & CD. ⁴The adoption of the Interim Constitution in 1994, signaled a new dawn for South Africa. The document proclaimed as ‘a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence.

The Department of Justice and Constitutional Development has the core aim of upholding and protecting the Constitution of the Republic Of South Africa, 1996 (Act 108 of 1996) and the rule of law. The three tiers of Government are the Legislature, the Executive and the Judiciary. All three tiers are separate, the Judiciary is independent. This is to ensure accountability and transparency. The Doj & CD ⁵aims to render accessible, fair, speedy and cost – effective administration of justice in the interest of a safer and more secure South Africa.

The Doj & CD was faced with the challenge of drafting new legislation, owing to the fact that ⁶legal precedence developed during apartheid is of limited relevance to issues of good governance, human

¹ Idasa Cape Town Democracy Centre, Judicial Independence and Judicial Accountability in South Africa” Judicial Accountability Mechanisms: A resource Document, March 2007

² (ed.) Todd J, Bottos L.C, Rougier N, Political Transformation and National Identity Change: Comparative Perspectives, 2008

³ Ms. B. Mabandla Minister of Justice & Constitutional Development, Department of Justice & Constitutional Development, Justice Medium term Strategy Framework 2005/06 – 2008/09

⁴ TRANSFORMATION IN THE JUDICIARY – A CONSTITUTIONAL IMPERATIVE , (Inaugural Lecture, University of the Free State, 6 October 2004)

⁵ Burger E, The South Africa Year Book 2006/2007” GCIS, page 387

⁶ Idasa, Judicial Independence And Judicial Accountability in South Africa: Judicial Accountability Mechanisms: A resource Document, March 2007, Cape Town Democracy Centre

rights and judicial independence, decisions made by the South African judiciary today are of greater legal significance.

The Doj & CD has the mandate of guaranteeing liberty and equality which are the cornerstones of democracy through providing oversight into the Chapter 9 Institutions. The ⁷Department embodied its notion of Justice in a landmark document that came to be known as Justice Vision 2000.

This paper will present a discussion which examines five areas pertaining to justice and constitutional development in South Africa: South Africa's record in ratifying, domesticating and reporting under international human rights treaties, the independence of the judiciary and the National Prosecuting Authority, the implementation of laws, Crime and punishment and Access to justice. The paper will close with a discussion on the Justice System and deliberation. The final issue to be discussed will be a look at Constitutional Hill in Johannesburg, and the symbolic meaning of the Constitutional Court building.

2. THE ROLE OF THE DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

The mandate of the Doj & CD is to ensure that the conceptualization of Justice was rooted in the core value of respect for human rights. The Doj & CD is ⁸responsible for rendering attorney and advocacy services to the State and for drafting legislation. This entails litigating on behalf of the government, giving quality legal opinion and ensuring that all legislation passed by Parliament conforms to the Constitution and its values. The Doj & CD ⁹four national core branches are Court Services, Master of the High Court, Legal Advisory Services and Legislation and Constitutional Development.

In terms of ¹⁰section 165 of the Constitution, ¹¹the judicial authority in South Africa is vested in the courts, which are independent and subject only to the Constitution and the law. Structures such as the

⁷ Ms. B. Mabandla Minister of Justice & Constitutional Development, Department of Justice & Constitutional Development, Justice Medium term Strategy Framework 2005/06 – 2008/09

⁸ Ms. B. Mabandla Minister of Justice & Constitutional Development, Department of Justice & Constitutional Development, Justice Medium term Strategy Framework 2005/06 – 2008/09

⁹ Burger D, "South African Year Book 2006/2007" GCIS

¹⁰ Constitution of the Republic of South Africa, 1996 Act 108 of 1996

¹¹ Burger D, "South African Year Book 2006/2007" GCIS

National Prosecuting Authority Court Services, ¹²the Master of the High Court have established provincial and local structures linked to courts to coordinate the implementation of national policy.

