Judicial service and accountability: some questions and suggestions

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Such discussion of the composition, structure and functioning of a future South African judiciary as has appeared so far continues to be at the level of pious pronouncement and wishful thinking.[1] While some recent publications show a welcome shift to greater attention to detail, most of this comment is focused on appointment mechanisms to a future constitutional court and supreme court.[2] Almost no critical suggestions have been made concerning the conditions of service and the accountability of judges who will inevitably have a much higher profile in the process of government.[3]

Are we to assume that the politicians who will instruct the drafters of a constitution and future legislation regulating the administration of justice are content to allow the judiciary to proceed on its present course, as regards work habits, allocation of cases, resignation, retirement and so on? Should there be a procedure for hearing complaints against judges from lawyers and lay-people? If so, how will the vital and universally-acknowledged principle of formal independence of the judicial branch of government be sustained? Should new appointees to the bench not undergo an introductory course of lectures to help them adapt to their new role, and, if deemed desirable, who should be responsible for presenting such a course? Should our future judges not have a regular opportunity, at public expense, to meet to discuss issues of common concern (whether they be domestic matters or points of law) and to hear the thoughts

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1 In this category I would include the following published comment: ANC Constitutional Committee *What is a Constitution?* (1990) 44-46 and discussion document *Constitutional Principles and Structures for a Democratic South Africa* (1991) 18-19; National Party 'Proposals for a Future Democratic South African Constitution' 1991 (Oct) *Monitor* 71 at 72; and many other statements by lawyers and politicians across the spectrum: see e g the remarks of Albie Sachs in 1990 (Aug) *Monitor* 90.

2 See e g Democratic Party discussion document on constitutional proposals as published in 1991 (Oct) *Monitor* 75 at 78 (par 3.4) and in the same issue the valuable suggestions of Kader Asmal (a leading ANC constitutional lawyer) at 88; Jeremy Gauntlett SC 'Appointing and Promoting Judges: Which way now?' 1990 (3) *Consultus* 23; Gawie Nienaber 'United States Supreme Court Appointments: Implications for a Future Constitution in South Africa' 1991(3) *Consultus* 19.

3 On the near-certain assumption that they will be charged with the enforcement of whatever form of bill of rights is to be agreed upon, as well as the vital function of judicial review of the constitution.

of others (such as academics, practitioners or foreign lawyers) on contentious or developing points of law? Should provision be made for dismissal of judges, and, if so, how and by whom?

These and a myriad further questions (not all of which are amenable to inclusion in the constitution, but could certainly be dealt with by Act of Parliament) need to be carefully considered and answered. Some of them are easier to answer than others – the issue of accountability (to whom/what? how? are there circumstances in which the courts should rightly be unaccountable?) is particularly complex.[4]

This article attempts to address only two matters: 'orientation' and continuing education of judges, and procedures and causes for disciplinary action against judges (including their removal from office). It does so by pointing to models and provisions adopted in judicial systems generally not unlike our own, although the experience of very different systems might also be instructive, and is referred to on occasion. The less contentious issue is considered first.

Judicial training

As far as is known, there is no formal arrangement currently whereby newly-appointed judges in South Africa are provided with instruction on how to conduct themselves in any aspect of their judicial functions. They receive no basic training in sentencing procedures, nor in areas of law which might be beyond their experience or which have become so remote in time as to be obsolete. One thinks typically of the senior counsel with 25 years' experience at the bar, who spent the first five years on criminal work but who has subsequently concentrated on the more exclusive areas of civil litigation and whose focus has shifted increasingly to opinion work in chambers.[5]

Likewise, no provision is made for 'continuing education' of South Africa's judges in the form of seminars and short courses to keep them abreast of developments in the law and legal practice. In addition, it seems that no national gathering of judges has been held since at least the 1930s, although the judges-president of each division of the Supreme Court and the chief justice meet with the Minister of Justice annually on the occasion of the opening of parliament.

Although these facts might startle laypeople, most South African lawyers would probably respond with approval of such practices. It would be argued that the intimacy of the bar and an appointee's long membership thereof and familiarity with court personnel and procedures render any 'induction' unnecessary, especially as the new judge is very likely to have acted in that capacity in the immediate past. It might also be said that the traditions and jealously-guarded independence of the judiciary militate against apparent 'instruction' by outside parties (who would conduct the seminars?), that judges are kept in touch with

4 The best and most up to date treatment of judicial accountability in South Africa is that of Edwin Cameron 'Judicial Accountability in Practice' in André du Toit (ed) *Towards Democracy* (1991) 181-199. In the international arena, see M Cappelletti *The Judicial Process in Comparative Perspective* (1989) ch 2.

