

# JUCIDIAL GOVERNANCE IN SOUTH AFRICA

PROGRESS, PROCRASTINATION & PROGRNOSIS

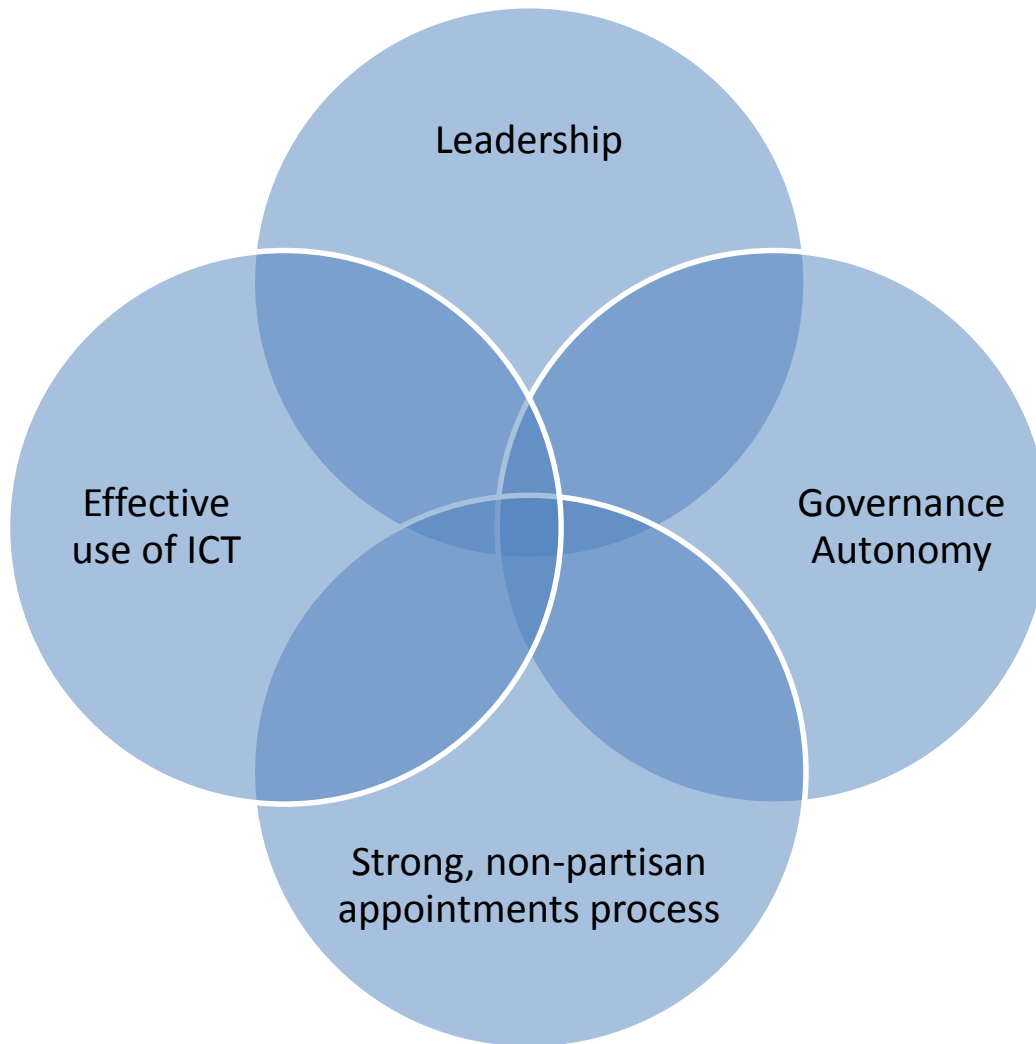
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# JUDICIAL MODERNISATION: FINDING THE SWEET SPOTS



# STARTING POINTS

The final Constitution of 1996 seemed to anticipate substantive reform and modernization...as the former CEO of the Constitutional Assembly, Hassen Ebrahim has noted, a transitional provision envisaged the kind of the rationalization of the court system commensurate with a “judicial system suited to the requirements of the new Constitution”.

Ebrahim, Hassen. ‘Governance and Administration of the Judicial System’ in Hoexter, C & Olivier, M. op cit. at p. 100, referring to item 16(6) of Schedule 6 of the Constitution.

