

# TRANSFORMATION OF THE JUDICIAL SYSTEM

## INTRODUCTION

1. The democratisation of government in South Africa in 1994 represented a decisive break with white minority rule. It also represented a realisation of many aspirations of the masses of our people. One of these was the fulfilment of the demand that the people shall govern. The call for democratisation was not limited to a mere tinkering with state institutions. It also included the fundamental reconstruction of South Africa. For, before 1994, South Africa was politically and economically a divided country. There were systemic inequalities in the distribution of wealth and access to resources. To be born black “was to inherit a lifelong curse.” (Thabo Mbeki on the 10th anniversary of our democracy 2004) To this end, government has since 1994 taken active steps to fundamentally change South Africa for the realisation of a better life for all. But as we move forward towards realising the goals of our revolution a number of challenges remain.
2. The transformation of society and all spheres of government, including the judiciary remains a challenge. Transformation involves a fundamental change of society in an effort to create a non-racist, non-sexist, democratic and prosperous society. The ANC has identified three main challenges of transforming the administration of justice as being the following:
  - a) the creation of an effective and efficient judicial system which is responsive to the needs and aspirations of all South Africans;
  - b) the creation of a judiciary which operates within a system of separation of powers with appropriate checks and balances; and
  - c) the creation of a legitimate judicial system which is gender and race sensitive and responsive to the needs and aspirations of all South Africans.
3. Now more than ever, there is an urgent need to speed up the transformation initiatives particularly those relating to the judicial system and the administration of justice in general. The 1997 conference in Mafikeng

and the 2002 conference in Stellenbosch highlighted the need to speed up the transformation of the judicial system and the administration of justice in general.

4. This policy paper highlights achievements made and focuses on the current challenges. The strategic thrust is to consolidate the gains made and to identify areas where strategic policy interventions are required. Where appropriate, the policy paper will re-affirm existing policy positions of the ANC.

## THE HISTORIC TASK OF THE ANC

5. The Constitution of South Africa, 1996 describes South Africa as a democratic state founded on the values, inter alia, of freedom, human dignity and the achievement of equality. The incorporation of these values to the Constitution was not an ahistoric event. It was a product of struggles waged by our people throughout the years since the arrival of the colonialists.
6. The Constitution reflects a consolidation of views expressed by the ANC since 1912 that unless all South Africans are given the right to decide their government, there can be no peace and stability. These views were espoused in the following foundational documents of the ANC:
  - a) The 1924 Bill of Rights and the 1942 African’s Claims in South Africa, where Africans demanded: the abolition of political discrimination; the right to vote and be elected to parliament; the right to equal justice in courts of law, including nomination to juries and appointment as judges, magistrates, and other court officials.
  - b) The Women’s Charter of 1954 identified law as having lagged behind the development of society and that it did not correspond to the actual social and economic position of women. It also concluded that the law had become an obstacle to progress of the women and therefore a brake on the whole of society.
  - c) The Freedom Charter, adopted by the ANC in 1955 has served as a rallying

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point for all our people in the struggle against Apartheid colonialism. Amongst others, the Charter, provided that there shall be equal status in the courts and that all people shall be equal before the law and that all shall enjoy equal human rights. The Freedom Charter also sought to locate the courts in their proper place in society. It stated that courts should only be for serious crimes.

- d) In 1986, the ANC adopted its Constitutional Guidelines. The Guidelines declared that all organs of government, including justice, security and armed forces shall be representative of the people as a whole, democratic in their structure and function according to the principles of a new constitutional framework.
- e) In 1989, the Harare Declaration was adopted. The Declaration stated that South Africa shall have a new legal system; that there shall be equality before the law; and that there shall be an independent and non-racial judiciary.
- f) In April 1991, the ANC published its Constitutional Principles for a Democratic South Africa. The central themes of the principles were the establishment of a unified South Africa, free of racism, sexism, poverty and deprivation. The principles also sought to establish a system which would administer justice to ensure that the goals embodied in the Principles were attained. In particular, the Principles provided for the following:
  - Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of the South African society. In a free South Africa, the legal system shall be transformed to be consistent with the new Constitution. The Court shall be accessible to all and shall guarantee to all equal rights before the law.
- g) These Principles were later to be reflected in the Constitutional Assembly's constitutional principles. The Constitutional Principles formed the foundation for the Constitution of 1996. In particular the principles stated:
  - There shall be a separation of powers between the legislature, execu-

