

Civil Government Lawyers in South Africa v 1a

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Introduction

This paper explores a set of issues around South African lawyers providing civil litigation services and legal advice to the government in support of the constitutional project to transform South African society through law. There is reason to think that the functions performed by justice professionals employed by and working within the South African state are essential to the projects of the rule of law and transformative constitutionalism. Yet these lawyers are little-studied and not often the subject of policy debate. Indeed, twenty years after the transition to constitutional democracy in South Africa, neither of the two key lawyering units internal to the government appears to be held in high esteem within the legal profession.

Working in a preliminary vein and from official and other publicly available documents, this paper first offers an introduction to these two key units and notes the official recognition of the two categories of problems in this area. The paper next details the official way forward towards the transformation of state legal services, which focuses on the implementation of a legislative change enacted in 2014. The following section of the paper argues that this solution is not one of mere symbolism but interrogates what sense of substantive transformation is likely to result from this structural change. Finally, the paper uses a contemporary historical and a comparative method to outline an institutional possibility for transformation of state legal services that might be in greater alignment with the project of transformative constitutionalism. As this paper is preliminary, a continuation of this work with semi-structured interviews and other research methods would be valuable.

An Introductory View of State Lawyering: Two Key Units and the Others

The institutions that are the focus of this paper are currently organisationally understood as two branches of the Department of Justice and Constitutional Development. One is the Office of the Chief State Law Adviser (OCSLA). The other is the Office of the Chief Litigation Officer (OCLO). This paper does not focus on the state provision of legal services to poor persons, e.g. through Legal Aid South Africa (LASA). Such state legal services are significant and are an important part of the current picture of access to justice in South Africa.¹

OCSLA is currently headed by Mr E Daniels.² The Office of the State Legal Adviser appears formally stable at the moment. Its operating budget is R57m.

¹ Klaaren - Cost of Justice - 2014.pdf, , <http://wiser.wits.ac.za/system/files/documents/Klaaren%20-%20Cost%20of%20Justice%20-%20%202014.pdf> (last visited Sep 1, 2014).

² Office of the Chief State Law Adviser/Structure, , <http://www.justice.gov.za/ocsla/organo.html> (last visited Oct 6, 2014).

The functions of the Office of the State Legal Adviser are, in the Office's words: "The Office of the Chief State Law Adviser provides legal advice, representation and legislative drafting services to the Executive, all state departments at both national and provincial levels, municipalities, parastatals and independent or autonomous bodies that may refer work to it. It supports the government to achieve its objectives of transforming South African society and redressing past imbalances by providing efficient and cost-effective legal advice, legislative drafting and translation services of high quality."³

There is not much detail on the operations of the State Legal Adviser from the annual reports of the Department. The report does however note an increase in the number of matters on the unit's workload and in the complexity of these matters. In 2013/2014, the SLA finalized 824 legal opinions, which included 88 sets of comments on draft bills and the certification of 574 bills and other legal instruments.⁴ Apart from comments on draft bills and certifications, the work of the SLA includes legal advice to the executive.

OCLO is currently headed by Ms O Phahlane (Acting).⁵ This office was approved in April 2007.⁶ The Office of the Chief Litigation Officer currently runs three chief directorates – Legal Services, Operations, and State Attorney Services. This paper is primarily concerned with the third, relating to the 12 Offices of the State Attorneys. The State Attorneys are established by legislation and that legislation has been amended by Parliament in 2014, though the amendment act has yet to come into force.⁷ The operating budget for the Offices of the State Attorneys for 2013/2014 was R332m.

The functions of the State Attorneys are: "[t]he drafting and managing of contracts on behalf of the State; the handling of criminal and civil litigation cases instituted against State officials and committed by means of acts or omissions while executing their official duties; the hand[ling]ing of applications from qualifying personnel for admission as advocates for the High Court; the handling of applications for admission as practicing attorney; and the regulation and overseeing of the conduct of private attorneys operating under the State Attorney Act."⁸

Some empirically-informed analysis regarding trends in the operation of the State Attorneys Offices comes from a parliamentary question asked in 2013 regarding the legal matters dealt with by the Department from 2009 to 2013. During this period, the number of matters relating to property deeds steadily and significantly declined. The Department engages private attorneys to work on

³ Office of the Chief State Law Adviser/Home, , <http://www.justice.gov.za/ocsla/index.html> (last visited Nov 5, 2014).