Chapter 8 of the ¹³Constitution of South Africa makes provision for the Constitutional Court, Supreme Court of Appeal, High Courts, magistrates' Courts and Courts established or recognized in terms of an Act of Parliament. The above mentioned Courts are responsible for the following services:

- Constitutional Court: is the ¹⁴highest court in all Constitutional matters. The Constitutional Court has the power to adjudicate disputes between organs of State concerning the Constitutional Status, powers or functions of any of those organs of state or that may decide on the Constitutionality or any amendment to the Constitution or any parliamentary or provincial bill.
- Supreme Court of Appeal: ¹⁵has jurisdiction to hear and determine an appeal against any decision of a high court.
- High Courts: ¹⁶deliberate on matters of importance which lower courts cannot make a ruling upon.
- Magistrate Courts:¹⁷ facilitated the separation of functions pertaining to the judiciary, protection and administration.

The following constitutional ¹⁸institutions, among other things, were established to strengthen constitutional democracy:

- the South African Human Rights Commission (SAHRC) promotes and monitors the observance of human rights in South Africa
- the Commission on Gender Equality (CGE) aims to create a society free from gender discrimination and any other forms of oppression

¹² Burger D, "South African Year Book 2006/2007" GCIS

¹³ Burger D, "South African Year Book 2006/2007" GCIS, page 388

¹⁴ Burger D, "South African Year Book 2006/2007" GCIS, page 388

¹⁵ Burger D, "South African Year Book 2006/2007" GCIS, page 388

¹⁶ Burger D, "South African Year Book 2006/2007" GCIS, page 388

¹⁷ Burger D, "South African Year Book 2006/2007" GCIS, page 388

¹⁸ Burger D, "South African Year Book 2007/2008" GCIS, page 362

- the Public Protector investigates any alleged improper, unlawful or prejudicial conduct in state affairs or in public administration in any sphere of government.

The Department of ¹⁹Justice and Constitutional Development administers the following public entities:

- the Special Investigating Unit (SIU) provides professional forensic investigating and litigating services to all state institutions at national, provincial and local level to combat maladministration, corruption and fraud, and to protect state assets and public money
- the Legal Aid Board (LAB) provides legal aid and representation to indigent people at the State's expense.
- The department has received a further R1,9 billion to, among other things, increase court capacity, reduce case backlogs, modernize the integrated justice sector, and increase the statutory provisions for judges and magistrates' salaries over the next couple of years

A report published by AfriMAP and the Open Society Foundation entitled "*South Africa: Justice and the Rule of Law*" identified key areas in terms of law and Constitutional Development in South Africa, they will be discussed under the headings of : (1) South Africa's record in ratifying, domesticating and reporting under international human rights treaties, (2) Independence of the Judiciary and the NPA (3) The implementation of laws, (4) Crime and punishment, and (5) Accessibility of the courts to ordinary South Africans.

2.1 South Africa's record in ratifying, domesticating and reporting under international human Rights treaties

The South African Government has signed and is party to five highly significant pieces of international legislations, these being:

- The International Covenant on Civil and Political Rights

¹⁹ Burger D, "South African Year Book 2007/2008" GCIS, page 362

- The Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment
- The Convention on the Elimination of All Forms of Discrimination Against Women
- The International Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Rights on the Child

South Africa has signed but not ratified:

- The international Convention on Economic, Social and Cultural Rights
- The Convention on the Political Rights of Women
- The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

In addition to ²⁰South Africa's failure to become party to or ratify important international human rights law, South Africa lacks mechanisms to enact domestic legislation in accordance with international treatise once these have been ratified, and is failing to meet its reporting obligations under international treaties.

2.2 The independence of the judiciary and the National Prosecuting Authority

Judicial independence is typically understood as ²¹a judiciary confident to give judgments without threat from or influence by the Executive or the Legislature.