5 See the case, in England, of Lord Devlin, as described by David Pannick *Judges* (1988) 69 and particularly n 84.

developments in the law by reading legal texts and journals and by the arguments presented to them by able and ambitious counsel, and that national gatherings smack of trade-unionism and could give the impression of judicial collusion. Such arguments may well have carried weight in the past (although this is not conceded), but it is submitted that they have no place in South Africa's present circumstances. Legal practice is undergoing rapid changes, not least among them the expansion and diversification in the provision of legal services, the likely restructuring of the profession in the near future, and the substantial alteration in the judicial process which will follow on the enactment of a justiciable bill of rights, some form of which seems a certain part of a new constitution. Judges and their judgments will become the stuff of vigorous popular debate to a greater and different degree than they are presently, and it will be expected that they will participate in such discussions to an extent and in a manner suited to the office.[6]

In other words, democratic values demand that those who wield public power account for their conduct to those on whose behalf they act. As judicial power grows with the vital part that the courts will play in enforcing the standards and procedures laid down in the constitution, even to the extent of invalidation of the product of the elected legislature, so will the demand for judicial accountability be more frequently and stridently expressed. This requirement of accountability will be highlighted most clearly at the stage of appointment of judges[7] and their possible dismissal, but it will exist throughout their tenure of office, in various forms,[8] one of which, it is suggested, takes the form of in-service or continuing education. Care must, however, be exercised to ensure that 'accountability' does not become 'dependence' – formal and substantive judicial independence is a goal equal in importance to democratic accountability.

The necessity for some form of initial and continuing judicial education is all the more urgent as new skills are expected from the bench. This submission becomes even more persuasive when the experiences of courts comparable to South Africa's are considered, in regard to the interpretation and application of charters of rights.[9] It is submitted that the case for judicial education is

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6 It seems that this process at least is beginning to occur: see the unpublished remarks of Corbett CJ, at the opening of the bill of rights conference at Potchefstroom in April 1992, the open and constructive participation of several judges of the Cape Provincial Division in a seminar on the 'Appointment of Judicial Officers' held at the University of Cape Town in May 1992, and the reaction of Curlewis J to an article on death-sentencing in the Transvaal Provincial Division, published as 'Correspondence' in 1991 *SAJHR* 229-232.

7 See the references in n 1 and 2 above, as also my 'The Appointment of Judges: Some Comparative Ideas' 1992 *Stellenbosch LR* (forthcoming).

8 The conduct of cases in open court, the participation of lay assessors (and possibly a jury), popular and legal reporting of cases and judgments and the subjection of judgments to public and learned criticism are the traditional means. See the excellent and witty treatment of the last-mentioned by Pannick (n 5) ch 5.

9 One can refer here to the changed role and requirements of judicial office in Zimbabwe, Namibia and Canada over the past twelve years. In respect of the Canadian experience, see Michael Mandel *The Charter of Rights and the Legalization of Politics in Canada* (1989) and David M Beatty *Talking Heads and the Supremes: The Canadian Production of the Constitutional Review* (1990).

clinched by the practices adopted in the United States of America and the United Kingdom to achieve a well-prepared and efficient judicial branch of government.

The United States has a long-standing system of judicial consultations and education, as can be expected from a political system in which the supreme court plays such a prominent role in resolving questions of great moment. Three facets of this system[10] deserve particular attention as worthy of consideration and possible implementation in a changing South Africa.

First, as the most important body in the federal judicial administration, we must take note of the existence (since 1922, in effect) of the Judicial Conference of the United States,[11] which serves 'as the principal policy-making body concerned with the administration of the United States Courts'. Its functions are, among others, to survey the conditions of business in the courts and suggest improvements in court procedures in the interest of promoting uniformity among the various courts and the expeditious conduct of court business, study federal rules of practice and recommend changes, and prepare plans for the assignment of judges.[12] The Judicial Conference is presided over by the chief justice of the United States, and is further comprised of the chief judge of each of the twelve federal circuits as well as a district[13] judge from each regional judicial circuit (who is elected for a term of three years by the circuit and district judges of that circuit) and the chief judges of the Court of International Trade and the Federal Circuit.[14]

The Conference traditionally meets every September and March, and all members must attend. It operates through a series of committees[15] which concern themselves with a range of standing or temporary issues[16] and some of whose members are drawn from outside the ranks of the Judicial Conference. It is clear that the Conference plays a pivotal role in the efficiency and accountability of the federal administration of justice in the US.

Second, this structure is replicated in each of the thirteen federal circuits by the Judicial Conference of the Circuit.[17] This body, however, consists of all the circuit, district and bankruptcy judges and the US magistrates in that circuit, as well as invited members of the bar. It meets annually to discuss common problems and recommend improvements to the administration of justice. In addition, there exists within each circuit a Judicial Council of the Circuit, which consists of the chief judge, a fixed number of circuit judges and at least two

10 I am indebted to Miss Alice L O'Donnell, Director of the Division of Inter-Judicial Affairs and Information Services at the Federal Judicial Center, Washington DC, who kindly hosted a visit by the writer and two colleagues in Oct 1989, and who supplied the information on which this description is based.

11 See 28 US Code s 331 enacted by Congress in 1948.

12 *Ibid.*

13 There are 94 district courts in the United States and its dependencies, with 575 district judgeships authorised by law – see *The US Courts: Their Jurisdiction and Work* (1989) 8.

14 Making a total of 27 members.

15 As of March 1989 there were 28 such committees.

16 Such as: the bicentennial of the Constitution, court security, defender services, judicial ethics, judicial resources, appellate rules, space and facilities and cameras in the courtroom.

17 The information which follows is culled from several publications of the Administrative Office of the United States Courts.

district judges from that circuit. This council has the power 'to take such steps, including particularly the assignment of judges, as may be required to dispose efficiently of the volume of cases in each district'.

