

Enter the UN and the IBA

The following are extracts from a letter dated 7 March 2001 by Dato' Param Kumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers, to the Minister of Justice and Constitutional Development:

"Since my communication to you by email on January 8, 2001 and that of March 5, 2001, I have since received further information that the Policy Unit in your Ministry on March 2, 2001 on the issue of the proposed composition of the statutory council for the legal profession has stated as follows:

'A council elected by lawyers, in the way that the statutory law societies were, is out of the question. The provincial statutory law for they purported to promote the interest of their members, while, at the same time promoting the interest of their members, while, at the

same time, promoting the public interest. Any lawyer should realise that this involves an inherent conflict of interest'

If such a statement was in fact made then I find it most perplexing. It appears to reflect a misunderstanding of the role of lawyers and the legal profession in general in a democratic society.

In this regard I must draw your attention to the UN Basic Principles on the Role of Lawyers endorsed by the General Assembly in 1990. I refer in particular to Principle 24 which reads:

'Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its function without external interference' (emphasis added)

Principle 24 needs to be read together with Principle 97 and 99 of the Draft Universal Declaration of the

Independence of Justice ("Singhvi Declaration") which the UN Commission on Human Rights by resolution 1989/32 endorsed.

Principle 97 Provides:

'There may be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists' (emphasis added).

Serving the public interest

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- Maintaining quality

A poorly performing barrister can simply not be briefed again. In an employed service it is extremely difficult to dismiss incompetent staff, and substantial severance payments may have to be made.

- The real costs

The Treasury view may be that public defenders will save money, but time after time the civil service has grossly under-estimated the true costs of running a public service. False comparisons are made. The headline comparison between the salary of an employee and the fee of the independent advocate is totally misleading. Out of the fee, a self employed barrister has to pay for the costs of running a practice – clerks and practice managers, rent and rates, insurance, IT, books, professional subscriptions, travel and pensions, *et cetera*. By contrast, on top of an employee's salary there is a host of additional expenses: establishment, administration, premises, insurance, IT, books."

He concludes that although the system is being implemented, it must be implemented cautiously. The mixed economy of legal services provision must be maintained, together with the value for money and expertise offered by an independent Bar in private practice. 

International Bar Association

Letter dated 9 March 2001 by Dianna Kempe QC, president of the International Bar Association, to the Minister of Justice:

"It has been drawn to the attention of the International Bar Association (IBA) that the draft Legal Practice Bill may appear to threaten the independence of the legal profession and ultimately that of the judiciary in South Africa. We are forwarding some observations on this matter.

The draft Legal Practice Bill makes provision for the establishment of a Legal Practice Council (LPC) to control the legal profession. The LPC will be responsible for the enrolment, removal and disciplining of all legal practitioners.

The proposed constitution of the LPC is of particular concern. The relevant provisions are as follows:

Section 3(1) provides that the 20 members of the LPC will be selected and appointed by you, as Minister of Justice, from a selection of nominees.

Section 3(1)(a) states that the 'Chairperson will be a judge or retired

judge, or person of similar calibre, selected by the Minister in consultation with the Chief Justice and the President of the Constitutional Court.'

The remainder of Section 3(1) goes on to list the organisations that may make nominations.

As you are aware, the IBA is intimately concerned with the promotion and protection of the independence of the judiciary and the legal profession worldwide. We are sure you share our position on this principle that is supported in international agreements, as shown below.

The IBA shares the concerns of its members organisations, the General Council of the Bar of South Africa and the Law Society of South Africa, that these provisions may lead to the appearance of undue influence of the legal profession by the government. We feel that the principle of independence requires that the majority of members of the LPC should be practitioners and should not be subject to selection by a member of the executive. Many members of the legal profession will not be represented due to the selection process.

Thank you in advance for considering our position on this matter and we look forward to hearing from you in due course."