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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE

MONDAY
12 FEBRUARY 1996
E249
(10H00)

DOCUMENTATION

CONTENTS

CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

DATE: Monday, 12 February 1996

TIME: 10H00 - 18H00

VENUE: E249, Parliament, Cape Town.

DRAFT AGENDA

1. Opening
2. National Assembly
3. National Executive
4. Courts and the Administration of Justice
5. Finance
6. Any Other Business
7. Closure

NB. Please bring along your copy of the Third Edition of the Working Draft.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

Enquiries: Ms MM Sparg, Tel 245031, page 4184616 Code 6970

CONSTITUTIONAL ASSEMBLY

DRAFT REPORT

SUB-COMMITTEE CONSULTATION ON COURTS AND THE ADMINISTRATION OF JUSTICE

THURSDAY 1 FEBRUARY 1996

1. OPENING

1. Mr Ramaphosa welcomed the representatives from the legal profession and the members of the Sub-committee to the meeting. He said that the Sub-committee had requested this consultation to share views with stakeholders and that further written submissions would also be valued.

2. It was noted this was a consultation and that the meeting was not in a position to take binding decisions, but would report back to the CC Sub-committee.

2. DISCUSSION

1. The discussions were chaired by Mr Ngcuka.

2. Discussion was based on **Chapter 6: Courts and the Administration of Justice** of the *Third Edition of the Refined Working Draft*.

3. The following documents were also tabled:

   updated draft-in-progress of Chapter 6
   memoranda from the Independent Panel of Experts:
   Memorandum on the Need for Automatic Referral Procedures
   Survey: Appointment of Judges
   Memorandum on Abstract Review
   Supplementary Information on Prosecutorial Authority

4. The following submissions were distributed:

   Submission of the Association of Law Societies on this chapter
   Submission of the National Association of Democratic Lawyers on this chapter

5. It was agreed to discuss this chapter section-by-section, but due to time constraints discussion on the last few sections concentrated on identified issues.

2.1 Section 94: Judicial Authority

1. Regarding Subsection (1), a view was expressed that if the intention had been to create a centralised system of courts, instead of using "of" in "The judicial authority of the Republic, to consider replacing it with "in" or "of and in".

2. Regarding Subsection (2), it was agreed that the word "judiciary" used in the Interim Constitution may be interpreted more narrowly than the word "courts". It was also noted that the intention of the CA had been to use the last mentioned broader term in order to extend and not limit independence. A view was expressed that the word "courts" was wide enough to include both structure and personnel.

3. Regarding Subsection (4), it was agreed to introduce to the list which ended with "effectiveness" of the courts, the word "accessibility". It was noted that this proposal was motivated by the past experiences of inaccessibility and supported by the findings of the Milne Commission.

4. Regarding Subsection (5), further written submissions were requested and it was agreed the technical experts take this under review.

5. It was noted that the intention had been to entrench the *stare decisis* rule, especially regarding the new Constitutional Court, but a view was expressed that it was not clear whether the subsection also referred to *res judicata*.

6. It was noted that views were expressed that the term "decision of a court.." may be too narrow, but that the intention had been to capture both orders and interpretations of the courts. It was noted that the refinement into plain language may have lost what was intended in this subsection.

7. It was noted that decisions of the Constitutional Court may be binding on everyone, whereas the decisions of other courts were not necessarily so. A view was also expressed that use of the word "decision" may be wide enough to leave its further interpretation to the Constitutional Court.

2.2 Section 95: Judicial system

1. A view was expressed that it may be redundant still to speak of "Divisions" of the High Court. However, it was noted that in Gauteng the two busy divisions functioned separately but under one Judge

President, and the need would still remain to accommodate more than one seat of this Court in a province.

2. Regarding Subsection (c), a view was expressed that it may be advisable to set out the hierarchy of the courts. In response it was noted that it was intended to address the hierarchy of the courts by use of the term "High Court", and that it had even been contemplated to use the word "hierarchy". However, it was noted that the difficulty had in the end translated into one of style. It was noted that suggestions to deal with this be sought.

2.3 Section 96: Constitutional Court

1. Regarding Subsection (1), a view was expressed that the Constitutional Court was given status, but that it did not really vest jurisdiction. The view was that this subsection therefore does not say to what standing is related.

2. It was noted that there had been broad agreement to include a definition of a constitutional matter, and that the Court should have no inherent jurisdiction. It was also noted there was general agreement that the Constitution should include the type of order the Court could make. It was noted that a separate clause may be required to deal with jurisdiction, and that a similar problem was experienced regarding the Supreme Court of Appeal.

3. Regarding Subsection (3), after some discussion it was agreed to note that there was little difference of substance, but a view was expressed that there was a difference of nuance. A view had been expressed that the President should not be protected from review by courts other than the Constitutional Court, as this would make litigation more expensive and exclude the possibility of approaching another court such as in the famous Harris case.