The following legislation deals with issues of discipline & ethics and education of Judges:

- Judicial Services Commission Amendment Bill
- Judicial Conduct Tribunal Bill
- South African Judicial Education Institute Bill (deals with Judicial education)

²⁰ National Democratic Convention, Justice Draft Policy Document, 2005 (T)

²¹ Seedat S, "Tread warily in judging the judges", Cape Times, 11 April 2005

2.2.1 Judicial Conduct

Judges are ²²informally regulated by a 34 clause code (Guidelines for Judges of South Africa) drafted and issued by senior judges and the Chief Justice in 2000. These serve as guidelines without any legally binding sanctions for breach. The bills, the Judicial Services Commission Amendment Bill and the Judicial Conduct Tribunal Bill are targeted at outlining judicial behaviour and potential disciplinary action. These bills introduce 5 categories of conduct which can subject a judge to potential disciplinary action²³:

- (a) incapacity, gross incompetence, or gross misconduct
- (b) willful or grossly negligent breach of the Code of Conduct or of the regulations pertaining to a financial register for judge's
- (c) accepting or performing any office of profit or receiving fees
- (d) willfully or negligently failing to comply with remedial steps to correct improper judicial conduct or
- (e) willful or grossly negligent conduct that is prejudicial to independence, impartiality, dignity and efficiency of the judiciary

The Bills also make provision for the establishment of a ²⁴Financial Register of Judges' Interests. The Judicial Service Commission has drafted 5 other bills on the judicial code of conduct.

2.2.2 Judicial Accountability

Prior to 1994 ²⁵the apartheid era judiciary acted as an extension of Executive power through its regular enforcement of repressive and racially biased legislation. The judiciary post 1994 is independent and seeks to protect the citizenry against State power by providing oversight of the Chapter 9 Institutions. In

²² Idasa, Judicial Independence And Judicial Accountability in South Africa: Judicial Accountability Mechanisms: A resource Document, March 2007, Cape Town Democracy Centre

²³ Seedat S, "Tread warily in judging the judges", Cape Times, 11 April 2005

²⁴ Seedat S, "Tread warily in judging the judges", Cape Times, 11 April 2005

²⁵ Idasa Cape Town Democracy Centre, Judicial Independence and Judicial Accountability in South Africa Judicial Accountability Mechanisms: A resource Document, March 2007

South Africa the ²⁶judiciary is further empowered to provide remedies to citizens (and permanent residents) whose Constitutional rights have been violated by private actors, and not just the state. Judicial accountability can be defined as the ²⁷lack of personal interest in cases or abstaining from improper behaviour in an official capacity, such as making discriminatory remarks in court or late or tardy judgments or abstaining from improper behaviour in a personal capacity or proper exercise of judicial discretion.

South Africa comes from a historical background whereby the judiciary was not trusted by the citizenry owing to the fact that it was not independent and was controlled by the Executive, thus the independence of the judiciary must not only be constitutionally protected, it must also capture and maintain the confidence of the public it seeks to protect. It is crucial that the citizenry should not lose faith of the Judiciary, owing to the fact that South Africa is a country in a democratic transition. A combination of ²⁸judicial independence and judicial accountability should foster public confidence in the courts – provided that accountability mechanisms are embedded in the judiciary and satisfy the appropriate standards for judicial autonomy, respect the separation of powers framework, and are transparent and publicly known.

The autonomy and accountability of the judiciary is of extreme significance to the continued development of a ²⁹democratic culture to support, defend and sustain the practices, procedures and institutions of representative popular government. Some of the practices used to ensure accountability are, ³⁰open hearings, reasoned judgments, appellate procedures and recusal rules. The introduction of the Judicial Services Commission Amendment Bill & Judicial Conduct Tribunal Bill were criticized by various political parties and the civil society owing to the fact it was stated ³¹that the bills would intrude on judicial independence – therefore the threat of discipline gives government, politicians or litigants an opportunity to influence judgments. It is important to note that the accountability of judges to the citizenry is vital because at the core of the function of the judiciary is the issue that judges are not