tive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

- The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
  - The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.
- h) The historic task of the ANC is thus to create a non-racial, non-sexist, democratic and prosperous South Africa. That much, appears from the preamble of the Constitution itself. However, unless the institutions of government (including the judiciary) are transformed, the society which the ANC seeks to create will not be fully realised.

### **The Mafikeng Conference**

- 8. During the Mafikeng conference, the ANC adopted amongst others, resolutions regarding transformation of the judiciary. In particular the ANC reiterated its commitment to adhere to the basic law of the land to implement both the letter and the spirit of the Constitution, including the principle of multi-party democracy, and the doctrine of the separation of powers, upholding fundamental human rights to all citizens; respect for the rights of linguistic; religious and cultural communities and social equity within the context of correcting the historical injustices.
- 9. The Mafikeng Conference also noted that the civil service; the army; the police; the intelligence structures as well as the judiciary as a whole were all moulded to attain the opposite of what the movement sought to achieve. Thus, it is critical for the ANC to transform these institutions to reflect and serve South African society.
- 10. Specifically, the Mafikeng Conference resolved, inter alia, in respect of matters relating to the administration of justice, as follows:
  - to rationalise the magistracy and judiciary into a single judiciary;
  - to rationalise the court system to provide, at least, for a High Court in each

province, which is to be situated in the capital of such province;

- to introduce legislation to give effect to section 180 of the Constitution by providing for a training programme for judicial officers, which includes sensitisation and capacity building components and a grievance procedure and mechanisms for complaints against, judicial officers;
- to examine and introduce legislation for the implementation of alternative dispute resolution mechanisms within the court procedures;
- to establish specialised family courts to adjudicate on and deal with all family related matters;
- to pursue the establishment of community courts;
- to further pursue and investigate a proper and appropriate language policy within the administration of justice; and
- to investigate the expansion of the Small Claims Court system in respect of both jurisdiction and the number of such courts.

#### **The Stellenbosch Resolutions in 2002**

11. At the Stellenbosch conference, the President of the ANC in his address pointed out that whereas there had been progress in the transformation of other branches of government, the same could not be said about the judiciary. Further, the conference itself, noted the need to speed up the transformation of the judiciary to ensure representativity and access to justice for all, especially rural communities. The conference resolved, amongst other undertakings, to:
  - pay special attention to speeding up legislation to create a grievance procedures to deal with complaints against judicial officers; and
  - expedite the transformation of the judiciary, to create a more representative, competent, sensitive, humane and responsive judiciary.
12. Undoubtedly, the ANC has moved faster in certain areas in attaining the revolutionary goals set out in the Freedom Charter and other guiding documents.

#### **ESTABLISHING A SINGLE, TRANSFORMED AND INDEPENDENT JUDICIARY**

13. The Mafikeng Conference resolved that the court system should be rationalised to create a single judiciary. This resolution is informed by the court dispensation which is envisaged in the Constitution. The Constitution clearly contemplates a single judicial system

at the apex of which is the Constitutional Court ("CC"). The Constitution states that the CC is the highest court of appeal in all constitutional matters. Further, the Constitution provides that the CC "makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter." In section 166, the Constitution places the CC at the apex of the "judicial system." The Magistracy is also expressly located by the Constitution within the judicial system. This is a far cry from the days of Apartheid when the Magistrates were part of and were controlled by the Executive.