⁴ DOJCD Annual Report 2013-14.pdf, 39, <http://www.justice.gov.za/reportfiles/anr2013-14.pdf> (last visited Oct 6, 2014).

⁵ Justice/Branch Structure/Chief Litigation Officer, , http://www.justice.gov.za/branches/organo/organo_CLO.htm (last visited Oct 6, 2014).

⁶ Department of Justice briefings: Court Services, Master's Office, Justice College, Chief Litigation Office, Chief State Law Adv, PARLIAMENTARY MONITORING GROUP, <http://www.pmg.org.za/minutes/20070527-department-justice-briefings-court-services-master%E2%80%99s-office-justice-college-chief-l> (last visited Jul 15, 2014).

⁷ State Attorney Amendment Act [No. 13 of 2014] (Gazette 37662, Govt Notice 386), POLITY.ORG.ZA, <http://www.polity.org.za/article/state-attorney-amendment-act-no-13-of-2014-gazette-37662-govt-notice-386-2014-05-19> (last visited Jun 13, 2014); State Attorney Amendment Act, Act No. 13 of 2014 - 49992_37662_act13of2014stateattorney_19may2014.pdf, , http://us-cdn.creamermedia.co.za/assets/articles/attachments/49992_37662_act13of2014stateattorney_19may2014.pdf (last visited Jun 13, 2014).

⁸ Justice/Branch Structure/Chief Litigation Officer, *supra* note3.

state civil litigation matters in two situations: where the State Attorney is legally precluded by a conflict of interests from acting and in “instances that require specialization (i.e. where there exists no expertise within the Office of the State Attorney)”.⁹ The statistics kept by the Department do not differentiate between the matters which are dealt with by private attorneys on behalf of the state and the matters which are dealt with by state attorneys.¹⁰ One might think that the number of cases dealt with by private attorneys is increasing since the total funds paid to private attorneys during the four years covered increased by 28%, 21%, and 20% in each of the years or periods for which statistics were provided.

While these two units are indeed key to the provision of state legal services, they do not cover the field. And the rest of the field is significant. A good sense of this can be obtained by considering the spending of the police on legal services. As reported on 2 Nov 2014, according to the police’s annual reports, the department spent R291m on its legal defence in 2013-2014 compared with the R165m it spent the previous year. It was further reported that the police are responsible for more than a third – 38% – of the total expenditure on legal fees by all 33 of national departments this year. The entire national government spent a total of R759m on legal fees in 2014.

This expenditure on legal services by national departments must be supplemented by the spending of the provincial and the local governments as well as state agencies. These fees would be spent on a mixture of attorneys and advocates. Even this expenditure itself would be incomplete as one would have to add in the spend of departments, governments, and agencies on in-house (staff) lawyers.

Some comparisons and proportions may be made. The spending in one year, 2013/2014, by one department of the South African state, the South African Police Services is only slightly less than the state spending on the state attorneys. Indeed, this figure for total national department spending on legal services is more than twice the budget of the Offices of the State Attorneys. The operating budget of the State Law Advisor (R57m for 2013/2014) is far smaller (about one sixth) than that for the State Attorneys (R332m) for the same period.

An Introductory View of State Lawyering: The Official Problems

There is official recognition of two types of problems with respect to state legal services. The first relates to the quality of the services delivered. The second relates to the demographic profile of the lawyers providing legal services to the government.

With respect to the first type of problem, the latest annual report of the Department forthrightly refers to “a number of operational challenges experienced across government [with respect to state legal services], which include the following: Prescription of claims involving government; Default judgments granted against government; Lack of monitoring systems over the work and outputs of attorneys and advocates; Inconsistency in the determination of counsel fees; [and] Low success rates in cases against the State.”¹¹

⁹ Parliamentary Question 2013-147.pdf, , <http://www.justice.gov.za/pqa/pqa2013/2013-147.pdf> (last visited Oct 6, 2014).