²⁶ Idasa Cape Town Democracy Centre, *Judicial Independent and Judicial Accountability in South Africa*” Judicial Accountability Mechanisms: A resource Document, March 2007

²⁷ Seedat S, “Tread warily in judging the judges”, Cape Times, 11 April 2005

²⁸ Idasa, *Judicial Independence And Judicial Accountability in South Africa: Judicial Accountability Mechanisms: A resource Document*, March 2007, Cape Town Democracy Centre

²⁹ Idasa, *Public Opinion and democracy in Southern Africa I* July 2000

³⁰ Seedat S, “Tread warily in judging the judges”, Cape Times, 11 April 2005

³¹ Seedat S, “Tread warily in judging the judges”, Cape Times, 11 April 2005

accountable to government or popular opinion; they are bound instead by the Constitution and basic standards of ethical behaviour.

2.2.3 Judicial Financial Disclosure

³²Clause 13 of the Judicial Services Commission Amendment Bill makes it compulsory for judges and immediate family members of the judges to declare their interests. Failure to comply with any provision relating to the ³³financial register is one of the five valid grounds for complaint under section 14(4) of the Bill and may attract a sanction.

The Judicial Service Commission Amendment Bill B- 2—7 prohibits extra judicial work : ³⁴clause 11 prevents judges from holding or performing any other office of profit or receiving in respect of any service any fees, or other remuneration apart from his or her salary and other amount which maybe payable in his capacity as a judge.

2.2.4 The National Prosecuting Authority

As regards the ³⁵NPA, it has been suggested that the NPA's credibility has been undermined by controversies surrounding the investigation and prosecution of former Deputy President of the country and current President of the African National Congress, Mr. Jacob Zuma. It is worthwhile ³⁶remembering that this controversy has also involved two divisions of the High Court, the Public Protector, a parliamentary portfolio committee, a commission of inquiry appointed by the former President, Mr. Thabo Mbeki, the former President himself and the Deputy President. Furthermore, the recent dismissal of the former head of the NPA, Mr. Vusi Pikoli by the former President, citing that it was due to the breakdown in the relationship and difference in opinion between the former head of the NPA, and Minister Bridget Mabandla, is an indication that the NPA has been a victim of political manipulation.

³² Idasa, Judicial Independence And Judicial Accountability in South Africa, Judicial Accountability Mechanisms: A Resource Document, March 2007

³³ Idasa, Judicial Independence And Judicial Accountability in South Africa, Judicial Accountability Mechanisms: A Resource Document, March 2007

³⁴ Idasa, Judicial Independence And Judicial Accountability in South Africa, Judicial Accountability Mechanisms: A Resource Document, March 2007

³⁵ National Democratic Convention, Justice Draft Policy Document, 2005 (T)

³⁶ National Democratic Convention, Justice Draft Policy Document, 2005 (T)

The Ginwala Commission which was tasked with establishing what caused the irreconcilable differences between Pikoli and Mabandla cleared Pikoli, only to have current President Kgalema Motlanthe agreeing to his dismissal.

There are Constitutional safeguards in place to protect the NPA's independence. However, at present it will take a while for the National Prosecuting Authority to rebuild its image as a body that is independent. The true test will be whether existing state institutions rise to the challenge of dealing with [evidence of interference] according to the standards set by the Constitution and the legislative framework.

2.2.5 Backlogs in the Court System

The percentage of criminal case backlogs in South Africa is appalling and it is enormously disconcerting for the investigating police service, which spend months on end careful and painstakingly piecing together a case, just to be told that the case will not go to trial owing to the fact that the docket is missing. The reasons for the majority of criminal cases not making it to court is ³⁷lack of evidence, lost dockets, cases being withdrawn or struck off the roll by judicial officers, and the failure of accused to attend court proceedings. Media reports issued information on a confidential report compiled by the National Prosecuting Authority and Lower Court Management Forum; ³⁸it paints a shocking picture of dysfunction within the courts. Lack of discipline, lack of filing, lack of control, negligence, carelessness, indolence and lack of experienced, competent and trained management are just some of the issues the report highlights. The report ends with a plea to the department:

"The department is requested to urgently address the mentioned risks and problems which could cause a total collapse in the administration and supporting service to the Judiciary and the NPA."