14. The judicial system envisaged by the Constitution has not yet been fully accomplished. There are still separate procedures for the appointment of and handling of complaints in respect of judges and magistrates. As our constitutional jurisprudence evolves, it is necessary to review the present system where the Supreme Court of Appeal also exercises final appellate jurisdiction in respect of "non-constitutional" matters. In our country, the Constitution is the supreme law. Law and conduct inconsistent therewith is invalid to the extent of the inconsistency. There is accordingly no clear line which distinguishes constitutional matters from "non-constitutional" matters. The present system is also burdensome and costly for the majority of South Africans. It is therefore necessary to move faster towards the creation of a single judiciary as envisaged in the Constitution.
15. In a single judicial system, judges and magistrates should be appointed and regulated by a uniform body of rules, standards and norms which recognise the hierarchy within the judiciary and the different conditions of appointment applicable to each level of judicial officers.
16. The Constitution converted the former Provincial and local Divisions of the former Supreme Court into various High Courts thereby implying that every province could have its own High Court. A system of establishing several High Courts in a single judicial system defeats the purpose of a single judicial system. This policy paper envisages the establishment of a single High Court constituted by the various divisions established at different seats in each province. This will enhance access to justice for people in remote areas of the country. The apartheid boundaries of the High Court system have not been fully abolished and remain intact. Alongside the High Court system are specialised courts, with equal competence and status, but different jurisdictional rules. The system is in reality disparate and is not

geared towards the achievement of a single judiciary where access to justice is a paramount concern. To achieve these goals, the following policy positions are proposed.

*Policy position on the Apex court and its jurisdiction*

- a) The CC should be affirmed as the apex court. The Chief Justice should be affirmed as the Head of the Judiciary.
- b) The CC should be the highest court in all matters.
- c) The CC should sit en banc. This will ensure legal certainty.
- d) Appeals from the SCA should lie to the CC, with leave of the CC.
- e) The SCA should remain as an intermediary court of appeal, with jurisdiction on all matters.

*Policy position on the rationalisation of the High Court system*

- a) The policy positions adopted in the Mafikeng Conference should be re-affirmed.
- b) The “full bench” system should be reviewed. Such review must take into account the need to create a simple, less cumbersome and accessible justice system.
- c) The High Courts should be rationalised by creating a single High Court with at least a division in each province and as many local divisions as may be required for the effective administration of justice.

*Policy position on the role and location of specialist courts*

- a) Without negating the need for specialist courts, the policy with regard to these courts needs to bear in mind the provision of access to equal services for communities beyond the reach of the specialised courts. Specialist courts need to be purpose driven and enhance efficiency and expertise in the relevant specialised area. Locating specialised courts within the court system will enhance access to justice. But this is an issue which requires a balanced approach. It is important for judicial officers to develop specialisation in certain fields of law, such as labour law, to enhance professional efficiency. These judicial officers may be designated to hear cases within their area of expertise. The courts themselves do not necessarily need the label of specialised courts. In dealing with the concept of specialist courts,

it is important to recognise the critical importance of access to courts and ensuring that the Presiding Officers are adequately equipped to deal with any matter before them.

- b) The existing specialist courts should thus be integrated into the court system. The modalities pertaining to such integration, including questions of jurisdiction should be addressed in national legislation.

**An efficient court system**

17. The question of a representative judiciary is inter-linked with the creation of an efficient judiciary. Unless the public develops confidence in the ability of the law and the judicial officers to protect them, the system can not be said to be efficient. Through the work of the Judicial Services Commission (“JSC”) and the Magistrates Commission there has been an increase in the appointment of judicial officers from previously disadvantaged groups. Women are still, grossly under-represented in the ranks of the judiciary. Out of 194 High Court judges in the country, only 31 are female. Women are also grossly under-represented in the lower courts especially in the regional court division.
18. The delay in the finalisation of cases negatively impacts on access to justice. After all justice delayed is justice denied. Government has increased the capacity of the courts to deal swiftly and effectively with cases.

