

Legal Services Sector Charter

Jannie Eksteen SC, chair of the General Council of the Bar of South Africa

On 11 August 2006 the Minister of Justice and Constitutional Affairs released a draft 'Legal Service Charter' for discussion. The Charter is one to be developed and ultimately gazetted in terms of the BEE Act.¹ A National Indaba on the Legal Services Charter was announced by the Minister at a media breakfast held in Pretoria on the same day. The Indaba was held on 17 and 18 August.

Members of the executive committee of the GCB attended the Indaba. As a result of the extremely brief notice and the date of publication of the draft Charter, the GCB was unable to present any mandated position on its content. An appropriate response is currently being prepared and will be submitted as soon as is practically possible. The GCB did, however, raise its concern at the proposal contained in the draft Charter that a single regulatory body be established by legislation, which body will be appointed by the Minister of Justice, after consultation with the Chief Justice and the President of the Supreme Court Appeal.

The Director General of the Department of Justice was subsequently quoted as having said that the position of the GCB represents a 'highly protectionist view' and that it constitutes a 'selfish argument'.² This criticism needs to be evaluated.

The GCB accepts, as it always has accepted, that the legal profession has to be regulated. What we resist is the proposition that this is best done by a State-appointed, State-controlled council. The position of the GCB is, I believe, motivated by basic constitutional principle.

The first draft Legal Practice Bill was published in 2000. It too proposed a State-appointed, State-controlled council to regulate the legal profession. The GCB resisted it then. We were joined therein by the attorneys' profession.

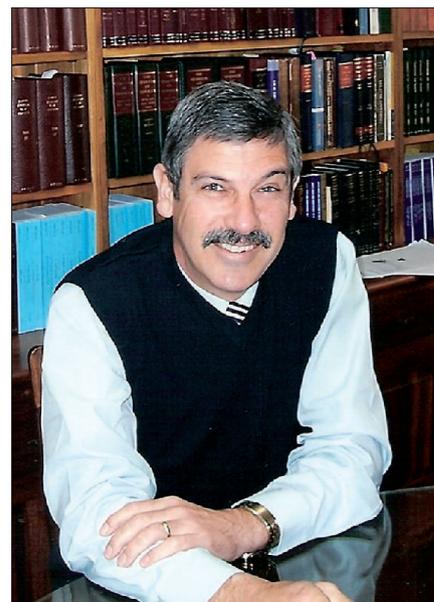
At that time, on 7 March 2001, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato'Param Cumaraswamy, wrote to the then Minister of Justice on

this issue. In his letter he said as follows:

'In its transformation process South Africa must be seen (to be) complying with international standards in the structuring of its vital institutions. The legal profession is one of them. It is the legal profession which cradles and nurtures appointees for judicial office. When the practising profession is not perceived as independent but is seen (to be) subservient to the executive, how could the judiciary be perceived as independent? The rule of law will seriously be in jeopardy in such a State.'

The independence of the practising legal profession is indeed inextricably linked to the independence of the judiciary. Lawyers, whether they are judges or advocates, are all part of the legal profession.³ 'It is the independent Bar inseparably from the independent bench, which is the protection of the individual citizen against the State.'⁴ Thus, 'the justice system cannot function without an independent judiciary which is able to administer justice impartially. In turn, an independent judiciary cannot exist without an independent Bar.'⁵

The independence of the legal profession is also a prerequisite, many will argue the most fundamental requirement, for the maintenance of the rule of law. At its annual meeting in Prague in September 2005 the International Bar (IBA), the global voice of the legal profession, adopted a resolution relating to the rule of law.⁶ The resolution emphasises the existence of both an independent judiciary and a strong and independent Bar as fundamental principles of the rule of law. In the United Nations Charter, the nations of the world declared their determination to establish conditions for the maintenance of justice and respect of human rights. Pursuant thereto, at the Eighth United Nations Congress on the Prevention of Crime and Juvenile Offenders, held in Havana in August/September 1990, a resolution on the 'Basic Principles on the Role of Lawyers' (the Basic Principles) was adopted. These principles recognised that



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an organised, independent, self-regulated legal profession is essential to the establishment of such conditions. Article 24 of the Basic Principles records that 'the executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.'

The preamble to the Basic Principles acknowledges that 'adequate protection of human rights and fundamental freedoms, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession'. It urges upon governments that the Basic Principles 'should be respected and taken into account by governments within the framework of their national legislation and practice and should be brought to the attention of ... members of the Executive and Legislature and the public in general'.

Viewed from this perspective, the position which the GCB has taken is indeed, 'protectionist' – but of basic constitutional principle. It is hardly 'selfish'. It requires members of the Bar to give up their own time, unpaid, for pupillage, lectures, examinations (moderated by judges), advocacy training and disciplinary committees.