¹⁰ *Id.*

¹¹ *Id.* at 35.

The success rate in concluded litigation is one of the performance indicators that the Department reports on. For 2013/2014, the Department noted that out of the 1 086 cases decided in court, “667 of these cases were successfully concluded, translating into 61% performance. Although the target has been exceeded, it should be noted that there is still a high number of cases that are settled as many of these cases are deemed difficult to defend. There is a greater necessity of interaction with client departments to improve relations and strengthen the approach to litigation management. The Department has established task teams to address challenges experienced.”¹² The 61% success rate was a significant reported increase on the previous year, which was 30%. The Department noted that the reason for this improvement was “the establishment of the task team and the interaction with stakeholders to strengthen the approach to litigation management.” By stakeholders, the Department here appears to be referring to the other government departments.

However, with respect to state legal advice (e.g. the operation of the Office of the State Legal Advisor), the latest annual report does not register any dissatisfaction.

Dissatisfaction with the quality of state legal services (meaning here the state attorneys) has also been expressed from the Bench.¹³

With respect to the second type of problem with state legal services, the official view appears to be one of limited success. For instance, for 2013/2014, the Department has reported “During the year under review, R641 874 613 was allocated to counsel in State litigation matters. Of this amount, R482 386 444 was allocated to PDI counsel, translating into 75% performance.” Indeed, raising the percentage of counsel spend on PDIs from 70% to 75% was one of the Department’s performance indicators and was achieved.¹⁴

Interestingly enough, the Judicial Service Commission, the constitutionally mandated institution for the selection of judges, has expressed dissatisfaction with both aspects of this problem. For instance, at the recent hearings for selection of judges to the Western Cape, the Premier of the Western Cape expressed dissatisfaction with the performance of state lawyering. The JSC is also clearly on record as supporting the transformation of the demographics of the legal profession as a way of assistance for the JSC to achieve its mandate of a representative judiciary.

The Transformation of State Legal Services: The Official Way Forward

The immediate way forward to solving these problems appears to be the impending legislatively mandated establishment and appointment of a new post, the Solicitor-General. According to the Minister (writing in the Department’s 2013/2014 Annual Report): “With regard to the transformation of State legal services, I am pleased that the amendment to the State Attorney Act of 1997 has been passed by Parliament. This will enable the Department to appoint a Solicitor-General,

¹² *Id.* at 69.

¹³ High court judges lash the State Attorney - South Africa | Moneyweb, , <http://www.moneyweb.co.za/moneyweb-south-africa/high-court-judges-lash-the-state-attorney> (last visited Oct 17, 2014); MEC may have to pay legal fees from her own pocket - Special investigations | Moneyweb, , <http://www.moneyweb.co.za/moneyweb-special-investigations/judge-wants-mec-for-health-to-pay-costs> (last visited Oct 17, 2014).

¹⁴ DOJCD Annual Report 2013-14.pdf, *supra* note 10 at 68.

who will oversee State litigation and put in place measures to effectively manage State litigation.”¹⁵
The President assented to this State Attorney Amendment Act 13 of 2014 on 19 May 2014.¹⁶

In one sense, there is relatively new that is envisioned with this new post. Indeed, the funding for the new office of the Solicitor-General will come from the currently vacant post of the Chief Litigation Officer (occupied by an acting appointment). However, in another sense, there is a fundamental change imagined with this new office. In terms of the new legislation, the Minister has the power, after consultation with the Solicitor-General, to make binding policy on the coordination of civil litigation within the Department and the state and on the appointment of attorneys and advocates from PDIs.¹⁷ While the policy will be the prerogative of the Minister, the implementation of whatever policy of coordination is decided upon will be the responsibility of the Solicitor-General.