*Policy positions on the efficiency of the High Courts*

- a) The Security cluster must function in an integrated manner to improve the management of cases through the criminal justice system. Consideration must also be given to the review of the civil justice system.
- b) The infrastructure of the courts must be designed to promote access to courts. Many of our courts are still inaccessible to disabled people. Facilities such as libraries, security at the courts must be improved by government.
- c) The Executive must assist the judiciary to investigate mechanisms to promote representativity of women judges across all levels of the judiciary. These measures must include making available appropriate training opportunities for law graduates and continuing legal education for women lawyers.

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## SUMMARY OF KEY POINTS

1. The achievement of democracy in 1994 provided South Africans with an opportunity to create a non-racial, sensitive and competent judiciary.
2. An important institution in the creation of a new judicial system was the Constitutional Court. The CC was given wide and extensive powers including the power to declare laws passed by a competent legislature as invalid.
3. Since 1994, steps have been taken to create a judiciary which is reflective of the demography of our country. These steps should be consolidated in order to deepen transformation and accelerate access to justice.
4. The creation of a single judicial system is required by the Constitution and will enhance access to justice.

## QUESTIONS FOR DISCUSSION

- a) What are the main successes in the era of liberation as far as the judicial system is concerned?
- b) What are the most important challenges facing us today?
- c) What should the principle of a single judiciary entail?
- d) Should the CC and the SCA exist in their current form? And if not, how should they be restructured?
- e) What are the areas that the government must take to ensure efficiency of the courts?
- f) Do we want specialist courts such as the Tax and the Competition Courts to remain outside the High Court system? If not, what is their role and where should they be located?

## THE LOWER COURTS

19. Before the constitutional dispensation, the magistracy was effectively part of the Executive. The magistrates wielded enormous power and control over the lives largely of our people in rural communities. The perception, justifiably, of most people who came into contact with the law was that the police, the prosecutors and the magistrates were one and the same in that they were perceived as part of the apartheid law enforcement machinery. Thus, the majority of South Africans lost confidence in the ability of the law to protect them. In this context alternative institutions were developed by communities as mechanisms to resolve their local disputes.
20. Since 1995 the magistracy has been severed from the Executive. The magistracy is now distinctly part of the judiciary. This is crucial to enhance the credibility of the magistracy in the eyes of the public. Justice, after all, must not only be done, it must manifestly be seen to be done.
21. There has also been a substantive improvement in the conditions of service for magistrates. Since 2003 the determination of remuneration of magistrates has been aligned with that of the judges and other public office-bearers. Therefore, their remuneration is in effect determined, not solely by the Executive, but through an independent body, to enhance their independence.

### *Policy position on the lower courts*

- a) The institutional framework of the lower courts has fundamentally changed since 1994. However, practices in certain parts of the country are characteristic of the old apartheid practices. Many of our people living in rural areas and in small towns complain about poor service, unnecessary postponements of cases, delays in the finalisation of cases, long distances which they must travel to courts; racism and abuse at the hands of the judicial officers and other officials in the criminal justice system. For instance, in certain parts of the country, periodical courts still operate. Some of these courts operate from police stations and prisons. This strengthens the perception of collusion between the Magistrates, Prosecutors and the Police.
- b) Government, in conjunction with the legal profession must provide an enabling environment for the judiciary to function independently, impartially and efficiently.
- c) This challenge cannot be addressed adequately by government acting alone. The judiciary, institutions such as the Human Rights Commission, organs of civil society and branches of the ANC should play a central role in addressing this challenge.
- d) The Regional Courts should be transformed by extending its jurisdiction to civil and family law matters.
- e) Government in partnership with the

- private sector must consider training the many unemployed law graduates to strengthen the administration of justice.
- f) ANC branches must take active participation in exposing and challenging pockets of racism and gender prejudices existing in the justice system.
  - g) The magisterial districts must be re-demarcated by:
    - Changing the jurisdiction of courts in accordance with population demographics and needs of society, especially the rural community who were marginalised by the system of the past;
    - the increase of the courts in rural areas to address the urban biases approach of the past;
    - the incremental increase of the capacity of all the courts to provide all essential services to the community they intend to serve;
    - the phasing out of periodical courts, which were established at police stations and prisons for the convenience of the police and magistrates. Consideration should be given to the upgrading of other periodical courts established by the Department depending on availability of resources.