Third, Congress established the Federal Judicial Center in 1967 to 'further the development and adoption of improved judicial administration in the courts of the United States'.[18] Supervised by a board chaired by the chief justice,[19] the Center[20] researches problems in the management of courts and conducts education and training, including 'orientation programs or seminars for newly appointed judges, ... magistrates, ... and other court officials ...'. As an example of the latter, the programme for a 5-day 'Orientation Seminar for Newly Appointed District Judges' in late 1988 included sessions on: what it means to be a judge; employment discrimination law; guideline sentencing; court security; judicial activities and ethics; search and seizure law and federal rules of evidence. The sessions were conducted by serving judges and professors of law, and were augmented by social events and a tour of the supreme court.[21] It may be argued with some justification that the relative history, size, sophistication and wealth of the American judicial system render such services and structures both possible and necessary, and that South Africa does not need such an elaborate mechanism. However, this does not entirely dispose of the submission that a measure of supervision of judicial services and continuing education is vital at this stage of South Africa's constitutional history, for even the judges of our 'parent legal system' have themselves recognised the need for judicial training.[22] Since 1963, the Judicial Services Board has provided seminars on sentencing and other aspects of the judicial process for new and serving judges as well as those responsible for the training of Britain's lay magistrates and those persons presiding over administrative tribunals.[23]

In another jurisdiction not dissimilar to South Africa, that of Canada, an Act of Parliament[24] provides that the Canadian Judicial Council has among its objects the promotion of efficiency and uniformity and the improvement of the quality of judicial service. In particular, the Council is empowered to establish 'from time to time a conference of chief justices' and 'seminars for the continuing education of judges'.[25] The Canadian Bar Association, while not recommending the institution of sabbatical leave for judges, recognised that the increasing workload of the courts was making it very difficult for judges to ensure that they remained conversant with developments in the law.[26] This

18 See 28 US Code s 101 ch 42 par 620(a).
19 Pargaraph 621.
20 Paragraph 620(b).
21 For further details see the programme published by the Center for the seminar held from 28 Nov – 2 Dec 1988, chaired by District Judge Robert E Keeton.
22 See the letter by LG Rood 'Keep the Judges on Course' 1990 *De Rebus* 845-846, in which he asks whether South African judges have considered taking such steps.
23 See the discussion by Pannick (n 5) 69-73, as well as his eloquent plea (echoing that of several judges) for an expansion of the judicial training aspect.
24 Judges Act RSC 1970 s 39(2).
25 Sections 39(2)(a) and (b).
26 See Canadian Bar Association Committee Report *The Independence of the Judiciary in Canada* (1985) 36-37.

necessarily heightens the importance and benefits of continuing education programmes.

Finally, in this brief and highly selective survey of methods of judicial training, the recommendation concerning the status and rights of judges adopted at the Lusaka Seminar[27] by African judges and lawyers should be noted, as follows:[28] 'Judges, along with other judicial officials, should promote the establishment of institutions for professional training for various cadres of judicial officers locally or on a regional basis'. This type of recognition of the need for continuing judicial education and regular conferral among judges in order to discuss conditions of judicial service can only lead to an increased level of efficiency in the administration of the courts, and therefore to the attainment of justice.

The in-service training required of career-judges in many legal systems of the world has not even been considered. It is perhaps enough to state, at this point, that South Africa lags behind all of its former comparable jurisdictions in the British Commonwealth in this regard. The present and any future government will have to remedy this by providing structures and the financial means to ensure the maximum efficiency and justice of the court system. For example, there is no reason why there should not be an annual judicial conference attended by a proportion of the judges of each provincial division (elected by their fellow judges) and presided over by the chief justice, to review the functioning of the courts and conditions of judicial service, and to recommend changes to the Department of Justice accordingly. Equally, there is no formal barrier to the holding of a series of seminars in the provincial capitals, at which judges and practising and teaching lawyers can present and discuss particularly complex or novel legal issues with serving judges[29] – the Association of Law Societies presently provides such a service to attorneys throughout the year.

Judicial discipline (including dismissal)

South African judges at present have security of tenure until retirement.[30] Although a mechanism exists whereby a judge could be dismissed by the state president on the advice of parliament for 'misbehaviour or incapacity',[31] this has not occurred since Union and it seems highly improbable that this will happen.[32] There are no formal procedures whereby a judge who acts inappro-

27 See International Commission of Jurists *The Independence of the Judiciary and the Legal Profession in English-speaking Africa*, being a report of seminars held in Lusaka (November 1986) and Banjul (April 1987).

28 *Idem* 83 recommendation 32. Substantially the same recommendation was made by the Banjul seminar – *idem* 146 recommendation 34: '... there should be continuing education for judges at both national and international levels through conferences, seminars, workshops, etc'.

29 If the current problem is merely one of a lack of funds, this should be openly acknowledged – it is possible that a sponsor could be found or that the presenters of seminars would offer their services without charge.

30 Supreme Court Act 59 of 1959 s 10(7).

31 *Ibid.*

32 See the discussion of this matter by Cameron (n 4) 196.

priately on or off the bench can be disciplined,[33] where such misconduct is obviously not serious enough to warrant dismissal but none the less irksome to counsel and damaging to the administration of justice.[34] It is not being argued that such measures were necessary in the past, although they might have been. It is, however, my contention that the changed nature and constitutional role of the judiciary in a future South Africa will make some form of judicial discipline essential, while at the same time ensuring that judicial independence is not tampered with.