³⁷ Producer : Magteld Venter, Wynand Grobler Presenter : Devi Sankaree Govender Genre : Government, Municipal and, Carte Blanche, 28 October 2007

³⁸ Producer : Magteld Venter, Wynand Grobler Presenter : Devi Sankaree Govender Genre : Government, Municipal and, Carte Blanche, 28 October 2007

It is clear that urgent intervention is required, it begins with the Department of justice and Constitutional Development creating special task teams' throughout the country to work speedily through the backlog. Mostly importantly SITA (Government I.T. agency) needs to create a special system and programmes strictly for the Courts that is able to guard against the loss of dockets. There is a need for synergy between all State departments, at National, Provincial, and Local Government levels, especially for departments with have overlapping function, for example the Doj & CD, Correctional Services, Safety and Security owing to the fact that these are departments that need to have synergy. Through this, dockets will not disappear and awaiting trial prisoners will not await trial for years.

Backlogs in the Courts are also caused by the lack of capacity, owing to the shortages of Magistrates and of trained interpreters. The workload becomes unbearable for the staff. The Doj & CD needs to also concentrate on capacity building in order to address the problem of backlogs.

2.2.6 Women on the bench

Women still continue to face challenges of being marginalized in the work place, socially, economically and transformation is still required. Transformation will be possible through the drafting of policies and frameworks of gender mainstreaming in the work place and our communities. The Justice profession is still extremely male dominated, and there are a small percentage of females, the problems also lie with some of the ³⁹barriers that women legal practitioners, not only face within the judiciary and the magistracy, but also within the legal profession. ⁴⁰Those who successfully enter the profession face additional obstacles with regard to finding sufficiently challenging and rewarding work, not only to sustain their practices, but to help them grow financially and professionally. Government recently launched a programme to assist aspirant female judges. This is a great initiative and more programmes such as these are need.

³⁹ Deputy President P Mlambo – Ngcuka : Gala Dinner for the Launch of Training Programme for Aspirant Women Judges, Johannesburg, 16 August 2007

⁴⁰ Speech by Deputy President P Mlambo – Ngcuka : Gala Dinner for the Launch of Training Programme for Aspirant Women Judges, Johannesburg, 16 August 2007

2.3 The implementation of laws

The drafting of a new legislative framework and amending of laws from the apartheid era, has been one of the key areas of South Africa's new political dispensation. South Africa's legislative framework, had to transform the country in order to ensure that it was in line with International treaties, was democratic, upheld human rights, protected South Africans regardless of race, creed, ethnicity, religious or sexual orientation, and ensured equality. Most significantly, the public policy making process had to be public and transparent. According to the AfriMAP and Open Society Report 2005, delays in introducing bills to Parliament and implementing legislation already passed by parliament continues to be a problem. Numerous important pieces ⁴¹of legislation are stuck at various stages of the system. Efforts to make law-driven social change work must therefore be redoubled. This in turn requires that attention be paid to three key areas:

- Improving the technical quality of new legislation
- The implementation of court judgements
- The structure of the courts

As regards improving the technical quality of legislation, a more considered and technically sophisticated approach to law making that includes mechanisms for monitoring and evaluation is needed. As the discussion paper suggests, ⁴²law making and monitoring and Evaluation should be part of a continuous information cycle in which the reasons for legislative failure are fed back into the policy process. The Regulation Impact Assessment system mentioned in the government's Programme of Action might be useful in this regard, not just in terms of law-making, but also because it places a premium on coordination between departments.