#### **ADMINISTRATION OF COURTS, BUDGETTING AND POLICY MATTERS**

22. An outstanding task relates to giving content to the principle of separation of powers. It is important to carve out matters of policy making, budget and administration which appropriately fall within the realm of the elected branches of government. It is important for the Executive not to interfere in matters which relate to the administration of the adjudicative functions of the courts.
23. The ANC should advance the principle of co-operative governance. This recognises that the Constitution envisages that the three branches of government must work in tandem with one another. The Constitution does not envisage that the Judiciary will operate in complete isolation from the other branches of government. In fact, it envisages a system where all branches of government work in collaboration with each other. At the same time, the Constitution firmly entrenches the principle of the separation of powers amongst all branches of government. To enhance access to justice and ensure efficiency in the administration of justice, it

#### **SUMMARY OF KEY POINTS**

1. Before liberation in 1994, the lower courts were directly controlled by the Executive.
2. After 1994, the magistrates were placed under the judiciary in order to preserve the principle of separation of powers and the independence of the judiciary.
3. Despite liberation, some practices persist with create the impression that lower courts are not independent from the Executive.
4. For many people living in rural areas, it is still difficult to access courts.
5. Compared to High Courts, lower courts account for almost 90% of the cases coming to courts and are closest to the communities which they serve.

#### **QUESTIONS FOR DISCUSSION**

- a) What are the most important gains in relation to lower courts?
- b) Are the lower courts independent from government? If not, what factors impact on their lack of independence?
- c) Should the branches play any role in exposing incompetence, corruption, racism and other malpractices in lower courts? If so, what role should the branches play?
- d) How can the state facilitate access to lower courts?

is important that the roles of each branch of government be carefully delineated. The ANC should ensure the existence of a legitimate and independent judiciary.

#### *Policy positions on budget, policy and administration*

- a) The ANC should re-affirm the principle of co-operative governance amongst all branches of government.
- b) Policy and budgeting for courts and all matters relating to the administration of the justice system are the responsibility of the member of cabinet responsible for the administration of justice.
- c) The general administration of the justice system is the prerogative of the Minister of Justice. In carrying out this function, the Minister is required to take into consideration the views of the Judiciary in relation to matters which have a bearing on the proper functioning of the Courts and the administration of justice.
- d) The administration of all judicial and adjudicative functions falls within the Judiciary.

## SUMMARY OF KEY POINTS

1. The Constitution entrenches the principle of separation of powers.
2. The principle of separation of powers is a principle of constitutional democracy which ensures efficiency of government and enhances the credibility of the judicial system.
3. The distinction of which powers and functions fall under the elected branches of government and which powers and functions do not is not always easy to draw.
4. When exercising powers which have an effect on the functioning of the judiciary, the Minister of Justice is required to take into consideration the views of the judiciary in accordance with the spirit of co-operative governance.

## QUESTIONS FOR DISCUSSION

- a) What are the most important successes gained as a result of an independent judiciary?
- b) How should the government enhance the principle of separation of powers?
- c) Should the judiciary have any role in the policy making, budgeting and general administration of courts? If so, what should the role be?