This is clearly a sensitive issue which requires a fine balance between accountability (requiring measures for discipline and ultimate dismissal) and independence (necessitating security of tenure, including sufficient financial and personnel resources to allow judges fearlessly to carry out their duties). In moving towards a greater degree of formal accountability, it is useful to consider mechanisms employed by other judicial systems, particularly those which share South Africa's traditional roots in Britain. Dismissal and discipline short of dismissal will be considered in turn.

Dismissal of judges

Most constitutions provide for security of tenure for the judges of the superior courts, which can be departed from only in highly exceptional circumstances. A survey of the formal constitutional provisions of eleven African members[35] of the British Commonwealth reveals the following pattern:

(a) a typical retirement age of 62 years 'or as prescribed' by the legislature;

(b) security of judicial tenure, subject to removal for inability to perform the functions of office (due to bodily, mental or other reasons) or misbehaviour;

(c) any removal must proceed in accordance with the provisions of the constitution, which typically prescribe one or other of the following processes: the head of state, after representations by the head of government or the chief justice, refers alleged judicial misconduct to a judicial committee, composed of three judges who hold or have held high judicial office in the Commonwealth and chosen by the chief justice (or, if he/she is under investigation, by the chair of the public service commission), which committee then reports to the head of state who acts on its advice;[36] or the head of state appoints a tribunal of three persons who hold or have held high judicial

33 If such behaviour amounts to a ground for appeal, the censure of a higher court can naturally be called into play, In addition, it is likely that informal representations by the bar to the Judge President may result in 'a quiet word in the ear' of the judge which may or may not remedy the problem. For a fascinating account of the situation in this regard in England, see Pannick (n 5) ch 4, particularly at 92-94.

34 The type of behaviour being referred to here is e g consistent rudeness by the judge to counsel (or counsel of a particular group), regular apparent inattention by the judge to counsel or witnesses, reckless behaviour in public etc. Again, see Pannick (n 5) ch 4.

35 Details were taken from the constitutions of Botswana (1966), The Gambia (1965), Ghana (1969), Kenya (1963), Lesotho (1966), Malawi (1966), Mauritius (1968), Swaziland (1968), Tanzania (1965), Uganda (1967) and Zambia (1964). Subsequent amendments and adherence in practice to these provisions have not been taken into account.

36 This is the system adopted by The Gambia, Kenya, Lesotho, Mauritius and Tanzania.

office, which enquires into the matter and advises the head of state, who acts in accordance therewith;[37]

(d) a judge who is under investigation is suspended from office pending the outcome of the process.

It seems that Nigeria's adoption of an American-style federal constitution sets it apart in this regard, in that a petition of a two-thirds majority of one or other of the houses of parliament or the recommendation of the appropriate judicial services commission to the president is the preferred mechanism for removal of judges.[38]

Procedures for removal adopted or recommended elsewhere in the Commonwealth indicate that some kind of specialist tribunal is the favoured method in modern constitutions. Thus Canada's parliament requires the Canadian Judicial Council to conduct investigations into the competence of a judge,[39] at the request of the Minister of Justice or a provincial attorney-general, or in reaction to any complaint or allegation made in respect of that judge. The Council examines all the information which it obtains and consults the parties, before launching a formal investigation. If, as the result of such an exercise, the Council reaches the opinion that the judge concerned

> ... has become incapacitated or disabled from the due execution of his office by reason of (a) age or infirmity, (b) having been guilty of misconduct, (c) having failed in the due execution of his office, or (d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of his office,

it may recommend to the Minister of Justice that the judge be removed from office.[40] While the Canadian Bar Association does not regard this procedure as 'adverse to' judicial independence, it does raise the issues of whether the inquiry should be held in public should the judge being investigated so desire, and whether any decision reached by the Council be judicially reviewable.[41] These are the kinds of matters which need to be considered when such procedures are instituted.

While the Australian Constitution contained a provision almost identical to that in South Africa,[42] the Constitutional Commission recommended[43] in 1988 that this be altered to provide for the establishment by parliament of a judicial tribunal 'to determine whether facts established by it are capable of amounting to proved misbehaviour or incapacity warranting removal of a judge'. The tribunal should consist of 'persons who are judges of a federal court (other than the High Court) or of the Supreme Court of a State ...', and parliament should not consider adopting an address requesting removal unless the tribunal had reported that

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37 This is the system adopted by Botswana, Swaziland, Uganda and Zambia; Ghana and Malawi have variations on the theme, involving a petition from the legislature.

38 See the 1979 Constitution s 255 and 256. The grounds for removal and retirement age are in line with the pattern, however.

39 Judges Act RSC 1970 s 40.

40 Section 41(2).

41 See the comment of the CBA Committee referred to in n 26 at 42.

42 Commonwealth of Australia Constitution Act (63 & 64 Victoria, ch 12) 1900 s 72(ii).

43 See the Final Report of the Constitutional Commission Canberra (1988) vol I par 6.180.

the facts warranted it.[44] Similar provisions were recommended in regard to the removal of judges from the superior courts of the states.[45]

Turning to two Asian members of the Commonwealth, we find that Malaysia follows the kind of path which the African members have generally adopted, being the appointment by the head of state of a tribunal (of at least five judges)[46] to enquire into the possible removal of a federal judge on the ground of misbehaviour or 'of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office'.[47] The process is set in motion by the prime minister or the Lord President of the federal court, and can culminate in the removal of a judge if the tribunal so recommends.[48] India, on the other hand, has stuck to the formula of an order of removal from office by the president after an address by each house of parliament presented to him in the same session praying for such removal on the ground of 'proven misbehaviour or incapacity'.[49]