In the development of the policy lying behind this legislative change to the structure of state legal services, the goal of demographic transformation took pride of place. The key document here is the Cabinet-approved policy document, the Framework for the Transformation of State Legal Services.¹⁸ This policy largely though not exclusively understands transformation in terms of demographics. As the Framework states: “The primary objectives of the policy framework are to the develop legal skills in the private sector through the equitable outsourcing of legal work to PDIs in order to redress the imbalance of past discriminatory practices in the legal profession and the state. This is intended to ensure the progression of PDIs, and women in particular, in the practice of law, the judiciary and other positions of responsibility in the broader community and internationally.”¹⁹

However, in the process of implementation this legislation, the goal of quality and performance improvement is often present at least as a primary goal of the legislation. For instance, according to the then-Minister in 2012: “The outcome of this ... policy framework, in the medium term, is to consolidate and streamline all state legal services under a single functionary who will be appointed as Head of State Legal Services. The Head of State Legal Services, who will occupy a position of, or similar to, that of Solicitor-General in comparable jurisdictions, will be the state’s chief legal adviser, who will represent the state in all civil litigation in the same way that the National Director of Public Prosecutions represents the state in criminal prosecutions. The appointment of the Head of State Legal Services will be made as a matter of urgency so that the desirable consolidation, mainstreaming and co-ordination of state legal services may begin in earnest. This will set in motion all the institutional arrangements aimed at transforming state legal services.”²⁰

Likewise, after noting challenges regarding the quality of legal services, the recent Annual Report of the Department states: “Cabinet has approved a Framework for the Transformation of State Legal

¹⁵ *Id.* at 14.

¹⁶ State Attorney Amendment Act, Act No. 13 of 2014 - [act13of2014stateattorney_19may2014.pdf](http://db3sqepoi5n3s.cloudfront.net/files/act13of2014stateattorney_19may2014.pdf), , http://db3sqepoi5n3s.cloudfront.net/files/act13of2014stateattorney_19may2014.pdf (last visited Oct 17, 2014).

¹⁷ State Attorney Amendment Bill: Departmental briefing; Private Security Industry Regulation Amendment Bill: further Departmental briefing and adoption, PARLIAMENTARY MONITORING GROUP, <http://www.pmg.org.za/report/20140304-state-attorney-amendment-bill-departmental-briefing-private-security-industry-regulation-amendment-bill-further> (last visited Oct 17, 2014).

¹⁸ Framework for the Transformation of State Legal Services 2012, 2, <http://www.justice.gov.za/docs/other-docs/2012tsls.pdf> (last visited Oct 16, 2014).

¹⁹ Framework for the Transformation of State Legal Services 2012, *supra* note 18.

²⁰ *Id.* at 2.

Services to address the above challenges. The implementation of the Policy Framework will also go a long way in responding to the general outcry within the profession that previously disadvantaged individuals (PDIs) are not given briefs or that the value of the briefs are not commensurate with transformational objectives. As part of these transformation initiatives, amendments to the State Attorney Act of 1957 have been passed by Parliament. This gives the Department an opportunity to establish the position of a Solicitor-General, who will represent the State in all civil litigation.”
[confirm]

However, in more political rather than bureaucratic contexts, the demographic goal appears to dominate. For instance, in his maiden budget speech, the Minister linked the amendments to the State Attorneys office to transformation in this sense: “Through the State Attorney Amendment Bill which was enacted by the fourth democratic Parliament, government will develop and implement policies which will enable us to monitor the preferential allocation of state’s legal work to female and other previously disadvantaged practitioners. These measures are aimed at widening the pool from which the Judicial Service Commission can select candidates who will advance the transformation of the judicial system.”²¹ This same theme was taken up in the response to the budget speech by the ANC chairperson of the portfolio committee, Dr MS Motshekga: “We also believe that you cannot produce good black judges unless you have good black lawyers. We are therefore, as this Parliament, going to monitor the issuing of briefs to black lawyers so that they can get the necessary experience that will make them eligible for appointment as judges.”²²

Symbol or Substantive Transformation?

The newly created post of Solicitor-General is likely to be rich in symbolism. Nonetheless, the official ambition with the appointment of the Solicitor-General is clearly not one of mere symbol. It is a substantive measure that has the potential to impact upon the problems of demographic transformation of the legal profession as well as upon the quality and impact of state legal services.