## ACCESS TO JUSTICE

24. Justice as an overarching concept is broad. Central to it in our constitutional state is that idea that ordinary citizens should not, for financial reasons, be unable to access courts. The Constitution guarantees access to courts and other independent tribunals or forums. Unless 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 realised. The following elements are necessary to enhance access to justice for ordinary citizens:

- a) Access to the legal profession;
- b) Access to courts which includes:
  - the right to effective legal representation;
  - Developing simple and effective rules governing the conduct of legal proceedings;
  - the promotion of use of all official languages; development of proper infrastructure; decentralisation of administration of justice services,
  - training of magistrates and judges in understanding the Constitution, values, aspirations and traditions of all the people

### *Policy positions on access to justice*

- a) Improving access to courts
  - The jurisdiction of the Magistrate Courts has a huge impact on access to justice. Magistrate Courts have traditionally been located in urban areas. The effect of this is that people living in townships and rural areas have to travel long distances to access services at these Courts. There is thus a

need to review the policy framework in which demarcation of magisterial court boundaries is determined.

- The High Courts still reflect the old order boundaries. For instance, whereas all TBVC states were officially abolished in 1994, the High Courts still bear not only the names but geographically still operate in terms of the pre-1994 dispensation. Government must urgently take legislative steps to rationalise High Courts in accordance with the Constitution.
- b) Effective legal representation
    - Effective legal representation is an indispensable component of access to justice.
    - It is also undeniable that in South Africa, legal services are inaccessible to most South Africans who desperately need them particularly the poor and the vulnerable groups in society.
    - The provision of quality legal services to the poor cannot be achieved by government acting alone. It is important that government engages with institutions which represent legal practitioners to explore ways of extending legal services to the poor. In this context, government also must encourage the transformation of the legal profession in a manner geared towards the facilitation of access to legal services.
    - Government must work towards the finalisation of the Legal Services Charter and the Legal Practitioners Bill.
    - Government must strengthen the legal aid system and together with other relevant stakeholders work

towards making the system more efficient.

c) Rules governing the proceedings of Court

- Rules of court are an important part of the judicial system and impact enormously on access to justice. This includes the cost of litigation, the speed with which matters may be dispensed with and general procedures for the processing of legal disputes.
- Currently, rule-making is fragmented with different courts often having different rules on the same matters and disparate standards of access to justice. The Interim Constitution, 1993 granted the CC the power to make its own rules. The Final Constitution does not contain a provision granting the CC the power to make its own rules. It does, however, provide in section 173 that the CC, the SCA and the High Courts have the inherent power to “regulate their own processes”. This section does not, however, give legislative power to the Courts to make rules.
- The ANC should affirm the existing position that rule making is a legislative competence. The power of rule making is delegated to the Executive, as the branch of government which is responsible for the administration of justice. The rules must be simplified to ensure access to justice particularly for the poor. There should be meaningful public participation in the process of rule-making. In making the rules of court, the Executive must take into account the views of the judiciary in keeping with the spirit of co-operative governance.

d) Language

The Constitution expressly recognises 11 languages. The old practice, where English and Afrikaans were exclusively used in our Courts undermines the spirit of the Constitution. Ordinary South Africans interacting with the legal system still experience difficulties of communicating in their language of choice. The interpretation services are in many instances inadequate. There are many examples where interpreters do not only misinterpret the evidence given by accused persons but at times openly harass accused persons. Such practices are inconsistent with the constitutional right to a fair trial. It is therefore neces-

sary to review the current practices with regard to usage of language in court. In this regard, the following policy positions should be re-affirmed:

- Multilingualism is the language policy of government.
  - The current language policy practised in courts is designed to benefit the Presiding officers and not the litigants.
  - The Constitution provides a right of access to courts and other independent tribunals or forums
  - Every litigant has a right to use their language in all matters. At present, the state provides interpretation services in criminal cases. The state must investigate means of providing interpretation services in civil matters.
  - The policy with regard to language of record should be reviewed. Institutions of language development should be utilised to promote multilingualism, including languages not provided for in the Constitution.
  - Government must investigate means to promote the use of sign language in court.
  - Communicative competence in at least one indigenous language should be considered for introduction as a requirement for qualification for undergraduate law degree.
  - It is noted that English and Afrikaans are used as the predominant languages of record. Government must promote the use of other official languages as languages of record. This must include use of other official languages in court processes such as summonses, writs of execution etc.
- e) Public Education
- There is a need to engage in public education regarding the Constitution and the manner in which the justice system operates. There is a need to work in partnership with the institutions created in terms of Chapter 9 of the Constitution to attain his goal.
  - There is a need to deepen the understanding of the judicial system amongst victims of crime.
- f) Alternative Dispute Resolution mechanisms
- The Constitution guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair hearing before a court, or where appropriate, another