Finally, it is useful to note two further variations on the theme of removal, to be found in the Caribbean and Africa. The Constitution of Jamaica follows the example set by Malaysia, except that the final decision to dismiss a judge is for the Judicial Committee of the Privy Council, by reference from Her Majesty, which constitutes a second tier of judicial inquiry.[50] The newest member of the Commonwealth, Namibia, has rephrased the grounds for removal of a judge to those of 'mental incapacity or ... gross misconduct',[51] and requires the Judicial Service Commission[52] to investigate possible removal of a judge, and recommend accordingly to the president.[53]

This brief survey of the practices prescribed in the constitutions of a number of Commonwealth countries should have made several things abundantly clear to those concerned with the future of the judiciary in South Africa. First, the principle of security of judicial tenure is regarded as an essential ingredient in the formal independence of any superior court. Second, the retirement age of 70, which is currently the norm in South Africa, is often fixed at an earlier stage in other countries, which signifies that a fair degree of flexibility may be in order. Third, the simple old method of removal of judges whereby a certain majority in each house of parliament could request such action from the head of state has been abandoned by most constitutions – it places too much power in the legislative majority for the time being and is too unsubtle, allowing for no half-measures and too much political opportunism. Fourth, most countries with constitutional backgrounds similar to that of South Africa have opted for a method of removing judges which incorporates the following elements: legislative or

44 *Ibid.*
45 *Idem* par 6.204.
46 Malaysia Act 26 of 1963 s 125(4).
47 Section 125(3).
48 *Ibid.*
49 The Constitution of India 1947 art 124 and 217.
50 The Constitution of Jamaica 1962 s 100 and 106.
51 The Constitution of Namibia 1990 art 84(2).
52 Set up by art 85.
53 Article 84(1) and 84(3).

executive initiation of the process; proper and confidential inquiry by a committee drawn from judicial ranks, both domestic and foreign; implementation of the committee's findings by the formal head of state, sometimes after legislative endorsement; and suspension of the judge under scrutiny for the duration of the process.

This kind of approach is sanctioned by the Basic Principles on the Independence of the Judiciary adopted[54] in 1985, as follows:

> 17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.
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> 18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
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> 19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
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> 20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Both the Lusaka and Banjul seminars adopted like provisions.[55] It is submitted that any future South African constitution requires security of judicial tenure as a basic principle, and a mechanism for removal of judges from office which respects at least the above principles. The reference in these principles to 'disciplinary ... proceedings' leads us to the final issue to be reviewed in this article.

Disciplinary action against judges

Disciplinary action against judges short of dismissal is perhaps a far more complex issue than their removal from office. Few legislatures and executives in the world would like to be seen to be dismissing judges, even if the correct procedures were followed, as the suspicion would always be present that there was some extra-legal motive. Thus the removal procedure is not often used, and, where resorted to, is mostly confined to clear circumstances of corruption or misconduct.[56] It is far more convenient for the other two departments of government to exert pressure on the courts as a whole or individual judges when they are proving to be 'politically troublesome' by indirect means short of removal from office.

For example, courts may be disestablished and new ones created, judges may be transferred and large numbers of new judges appointed, conditions of service may be significantly downgraded, or the courts' jurisdiction over certain issues may be transferred to administrative tribunals. No South African lawyer needs

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54 By the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, from 26 Aug to 6 Sept 1985.

55 See n 27 and 28, at par 45 (Lusaka) and par 26-30 (Banjul).

56 A glaring example of the abuse of the removal procedure for political purposes is to be found in the dismissal of the Lord President of the Federal Court of Malaysia in 1990. For an account of this episode, see Harding 'The 1988 Constitutional Crisis in Malaysia' 1990 *ICLQ* 57-81 and Hickling 'The Malaysian Judiciary in Crisis' 1989 *Public Law* 20-27.

reminding of the cynical enlargement of the Appellate Division by the National Party government during the 'coloured vote crisis' of the mid-1950s.

Thus any suggested disciplinary process short of dismissal must be approached with extraordinary circumspection. It must be emphasised that the types of conduct which are susceptible to such discipline are those referred to above,[57] such as rudeness to counsel or witnesses in court, reckless public behaviour (e g drunken driving, sexual impropriety), or financial corruption (including tax evasion) – none of which is serious enough to warrant resignation or removal from office.

It seems that these kinds of actions are normally dealt with informally, as likely as not through the offices of the organised legal profession. It may be that this is the route which should be followed in South Africa in the future, but it is as well to be aware of some avenues which are being explored in foreign legal systems.