The GCB shall continue to engage with the Department of Justice and with the Steering Committee appointed by the Minister of Justice in an endeavour to play a positive and constructive role in the process relating to the proposed Legal Services Charter.

Transformation

The legal profession clearly has an important institutional role to play. 'The institutional role of an independent legal profession and the need for public confidence in it is the very reason why it is desirable in a democracy that the legal profession and the judiciary chosen from it ... are, where possible, reflective of the whole community and include appropriately qualified men and women from diverse backgrounds.'⁷ These sentiments are particularly apposite in the context of a

changing South Africa. It is in pursuit of such public confidence that the GCB has again reaffirmed its commitment to transformation at the Bar.

The commitment of the GCB is borne out by the composition of the executive committee elected at the annual general meeting in July. Ten members were elected to the executive committee. Eight are black and four are women. At management level transformation has been largely achieved, yet the mem-

bership of the constituent Bars still fall far short of being reflective of the whole community. The reasons for the current pace of transformation are varied and complex. However, transformation of the profession remains one of the major priorities within the profession for the reasons referred to above. To this end it has been resolved to hold a symposium, probably early in 2007, in order to ponder, together with other role players outside of the Bar, a strategy to promote a sustainable transformation of the referral profession whilst ensuring that it remains comprised of 'appropriately qualified' persons.

Endnotes

- 1 Broadbased Black Economic Empowerment Act 53 of 2003.
- 2 *Sunday Times*, 20 August 2006.
- 3 Colin Nicholls QC 2006 April *Commonwealth Lawyer* Volume 23.
- 4 Sidney Kentridge SC 1991 *Consultus* 100 at 102.
- 5 Dato' Dr Cyrus Das, President of the Commonwealth Lawyers' Association, in his address to the Latimer House Joint Colloquium in June 1998, published in John Hatchard and Peter Slinn (ed) *Parliamentary Supremacy and Judicial Independence, a Commonwealth Approach* (London: Cavendish Publishing Limited, 1999).
- 6 The full text of the resolution was published in 2005 December *Advocate* 8.
- 7 Judge Margaret MacMurdo, President, Court of Appeal, Supreme Court of Queensland, in her address 'The Legal Profession, Advocacy and Independence in the Twenty First Century,' delivered on 21 July 2006 to the Bar Practice Course in Queensland, Australia. 

Rule of law symposium and IBA annual conference

Jannie Eksteen SC, GCB chair, attended the IBA meeting in Chicago during September 2006. He reports as follows:

Rule of law symposium

On 16 and 17 September a special 'Rule of Law Symposium' was held at the Westin Hotel, Chicago, Illinois. The symposium was a joint venture between the American Bar Association (ABA) and the International Bar Association (IBA). It was the first time that the two largest international lawyers' organisations had come together in this fashion. Almost 400 lawyers attended and I represented the GCG at this symposium.

In his opening remarks Francis Neat, the President of the IBA, urged lawyers to be patient when trying to foster a culture of respect for the rule of law, pointing out that it had taken nearly 300 years to develop universal democracy in the United Kingdom from the time when such values were first expressed.

Mary Robinson, a former President of Ireland and past United Nations High Commissioner for Human Rights, delivered the keynote address. She made a passionate call for a renewed defence of

the rule of law and asserted her belief that the rule of law is fundamental to supporting human rights. She expressed concern that the policies of many governments toward the threats posed by terrorism and other security problems are undermining the rule of law.

The sentiments expressed by Mary Robinson were echoed by numerous other prominent speakers at the symposium.

Lord Goldsmith, the United Kingdom Attorney General, also spoke at the symposium. He defended the British government's handling of security issues since 11 September 2001. He echoed a speech given by Prime Minister Tony Blair during August 2006 in which he described a global struggle against extremism in which values such as tolerance were as important a tool as force. He expressed the view that part of that effort was achieved by a continued commitment to rights and principles such as the rule of law.

Other specific issues discussed at the symposium included human traffick-

ing, corruption, the independence of the judiciary, the environment and corporate responsibility.

IBA annual conference

The annual conference of the IBA was held in Chicago from 18 to 22 September, following directly upon the Rule of Law Symposium. I attended these proceedings too on behalf of the GCB and in particular the sessions of the Bar Issues Commission (BIC).

The BIC was established in Auckland at the 2004 annual conference of the IBA and has generated considerable interest from Bar leaders during the first two years of its existence.

At the Chicago conference the BIC confirmed its commitment to providing a range of resources and services to developing Bars. These resources include:

- 1 Developing and organising activities/events which increase the opportunity for developing Bars to meet with and learn from one another in formal/informal settings.
- 2 Developing and strengthening ties with and between developed and developing Bars by creating the Bar Co-operation Programme.
- 3 Providing resources for developing Bars either through the IBA's Human Rights Institute or the BIC directly.