independent and impartial tribunal or forum. Closely associated with the right of access to court is the right to a fair hearing and the rights of arrested and detained and accused persons enshrined in the Constitution. The State has the legal, moral and social responsibility of realizing these rights. As a result of socio-economic imbalances and apartheid policies that shaped the South African society in the past, access to justice has been largely skewed, particularly on the basis of race, gender, class and social origin. Given our past history, measures that ensure equitable access to justice must be given priority.

- The Constitution requires legislative intervention to address the participation of people other than judicial officers in court decision. Not all available approaches to the settlement of disputes other than in the normal course of court proceedings have been adequately exploited in the South African legal system. Alternative Dispute Resolution (ADR) has largely developed in response to the shortcomings of the formal adjudication process. The judicial system is, most often, considered to be slow, very cumbersome and inordinately expensive. In contrast, ADR, which is based on the mechanism of mediation, is inherently flexible, more expeditious and substantially less expensive.
- Due regard should be given to such alternatives so that access to justice is not impaired by the economic status of litigants. These alternatives should also empower communities

to participate in the resolution of less serious offences that would normally not require the might of the State machinery to resolve. These alternative forums can also implement measures to promote restorative justice. These alternative forums must be located within the judicial system.

g) Traditional Courts

- Throughout the history of South Africa, traditional leaders established dispute resolution institutions. These institutions have, in general, been successful in resolving disputes in rural communities. Successive colonial and Apartheid governments have, however, fundamentally altered the functioning of these institutions. The role of traditional courts was gradually obliterated and made to function according to the dictates of the apartheid legislation.
- With the repeal of the Black Administration Act, 1927, it is imperative for government to urgently review the role of traditional institutions in the resolution of disputes affecting rural communities to conform to the Constitution.

h) Juvenile Justice System

- The present system of dealing with child offenders is inadequate in many respects. Places of safety also have not been functioning optimally. It is necessary therefore to review the current legislative framework and practices relating to child offenders.
- These challenges are set out in the draft Child Justice Bill. Government must urgently implement the Child Justice Bill.

### SUMMARY OF KEY POINTS

1. The Constitution expressly guarantees the right of everyone to access to courts and other independent tribunals. Since 1994, the government has made available resources such as legal aid system to enhance access to courts.
2. The right of access to courts may, however, be hindered by factors such as the economic status of the litigants, rules of court, geographic location of courts, language used in court etc.

### QUESTIONS FOR DISCUSSION

- a) What are the successes of the government in the area of access to courts?
- b) What are the main challenges in this regard?
- c) Is it important to introduce alternative dispute resolution mechanisms? If so, what form should these mechanisms take? What should be the role of the public in the ADR structures?
- d) What should the language policy of government be?
- e) Should the public have a role in the drafting of rules of court?

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## CONCLUSION

25. This paper has made an assessment of the gains made with regard to the transformation of the judiciary. It also reflected on the remaining challenges that require attention. The task of the ANC is to consolidate these goals. The judiciary occupies an important role in society. Unless, it is transformed to be accessible and to function according to the Constitution and to be representative of our people, the struggle for constitutionalism will not be complete. The ANC has made strides in this regard since the attainment of our freedom in 1994. The reality, however, is that the gains made since 1994 represent only the beginning of a long and protracted struggle for full emancipation. In this era, it is critical to marshal all progressive forces behind the vision of the ANC. Transformation as envisaged by the Constitution is, after all, in the national interest of all South Africans.