4. However, after further discussion it was noted that Higher Court should not be excluded from inquiring into the constitutionality of Acts of Parliament, a Provincial Act, and any conduct of the President, but equally that it may create delays if such matters were to percolate through all courts.

   It was noted that the concerns may be adequately covered by Section 99 which had been overlooked; by the possibility of making a declaration pending the decision of the Constitutional Court. Furthermore, it was noted that by allowing the ordinary courts to deal first with the matter, it would have the benefit of distillation, either when unconstitutionality is patent or the government does not dispute

it.

5. An explanation was given of the development of the thinking behind this issue. It was noted that the schema set up in Sections 98 and 99(2) clearly state that these courts could inquire into validity, but that the actual declaration of invalidity only be done by the Constitutional Court. It was said that this was fundamentally the same situation position as in the Interim Constitution, with the exception of the provision for leapfrogging in 2 situations.

6. Further regarding jurisdiction in Section 96, a view was expressed that the internal structure of Section 96 seemed imbalanced. It was suggested that it may assist to add words in Section 96(2) emphasising the rule of law and that the Constitutional Court was the upper guardian of the Constitution, to provide absolute clarity. It was suggested to add this to Section 96(2). It was noted that there would also be a definition section, but there seemed general agreement to incorporate the tenor of suggestions.

7. It was also noted that Section 99(2) allows for such matters to be heard before courts other than the Constitutional Court and for those courts to make findings; however, that the Court "may not declare the Act or conduct invalid; but, the court may grant a temporary interdict or other temporary relief to a party."

8. Regarding Section 99(3)(b), particularly the use of "any conduct of the President", a view was expressed that from an administrative law perspective the phrase may be too wide. It was noted that this matter be further investigated.

9. Regarding Section 96 3(c), it was noted that the reference to dealing with bills was still under discussion as indicated in the sidebar note. It was noted that what seemed to be in dispute amongst political parties was the question whether a minority party of Parliament should be able to use abstract review, and if so under what conditions, and at what stage.

10. Although views for or against the inclusion of a form of abstract review were generally not expressed, various views were expressed should such a clause be hypothetically included. It was noted that practical matters need to be addressed if abstract review were encountered; it would take a few months to get a decision, although urgent matters could conceivably be expedited.

11. It was noted that some of the disadvantages of inclusion of a form of abstract review included that only one Court would make a decision,

while the views of other courts were not heard. The view was expressed that this would bring the Constitutional Court into the political process.

It was noted that a mechanism guarding against abuse of this process would be required. It was also noted that an advantage of such a process of abstract review could be certainty. A view was also expressed that from an administrative justice point of view, it would be an advantage for the judicial system to know that if such a bill was passed, whether it was constitutionally valid.

12. Regarding mechanisms to prevent abuse of the process, other views expressed were that the legislative process not become captive to a small minority. A view was expressed that if this were included in the Constitution, the appropriate place for its inclusion would be in Section 96. A view was also expressed that it should then relate to the period after a bill had been passed, but before its promulgation.

A view was also expressed that the CA could decide on appropriate percentages for decisions in this regard. A question was also raised as to the effect such a referral would have on a bill, whether it would make it untouchable, whether the Court would only rule on certain clauses of it, and this was noted for further investigation.

13. It was noted that a number of cases of abstract review were already before the Constitutional Court.

14. Regarding Section 96(4), a suggestion was made that the wording be changed to provide for leapfrogging, and empowering the rules of the Constitutional Court to do so.

15. A view was noted that there may be a problem to say the Constitutional Court has no jurisdiction other than that provided for by the Constitution. It was noted this may exclude jurisdiction provided for in legislation such as provided for in recent legislation regarding claims before the Land Claims Court.

16. It was noted that the draft, because of the importance of the Constitutional Court, had aimed at giving the Court's entire jurisdiction in the Constitution. It was noted that the Sub-committee was open to improvements in the way this was phrased, but that parties may have a problem with adding to or reducing the jurisdiction by way of legislation. A view in response to this was noted that if jurisdiction may be taken away in this manner it may be inconsistent with the Constitution, but perhaps the Court of Appeal could be dealt with on a different basis.

2.4 Section 97: Supreme Court of Appeal

1. Regarding Subsection (1) it was agreed it may be neater if it dealt purely with composition, whereas another subsection concentrated on the question of jurisdiction.

2. It was suggested that the determination of the number of judges of appeal required for decisions not be determined restrictively and prescriptively. It was further suggested that the definition of "constitutional matters" be avoided, because cases may contain constitutional and non-constitutional matters. A further concern was that "appeal" may not be broad enough to include for example matters not strictly classified as appeal, such as matters of review.

3. Regarding Subsection (3), it was agreed it be refined to take account of what was said, and that the intention would be to rather extend the jurisdiction of the Supreme Court of Appeal, but not to diminish it.

4. A question was raised regarding the applicability of inherent jurisdiction in this context, and whether common law was also included here. It was noted that it was still hazy what was meant by inherent jurisdiction, and that the approach had been to rather say in the Constitution what it is. It was noted that a reformulation o this was available but the experts had not had an opportunity to reflect on it.