For instance, Canada's Judicial Council is empowered to investigate complaints against a judge from whatever source, as was referred to above.[58] Although this can result in removal from office, it may be that the inquiry and some sort of warning are deemed sufficient to convince the judge to desist from the type of conduct which led to the complaint. The Canadian Judicial Council was set up in 1971,[59] (arising out of a series of annual meetings of all provincial chief justices) and its objects are[60] 'to promote efficiency and uniformity, and to improve the quality of judicial service, in superior and county courts'. Similar bodies exist at provincial level, which also play an important role in judicial discipline. The fact that judges alone are involved in the disciplinary process has led the Canadian Bar Association to report that judicial independence is not affected thereby.[61]

The Australian Constitutional Commission considered this matter at length,[62] and concluded[63] that it was 'a matter of policy for the Parliaments and Governments of Australia rather than an issue calling for constitutional amendment'. The Advisory Committee considered[64] that 'the harm done to the Australian judicial system by the remedy of setting up an organisation to receive complaints about judges which could not warrant removal, would be worse than the harm done by disorders of judicial conduct which the remedy is designed to cure'. The state of New South Wales does, however, have a Conduct Division[65] of its Judicial Commission which may refer a minor complaint about a judge to

57 Note 34.
58 See text at n 39 and 40.
59 Judges Act (n 24) s 39.
60 *Idem* s 39(2).
61 See the Report (n 26) 24-26.
62 Through its Advisory Committee on the Australian Judicial System, which reported in 1987 – see par 5.77 to 5.111.
63 See the Final Report (n 43) par 6.230.
64 See the Report of the Advisory Committee on the Australian Judicial System (1987) par 5.111.
65 Consisting of three judicial officers appointed by the Judicial Commission itself.

the senior judge of the court in which that judge serves or any appropriate person.[66]

It is significant further to note that the Australian Committee reached its conclusion in the context of a thorough review of the system for handling complaints about judges which has existed in California since 1960. Even in that litigious American state, the complaints body (which had jurisdiction over 1308 judges at the time) received 360 complaints in 1982, of which only 14 were further investigated[67] after the judge's comment had been sought in response to the complaint.[68] Three cases were referred to the state supreme court, leading to a resignation and the public censure of two superior court judges – six judges were privately admonished by the complaints commission.[69]

After reviewing the several methods of judicial accountability (legal, public and informal) which existed in Australia,[70] the Committee justified its recommendation that no such body should be set up in Australia at federal level in a passage which warrants quotation in full:[71]

> The question ... is whether in Australia where for a century or more there has been a judiciary which, with minor exceptions, has maintained very high standards of conduct it is desirable to introduce a system which has been introduced in the United States to deal with widespread judicial misconduct. It is necessary to ask whether, in this country, the potential threat of a public censure by a court or of a private reprimand by a commission ... would be effective to deter from errant behaviour a judge who is not deterred by the existing influences. The most that can be said is that with some judges and in some circumstances these potential sanctions might operate to deter judicial misconduct but with other judges and circumstances they would not. It has to be appreciated that any judge who misbehaves in a significant way now is one who must be insensitive and unresponsive to quite powerful influences which tend to deter judges from misbehaviour.

Such remarks are likely to apply with equal force in South Africa, at the level of formal allegations of corruptibility – executive-mindedness and race-bias (not to mention gender discrimination) fall into a different category which is highly unlikely to be remedied by such a complaints procedure.

While complaints procedures exist in other countries[72] and while international and African concerns about the application of standards of fairness in any such processes have been noted,[73] it is submitted that the Canadian and Australian approaches to the problem sufficiently address the issues for present purposes. The makers of a constitution for a future South Africa must ask themselves whether the need for a complaints procedure is or is likely to be so substantial, and current practices so ineffective, that the setting-up of such a mechanism

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66 See the Judicial Officers Act (NSW) 1986 s 22-35.
67 247 complaints were not taken up after initial scrutiny.
68 See the Report (n 64) par 5.91.
69 *Ibid.*
70 *Idem* par 5.96 to 5.100.
71 *Idem* par 5.103.
72 See the comprehensive summary by Cappelletti (n 4), particularly at 98-104.
73 See n 54 and 55.

is justified, when weighed against possible disadvantages.[74] I would submit that this is an open question.

Concluding remarks

This article has attempted to raise questions and provide some tentative answers to three complex matters which the future judicial system will have to confront, under the general heading of 'accountability'. Discussion has proceeded on the basis that judicial accountability is properly an issue for constitutional debate in the present world. As Simon Shetreet notes:[75] 'No institution can operate without being answerable to society. The judiciary must also be accountable'.

I have put forward ideas which do not seem to enjoy much attention currently, in the belief that the questions to which they respond will have to be addressed at some stage and that lawyers and politicians ought to be creative and prepared to adopt the most appropriate solution in all the circumstances when devising a series of answers. Much thought and vigorous discussion on this vital issue is needed, and the legal profession must become involved, not least in its own interest.

74 Such as the effect on judicial independence, on the image of the administration of justice etc – most of which can, of course, cut both ways.

75 Shetreet 'Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends' 1986(2) *International Legal Practitioner* 28.

Sessies van die parlement: 'n uitgediende fiksie

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Summary

Sessions of parliament: an obsolete fiction

The concept of parliamentary sessions is one of the technical elements of a new constitution that will have to be reconsidered. The present system in terms of which the State President convenes and prorogues an annual session of parliament, is circumvented in practice so that essential parliamentary business can proceed during the recess. This system is out of step with the needs of a modern parliament and a continuous session, running for the life of a parliament and interrupted by regular adjournments, is advocated instead.