2.4 Crime and Punishment

This section falls within the Department of Safety and Security, and Correctional Services, however, it will be discussed in this paper owing to the fact, all these departments do work together, and synergy is need in order to combat the crime levels in the country. Within this heading one needs to examine the following issues:

⁴¹ National Democratic Convention, Justice Draft Policy Document, 2005 (T)

⁴² South Africa: Justice and the Rule of Law, AfriMAP & Open Society Foundation, page 16 (2005)

- Civilian oversight of policing
- The need for an integrated approach to sentencing
- Conditions of detention

As regards civilian ⁴³oversight of policing, the two bodies established by the SAPS Act to do this are largely ineffectual. The National Secretariat for Safety and Security, once prominent in policy formulation and implementation, diminished following the appointment of a new minister in 1999. The Independent Complaints Directorate (ICD) ⁴⁴has also become less effective than it should be. Noting its poor performance, the Parliamentary Portfolio Committee on Safety and Security has recommended the Minister intervene and has proposed the minister should investigate the feasibility of developing separate legislation to govern the functioning of the ICD.

Conditions in South Africa's prisons are notoriously poor. Prisoner's human rights are routinely violated and the Department of Correctional Services is simply unable to full fill its mandate. The Judicial Inspectorate of Prisons in 2002 reported on the appalling conditions of prisons. Three years later, the Working group on Arbitrary Detention of the UN Commission on Human Rights found that ⁴⁵the lack of adequate facilities is so blatant that they fall short of international guarantees.

2.5 Accessibility of the courts to ordinary South Africans

In South Africa, ⁴⁶the legal process is inaccessible to the majority of the population; this is primarily due to the high cost of litigation.

The Constitution in Chapter 2 of The Bill of Rights Section 34 states:

⁴³ National Democratic Convention, Justice Draft Policy Document, 2005 (T)

⁴⁴ National Democratic Convention, Justice Draft Policy Document, 2005 (T)

⁴⁵ South Africa: Justice and the Rule of Law, AfriMAP & Open Society Foundation, page 27 (2005)

⁴⁶ Du Plessis L, "An Introduction to Law" 3rd Edition, 1999, page 125

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court of where appropriate, another independent and impartial tribunal or forum.”

The South African Constitution guarantees its citizenry the right to access the courts but the harsh reality is that few South Africans gain access to the courts.⁴⁷ Many of the accused in criminal cases are undefended because they cannot afford a legal representative. The⁴⁸ courts in SA have often proved to be the last defense for ordinary citizens when taking on powerful parties, particularly in a commercial context, this is owing to the fact that the legal profession is elitist. The “⁴⁹rich man’s image” which goes with the limited “privilege to litigate” means that the services of attorneys and advocates are regarded by those who cannot afford them as luxury items.

⁵⁰Unless ordinary people have access to courts and other independent forums or tribunals to resolve their disputes, the vision of a society based on the rule of law as envisaged in the Constitution will not be realized.

⁵¹Time limits prescribe the amount of time which victims have to institute an action in civil cases. The problem is many potential litigants lack the financial and emotional resources within a short period of time and, being unaware of their rights, take time to obtain the necessary legal advice. Time limitations need to be done away with, in order for perpetrators to be aware that a crime will always remain a cry regardless of when it was committed. The competing rights of access to court, ⁵²effective remedy,

⁴⁷ Du Plessis L, “An Introduction to Law” 3rd Edition, 1999, page 125

⁴⁸ Seedat S, February J, “The Danger of bad apples on the bench” Business Day, 20 July 2007,

⁴⁹ Du Plessis L, “An Introduction to Law” 3rd Edition, 1999, page 126

⁵⁰ Speech by the Minister of Labour, the Honourable Membathisi Mdladlana, 20th Annual Labour Law Conference, Sandton Convention Centre, 04/07/2007, Source: Department of Labour

⁵¹ Professor van Bueren G, Public Law Department university of Cape Town, Monday Paper vol.22.15, 2 June 2003, <http://www.news.uct.ac.za/mondaypaper/archives/?id=3797>