# The Story of Sandile Ngcobo CJ & the Office of the Chief Justice in SA

“At a conceptual level, one cannot talk about the judiciary as a genuinely independent and autonomous branch of government if it is substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operations. The practical dimension flows directly from this. While the judicial officers may be free to operate independently and to hand down fair and impartial decisions according to law, their ability to do this may be constrained in various ways, notably by the financial, human and physical resources available to perform their tasks. A key element of this is the extent to which the judiciary has control over its own resources and thus is able to determine its policy and strategic priorities and how funds are to be allocated to pursue those priorities.”

- Justice Sandile Ngcobo (as he then was), National Judges’ Conference in 2003

# REFORM TIMELINE

- Apartheid era: judicial administration was a unit with department of justice
- 1996 Constitution established 'judicial independence' (s. 165)
- Chief Justice given increasing powers & range of authority
- Heads of Court resolved that more capacity be created around the CJ
- Section 1 of the Constitution Seventeenth Amendment Act, 2012 amends s 165 of the Constitution by adding subsection (6) which states that: "The Chief Justice is the head of the judiciary and exercises responsibility over the establishment of norms and standards for the exercise of the judicial functions of all courts".

# SA REFORM TIMELINE CONT.

- CJ Ngcobo appointed in 2009
- Ngcobo and Minister of Justice, Jeff Radebe, reach agreement on establishment of Office of Chief Justice (OCJ)
- OCJ established as a government department, by Presidential Proclamation (#44 of 2010, dated 23 August 2010)
- Research conducted on operational models for OCJ and court administration; secretariat led by former Constitutional Assembly CEO, Hassan Ebrahim

# SA REFORM TIMELINE CONT.

- Policy Framework: Independent Court Administration. Unpublished document prepared by the Department of Justice ‘in order to assist it to adopt a policy position in relation to a new system of court administration in South Africa’.
- Provided a survey of three different models of court administration: executive based model, entirely autonomous model, and judiciary-based model. The judiciary-based model emerged as the preferred one, which would “locate[s] an independent court administration authority outside both the executive and judiciary” but accountable only to the judiciary

# SA REFORM TIMELINE CONT.

- Study tour to Norwegian Court Administration, 2011
- Committee on Institutional Models appointed by CJ Ngcobo, to be chaired by Former CJ's Chaskalson & Langa
- August 2011, extension of CJ Ngobo's term by President Zuma declared unconstitutional by Constitutional Court; CJ Mogoeng Mogoeng appointed in September 2011
- CJ Mogoeng appoints Dep President of Supreme Court of Appeal, KK Mthiyane J., to chair a committee of judges to flesh out judicial administration system and necessary legislation
- February 2015: National Budget allocates R6bn (US\$500m) for next 3 years



# THE NGCOBO PROPOSAL

- Two independent bodies would be established: a Court Administrative Authority or Office would be the executive and administrative part of the new institutional arrangement, under the oversight of an independent Judicial Council and a Courts Advisory Board

# Budget – the pivotal issue

Explicitly adopting the approach of the seminal report on constitutional bodies and their funding and other institutional arrangements – the *Asmal Report* – the Department of Justice *Policy Framework* addressed the critical issue of the budget of the judiciary by submitting the proposal that the court administration body would be required to submit the budget of the judiciary directly to parliament without going through the conduit of a national department, thus inserting a significant element of protection for the fiscal integrity of the judicial branch of government. Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions (chaired by the late Professor Kader Asmal, MP). 2007.

# PROGNOSIS: QUESTIONS & ISSUES

- Proposition One: Judges need sufficient autonomy in the governance of their branch to be properly 'independent'
- Proposition Two: the Executive Branch needs sufficient control over administration of justice to pursue its legitimate public policy goals in relation to access to justice
- Where is the balance to be found?

# How much autonomy?

## A Typology of Judicial Governance Autonomy

### Options:

- Full Autonomy: Judiciary in full control of own governance and administration of justice; Determine own budget – sent to Parliament directly
- Semi Autonomy: Judiciary in charge of judicial governance matters, but executive is in charge of admin of justice and judiciary submit budget to parliament via department of justice
- No Autonomy: Executive runs the show and decides the budget with parliament.