Onderhandelaars is besig om tientalle politieke vraagstukke romdom 'n nuwe grondwet vir Suid-Afrika op te klaar. 'n Verskeidenheid uitdagende tegniese vrae sal daarna ook beantwoord moet word. Moontlikhede soos 'n beregbare menseregte-akte, 'n proporsionele kiesstelsel en 'n federale staatsvorm met al die implikasies ten opsigte van verskanste bevoegdheidsverdeling en dergelike meer, wyk drasties af van bestaande stelsels en tradisionele benaderings en sal besondere eise stel aan die innoverende vermoëns van wetsopstellers.

Sessies van die parlement is 'n tegniese aspek waaroor eweneens nuut gedink moet word. Die huidige formele stelsel waarvolgens 'n jaarlikse sessie deur die Staatspresident byeengeroep en geprorogeer word,[1] word in praktyk omseil ter wille van die voortsetting van parlementêre werksaamhede gedurende die reses[2] en hieronder word geargumenteer dat die stelsel uitgedien en uit pas is met die behoeftes van 'n moderne parlement. 'n Voorstel vir 'n aaneenlopende sessie vir die toekomstige Suid-Afrikaanse parlement word gevolglik gemaak.

'n Sessie is die jaarlikse tydperk, gewoonlik van Februarie tot Junie, wanneer die parlement volgens voorskrif byeengeroep is vir die verrigting van sy werksaamhede.[3] Dit sluit nie uit dat meer as een sessie per jaar gehou kan word nie. 'n Sessie moet onderskei word van 'n sitting, wat 'n daaglikse (of korter) vergadering van die parlement of 'n huis gedurende 'n sessie is.[4]

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1 Wet 110 van 1983 a 38.

2 Sien die verduideliking wat hieronder volg.

3 Vergelyk Malherbe *Die wetgewende prosedure van die parlement* LLD-proefskrif RAU (1992) 293. Wilding en Laundy *An encyclopaedia of parliament* (1972) 689 definieer 'n parlementêre sessie as 'the period beginning with the day Parliament is opened and ending with the day it is prorogued, or in the case of the final session of a Parliament, dissolved'. (Sien Wet 110 van 1983 a 66 wat vir afsonderlike sessies van die huise voorsiening maak.)

4 Sittings word dan ook gewoonlik ingevolge parlementêre prosedurereëls op 'n daaglikse basis bepaal en behels die werklike daaglikse sittingsure – vgl *Reglement van die parlement* (1989) r 11.

Elke parlement moet op die konstitusioneel voorgeskrewe wyse vir 'n sessie byeenkom. Dit kan deur die staatshoof byeengeroep word,[5] dit kan op eie besluit byeenkom, sessies kan statutêr, byvoorbeeld in die grondwet, vasgelê word terwyl daar laastens ook 'n moontlikheid is van aaneenlopende sessies.[6] Eersgenoemde metode van byeenroeping het sy oorsprong in die gebruik van die Engelse koning om 'n parlement byeen te roep wanneer hy geld van die volk nodig gehad het vir sy regering.[7] Aanvanklik het die koning die adel individueel na die parlement uitgenooi *sigillatem per literas nostras* – terwyl die gewone grondeienaars gewoonlik per brief aan die balju's opgeroep is.[8] Die parlement het spoedig meer verteenwoordigend geraak en met die byeenroeping van Edward I se parlement van 1295 is daar reeds sprake van verkose afgevaardigdes.[9] Parlemente is egter ongereeld byeengeroep en sessies het normaalweg slegs enkele weke geduur. Elizabeth I (1558-1603) het die parlement gemiddeld een keer elke drie jaar byeengeroep, James I het vanaf 1614 tot 1621 sonder enige parlement regeer en Charles I het vanaf 1629 tot 1640 geen enkele parlement byeengeroep nie.[10] In 1641 het Charles I bevestig dat daar jaarlikse sessies behoort te wees,[11] maar die *Triennial Act* van dieselfde jaar het slegs voorsiening gemaak dat die parlement minstens elke drie jaar byeen moes kom.[12] Daar is ook bepaal dat die parlement nie sonder sy instemming binne 50 dae na byeenroeping ontbind kon word nie. Dit is duidelik dat die parlement nie oorspronklik 'n kontinue liggaam was nie en na elke sessie in der waarheid ontbind is. Lidmaatskap het so lank soos 'n sessie geduur en byeenroeping van die parlement het telkens die samestelling van 'n nuwe parlement behels. Sedertdien is die termyn van die parlement statutêr gereël,[13] terwyl die jaarlikse byeenroeping van die parlement deur die monarg as 'n konvensie ontwikkel het en voortbestaan.[14]

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5 Dit is soos gemeld die posisie in Suid-Afrika, waar die Staatspresident die parlement by proklamasie in die *Staatskoerant* byeenroep (Wet 110 van 1983 a 38(1)).

6 Sien Inter-Parliamentary Union I *Parliaments of the world* 269-271.

7 Sien bv Stubbs II *The constitutional history of England* (1980) 65 e v; Wilkinson *Studies in the constitutional history of the thirteenth and fourteenth centuries* (1952), Anson II *The law and custom of the constitution: parliament* (1922) 49 e v; Plucknett *Taswell-Langmead's English constitutional history* (1960) 129 e v.

8 Anson (n 7) 49.

9 'To this Parliament were summoned by special writ the archbishops, bishops and abbots, and to the writ of summons of the two former was attached the *praemunientes* clause directing the attendance of the heads of cathedral chapters, of the archdeacons, and of proctors to represent the chapters and the parochial clergy. Special writs of summons were directed to seven earls and forty-one barons. And writs were addressed to the sheriffs bidding them cause to be elected two knights of each shire, two citizens of each city, two burgesses of each borough': Anson (n 7) 50.