⁵² Professor van Bueren G, Public Law Department university of Cape Town, Monday Paper vol.22.15, 2 June 2003, <http://www.news.uct.ac.za/mondaypaper/archives/?id=3797>

dignity and equality of the individual should determine whether or not a case is tried and not a time period. The importance of basing a decision on the human rights of an individual also acts as a symbol that the state will not tolerate a crime no matter when it occurred, especially in cases relating to the sexual abuse of children. Institutions such as the Legal Aid Board, which is available to South Africans who cannot afford to, hire an attorney of their own, need to provide an effective and an efficient service. The Legal Aid Board will advise its clients which services it can offer and which it is unable to offer. In cases the client is represented by Candidate Attorneys who are not experienced enough and thus are unable to provide the adequate and efficient services required by the client.

3. THE SOUTH AFRICAN JUSTICE SYSTEM & DELIBERATION

The South African⁵³ Prosecuting Authorities have done a stellar job of taking on even high – profile figures, but it is a worrying fact that the government still refuses to re – negotiate the arms deal. When former President Thabo Mbeki removed Special Investigations Unit, Judge Heath, from investigating allegations of corruption in the arms deal, and President Motlhale continues to remain mum on the request by the opposition parties for a special inquiry. It thus becomes clear that institutions of state are not above political and racial manipulation by the new government.

In “To the Brink: The State of Democracy in South Africa” Xolela Mangcu states:

A great challenge facing South Africa is to revisit the role parliamentarians in holding the executive accountable. One way of building such accountability would be to have some kind of direct constituency representation in the electoral system. Constituency representation is no guarantee that parliamentarians would have not be victimized by party leaders, but at least the constituency would have an opportunity to weigh in and express its opinion , whether that is in support of its MPs or to recall them. The power of the executive in South Africa is palatable.....Parliament needs to be revitalized so it can be the space where a new layer of leaders might find their way into the political system.

This report supports the above mentioned view point taken from Mangcu, owing to the fact that, if MP are directly elected by their Constituency, they would be under constant pressure and most importantly they would be able to influence legislation from a more informed position. Although all Parliamentary

⁵³ Mangcu X, “To the Brink: The State of Democracy in South Africa”page 87 (2008)

Committees conduct site visits, and departments are called in regularly to conduct presentations to the Committees, MP's are often not in touch with the realities a ground level. Even though MP' s are given time during the Parliamentary calendar to spend time in their various constituencies, this time, is often used for political purposes and not for governance. Thus the influence, and deliberation that takes place during Committees, is heavily influenced by party positions, and is seldom a reflection of Committee members as a collective.

⁵⁴Legislative deliberation, as well as executive and judicial deliberation, is a special context because it involves public officials working on behalf of a larger people.⁵⁵These officials have a sacred trust to look beyond their particular perspectives and to consider the larger public good while comporting themselves as models of professional, respectful debate and discussion.

It can be stated that the policy making process is a rhetoric process owing to the procedure that is followed. In his Art of Rhetoric, ⁵⁶Aristotle claims that legislation is one of the most important questions upon which the would be deliberative orator must be well informed. In more recent years, communication scholars have refined and expanded policy making studies, investigating the specific role of rhetoric in public policy formation. The process of law – making is a rhetorical process beginning with bill proposals, public hearings and parliamentary debates.

Legislation in South Africa has not only brought about the consolidation of democracy, but it has also molded the identity of a people, of a nation. The government was faced with forging an identity that created unity, but took stock of the diversity of South Africans. ⁵⁷With the ethnic and cultural diversity of its population and its inherited social and infrastructural disparities, attempts at forging a practicable “new” South African nationalism have since 1994 devolved less and less around ideology, and more and more around notions of identity, culture, and community.