In particular, it is worth noting that a sense of transformation – that usually associated with transformative constitutionalism that is not present in this debate over necessary changes in state legal services. This is the degree to which state legal services may assist the state in the promise of transformation. This ambition lies beyond that of demographic change and beyond that of providing quality and efficient legal services by competent legal professionals serving the government in advisory, transactional, and litigation capacities. It aims instead at structural change (including cultural transformation). Properly understood and reconfigured in this third sense of transformation, state lawyers could amplify the transformative role played by the judiciary and the executive.

A potential model for this sense of transformative government lawyering may be found in Israel. A recent socio-legal study has examined government lawyering in Israel.²³ *Lawyering for the Rule of Law* by Yoav Dotan introduces a new model of government lawyering in which government lawyers function as an ancillary mechanism that enables the court to expand its influence on policy-making

²¹ NA: Debate on Vote No 24 – Justice and Constitutional Development, PARLIAMENTARY MONITORING GROUP, <http://www.pmg.org.za/hansard/20140715-na-debate-vote-no-24-justice-and-constitutional-development> (last visited Oct 27, 2014).

²² *Id.*

²³ YOAV DOTAN, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* (2013).

within the political branches by forming out-of-court settlements. Examining a case study focused on the Israeli Supreme Court, Dotan discusses the centrality of government lawyers with regard to judicial mobilization. He details the enforcement of social reforms through adjudication, and sheds light on particular functions of government lawyers as adjudicators and facilitators of institutional arrangements. Even without binding power, with the appropriate structural position and mandate, government lawyers may be able to broker and foster transformation in key areas of state policy and practice. By (tentative) comparison, it appears that relatively few South African government lawyers function as an ancillary mechanism to the courts. For instance, the Office of the Chief State Law Advisor appears closer to the executive than to the judiciary. Further, South African government lawyers do not appear to often play a role adjudicating upon and/or facilitating institutional arrangements within government.

Another potential model for this sense of transformative government lawyering may be found in the recent institutional history of the Department of Justice and Constitutional Development itself. This is the road embarked upon but not taken. Indeed, even a preliminary exploration of government lawyering in post-apartheid South Africa would not be complete without mention of the Constitutional Litigation Unit (CLU). The CLU was an institutional innovation operating within the Department of Justice in the Office of the Chief State Law Advisor in the form of a strategic litigation unit. The Unit was initially headed by Halton Cheadle and staff included Johan de Waal. It operated around 2004/2005.

The Constitutional Regulation of Criminal and Civil State Lawyering in South Africa

The ambition of the 2014 amendment to the State Attorney Act to coordinate all state legal services under the direction of a single government lawyer might be understood to provide some cause for concern from the point of view of a constitutional democracy. Such an office might become a locus of significant power and might need to insure the public that it would not be acting in an arbitrary fashion. The exact shape of the relationship of the Office to the Minister is likely to be significant here.

In this vein, it is instructive to compare the constitutional regulation of the criminal side of state lawyering in South Africa (including the prosecuting authority) and the civil side. Here, it allows us to see that the dominant choice made by the Constitution in this context contrasts with the criminal context. Here, the choice was to provide protection against such real and/or imagined problems not directly through specific regulation but rather indirectly, through for instance the independence of the legal profession.

The criminal side is regulated in part through the provisions of section 179 and is a matter of current political and (to some extent) constitutional controversy.²⁴ In contrast to relatively detailed provisions of section 179, the civil side of litigation appears to be constitutionally directly addressed only by means of section 180, which provides: "Other matters concerning administration of justice. National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including - (a) training programmes for judicial officers; (b)

²⁴ Don't touch independence of NPA - Sunday Independent | IOL.co.za, , <http://www.iol.co.za/sundayindependent/don-t-touch-independence-of-npa-1.1718836#.U8TV8PvNyBo> (last visited Jul 15, 2014).

procedures for dealing with complaints about judicial officers; and (c) the participation of people other than judicial officers in court decisions.” Interestingly enough, it is precisely a desire to achieve parity between the civil and the criminal side of state litigation that is cited by the 2012 Framework for the Transformation of State Legal Services as a primary justification.²⁵

There is perhaps a transitional angle here – did something get lost on the civil side when the pre-1994 attorneys-general at provincial level were turned into the NDPP and the provincial DPPs?

²⁵ Framework for the Transformation of State Legal Services 2012, *supra* note 18 at 2.