10 De Smith *Constitutional and administrative law* (1979) 231.

11 Edward II en Edward III het reeds so 'n beginsel onderskryf en Maitland *Selected essays* (1936) 177 verwys na 'n wet van 1330 wat dié beginsel erken het.

12 De Smith (n 10) 231. Die *Bill of Rights* van 1688 a 13 het weer slegs na 'gereelde' sessies verwys: 'And that for redresse of all grievances and for the amending, strengthening and preserveing of the lawes Parliaments ought to be held frequently'.

13 'n Wet van 1694 het die termyn op drie jaar vasgestel. Die *Septennial Act* van 1716 het die duur van die parlement na sewe jaar verleng en die *Parliament Act* van 1911 het dit na vyf jaar verminder (sien Ilbert *Parliament: its history, constitution and practice* (1948) 46).

14 Erskine May *Treatise on the law, privileges, proceedings and usage of Parliament* (1989) 220 e v en Griffith, Ryle en Wheeler-Booth *Parliament: functions, practice and procedures* (1989) 181 e v. Sien ook Wiechers *VerLoren van Themaat Staatsreg* (1981) 184.

Suid-Afrika het die beginsel van jaarlikse byeenroeping deur die staatshoof oorgeneem en statutêre beslag daaraan gegee.[15] Ingevolge die vorige grondwet moes die staatshoof soos in Brittanje volgens konvensie die regering se advies volg oor die presiese datum waarop 'n sessie belê word, al was die funksie formeel aan die persoonlike diskresie van die staatshoof toevertrou.[16] Dit het geïmpliseer dat die staatshoof die prerogatief behou het om die regering se advies te weier as dit byvoorbeeld in stryd sou wees met die uitdruklike voorskrif aangaande jaarlikse sessies. Tans verrig die staatspresident die funksie in oorleg met sy kabinetskollegas.[17] Wat die huidige voorskrif oor sessies betref, moet verder eerstens gewys word op die bepaling dat daar nie meer as dertien maande tussen die begin van een en die begin van 'n volgende sessie mag verloop nie.[18] In die vorige grondwet is 'n maksimum tydperk van twaalf maande bepaal tussen die laaste sitting van die parlement in een sessie en die eerste sitting in die volgende sessie.[19] Dit is in die huidige grondwet gewysig omdat daar in die praktyk in elk geval nooit soveel tyd tussen sessies verloop en daar ook geen goeie rede bestaan om tydsgewys soveel beweegruimte aan die Staatspresident te verleen nie. Aangesien sessies tradisioneel op die laaste Vrydag van Januarie of die eerste Vrydag van Februarie 'n aanvang neem, was in plaas van twaalf maande 'n maksimum van dertien maande tussen die begindatums van opeenvolgende sessies egter nodig vir die handhawing van die tradisie: 'n maksimum van twaalf maande sou meebring dat die parlement elke jaar 'n dag vroeër byeen sou moes kom. 'n Tweede innovasie is die voorskrif dat die eerste sessie na 'n algemene verkiesing binne 30 dae ná die verkiesing moet begin.[20] Voorheen het net die beperking van 'n jaarlikse sessie op die regering gerus en daar is aanvaar dat die parlement binne 'n redelike tyd ná 'n algemene verkiesing byeengeroep sou word. Nou het die regering geen sodanige diskresie meer nie en enige moontlikheid dat 'n regering weens politieke of ander oorwegings die byeenroeping van die parlement so lank as moontlik ná 'n verkiesing kan vertraag, is uitgeskakel.[21] Derdens bestaan die unieke moontlikheid van afsonderlike sessies van die drie huise van die parlement spesifiek met die oog op die afhandeling van sake wat die huise afsonderlik raak.[22] Dié voorsiening hou verband met die besondere aard van die grondwet waarin 'n belangrike funksionele onderskeid tussen eie en algemene sake gemaak word, maar aangesien die reëling nog nooit toegepas is nie, is die bestaansreg daarvan te betwyfel.

In talle ander state word die parlement ook deur die staatshoof of die regering

15 Vgl ZA Wet a 20 en Wet 32 van 1961 a 25(1) en 26 .

16 Wet 32 van 1961 a 16(3). Sien ook Wiechers (n 14) 180 en 184.

17 Wet 110 van 1983 a 38 saamgelees met a 19(1)(b). Sien oor die betekenis van 'in oorleg met' Rautenbach en Malherbe 'Die grondwet 1984-1989' 1989 *TSAR* 479-481.

18 Wet 110 van 1983 a 38(2).

19 Wet 32 van 1961 a 26.

20 Wet 110 van 1983 a 38(3).

21 Soortgelyke reëlings word bv getref in Duitsland, waar die eerste sessie ook binne 30 dae ná 'n verkiesing moet begin (Duitse grondwet a 39(2)) en in Italië, waar die eerste sessie binne 20 dae moet begin (Italiaanse grondwet a 61).

22 Artikel 66. Sulke sessies word ook deur die staatspresident belê, maar dit is 'n *solus*-handeling (a 19(2)) en dit moet aanvaar word dat die Staatspresident volgens konvensie die advies van die betrokke ministersraad sal volg.