⁵⁴ Gastil J, “Political Communication and Deliberation” page 129 (2008)

⁵⁵ Gastil J, “Political Communication and Deliberation” page 129 (2008)

⁵⁶ Quarterly Journal of Speech vol. 87, No.4. November 2001, pp 341 – 365, “Are we going to Now Govern by Anecdote? Rhetorical Constructions of Welfare Recipients in Congressional Hearings, Debates, and Legislation, 1992 – 1996, Lisa M. Gring - Pemble

⁵⁷ Freschi Federico, Post apartheid Publics and the Politics of Ornament: Nationalism, Identity,

and the Rhetoric of Community in the Decorative Program of the New Constitutional Court,

Johannesburg, Africa Today

The country has drafted and passed some ground breaking pieces of legislation which have cemented this countries dedication to democracy and protection of human rights. Among these has been the Civil Union Bill which contained provisions for ⁵⁸the partial recognition of same sex relationship and a set of provisions dealing with Domestic Partnerships. The Sexual Offences Bill and Children’s Act have ensured the protection of children from a variety of atrocities. The Recognition of Customary Marriages Act has ensured the protection of women marriage under customary law. The Communal Land Rights Act has ensured that women who previously had no communal land, rights to secure title and greater inheritance rights over land.

4. THE CONSTITUTIONAL COURT BUILDING – A VISUAL RHETORIC

The Constitutional Court building and its location symbolize South Africa’s new identity, and is a beacon of hope for the people. Locally and Internationally, Constitutional hill, as it has become to be known ⁵⁹ has been hailed as a symbol of the human-rights culture that informs South Africa’s democratic constitution—effectively a remarkable feat of architectural daring and hope. The architecture of the building itself had to embody the country’s history and future.

Academics have argued that one is able to learn ⁶⁰much about a political regime by observing closely what it builds. With this link in mind, (we) can gain insight into a political regime’s ideological agenda by scrutinizing how it *decorates* what it builds. Thus the decorative features as well, had to reflect the ideology of the new regime. The ⁶¹significant aspect of its symbolic function is conveyed entirely through its decorative program, which in turn is driven by the need to establish a visual rhetoric of “community,” united in its diversity.

⁵⁸ Centre for Applied legal Studies (CALs), University of Witwatersrand, Annual Report, 2006

⁵⁹ Freschi Federico, Post apartheid Publics and the Politics of Ornament: Nationalism, Identity, and the Rhetoric of Community in the Decorative Program of the New Constitutional Court, Johannesburg, Africa Today

⁶⁰ Freschi Federico, Post apartheid Publics and the Politics of Ornament: Nationalism, Identity, and the Rhetoric of Community in the Decorative Program of the New Constitutional Court, Johannesburg, Africa Today

⁶¹ Freschi Federico, Post apartheid Publics and the Politics of Ornament: Nationalism, Identity, and the Rhetoric of Community in the Decorative Program of the New Constitutional Court, Johannesburg, Africa Today

Although the decorative aspect of the building was highly significant, it was important that the building was not imposing or intimidating on the ordinary South African on the street. In the words of Constitutional Judge Albie Sachs: “⁶²it was important from the outset that the court should be “gentle rather than imposing; inviting rather than forbidding; entrancing rather than monumental; human rather than austere; a building of the highest ideal for the humblest of persons.”

Finally, the Constitutional court had to be a structure that ⁶³symbolizes the notion of redemptive over repressive justice (that is, the privileging of the rights of the individual over those of the state), which is at the heart of South Africa’s democratic constitution.

5. Conclusion

This paper began by examining the functions of the Department of Justice and Constitutional Development in its entirety. The paper proceeded to identify five categories which were aimed at looking at the successes and challenges of the department. The next step was to shift the focus and concentrate on the Justice System and its deliberative function. Finally the paper, concluded with looking at Constitutional hill and the Constitutional Court building and its symbolic meaning from a rhetorical perspective.

⁶² Freschi Federico, Post apartheid Publics and the Politics of Ornament: Nationalism, Identity, and the Rhetoric of Community in the Decorative Program of the New Constitutional Court, Johannesburg, Africa Today

⁶³ Freschi Federico, Post apartheid Publics and the Politics of Ornament: Nationalism, Identity, and the Rhetoric of Community in the Decorative Program of the New Constitutional Court, Johannesburg, Africa Today

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