5. A view was expressed that in recent years the Appellate Division had managed to extend the meaning of inherent jurisdiction, and that it amy perhaps be dangerous to formulate what is meant by it. A view was also expressed that it may be uncertain whether matters relating to the Water Board or the Income Tax Act falls under the jurisdiction contemplated in Subsection (3).

2.5 Section 98: Other courts

1. A question was raised as to what is included in the words "any legislation" and whether it included courts of inferior status such as chiefs' courts.

2. It was noted that although it was clear that magistrates' courts are given the jurisdiction to invalidate by-laws, there may be a divergence of views as to the extent of this jurisdiction. It was noted that it may be clear regarding the application of the bill of rights, but that there was at this stage no wider view that Magistrates strike down laws on the basis of unconstitutionality. A concern was raised that in metro

areas local government legislation may affect millions of people, and that there was a concern that there could be Magistrate hunting for Magistrates prepared to strike down certain laws.

3. Regarding the use of the words "court of appeal", it was questioned whether this adequately covered the example of constitutional matters arising in a labour court. In response, it was noted that this example may be covered by Subsection 98(3), but that in general the scheme was that courts of appeal not be by-passed, and that the legislator could not set up another court parallel to the Supreme Court of Appeal.

4. A suggestion was also made that High Courts in Subsection (1) and other courts in Subsection (2) be split up in the conceptual framework.

2.6 Section 99: Powers of courts in constitutional matters

1. Regarding Subsection (1), a concern was raised that the impression was created that any court other than the Constitutional Court must declare invalid the inconsistent law or conduct, but the Court that was actually intended was the Constitutional Court only. It was noted that this may be phrased more clearly.

2. A concern was noted that the intention be not to limit the arsenal of choices, but then there seems to be internal contradictions in the rest of the section. A view was noted that the word "retrospectivity" may have a certain jurisprudential meaning important to the application of this clause, and that this kind of legalise often came about in order to create certainty.

3. In response it was noted that Subsection (1) is in line with the argument that laws struck down were void from the moment they are passed. It was noted that the next subclause set the date when the Court may make such a declaration effective. It was noted that the last mentioned subsection clearly gives jurisdiction to the Court to decide whether to make it retrospective in application or not.

4. Another concern was that the response to legislation was not always to strike it down, and that sometimes legislation could for example be cured of undue narrowness of law. A suggestion was noted that Section 98 of the Interim Constitution, Subsections (5), (6), and (7), were clear and well nuanced and had worked well in practice.

5. In response it was noted that this question had been considered and the suggestions were noted. It was also noted that a question of the

appropriate evidential burden regarding persons sentenced unconstitutionally was still under consideration.

6. Regarding Subsection (2), it was agreed to consider a view was expressed that there was an inconsistency that the High Court was unable to make a declaration of invalidity, but could give an interdict which had the practical effect of a binding decision.

2.7 Section 100: Appointment of judicial officers

Regarding the issue whether it be constitutionalised that judges be citizens or not.

1. A view was expressed that the judges of the Constitutional Court should be South African citizens or have permanent residence, because they make decisions of profound socio-economic impact. A view was expressed that judges should stay sufficiently long in a society, and must therefore "buy" into the system.

2. Contrary views were also expressed, namely that the best incumbents serve in these positions, and a qualification of citizenship may unnecessarily keep out a suitable person. A further view was that this was not a matter to be prescribed by the Constitution, but rather be a matter do be dealt with by the Judicial Service Commission. A further view was to note that for the Constitutional Court citizenship was a statutory requirement, but this speaker was against the view that there be a policy confining appointments to South African citizenship.

Regarding the appointment of judges, appointment by Parliament, or by the President on the advice of the Judicial Service Commission.

4. Different views were expressed on the mechanism for the appointment of judges. A view expressed was that option 1 was preferred.

5. Another view expressed was a preference for a combination of option 1 and option 2. It was said that the JSC was at present too large, and that a list should be circulated of all prospective judges, with a residual possibility of a majority of Parliament deciding. The speaker noted that this was therefore a hybrid proposal applying to all judges from High Court level.

6. Another view was expressed in favour of option 1, but with at leat 4 person coming from the judiciary, although the speaker expressed doubt that these details be constitutionalised.

7. Other views were expressed that the participation of lay persons in the JSC be increased, and that this was in line with the trend explained in the document from the Independent Panel of Experts.

2.8 Section 101: Acting Judges

Regarding the view that if they serve longer than 6 months their service has to be confirmed by the Judicial Service Commission

1. A view was expressed that there was no reason why the JSC was removed from this process for so long and that acting Judges be appointed for no more than 3 months without approval of the JSC.

2. Contrary views were expressed that the practicalities required the JSC does not have to sit regularly and become a laborious process, and that the suggested 6 months were acceptable.

2.9 Section 102: Tenure and Remuneration

Regarding the terms of office, particularly whether the judges presently serving should continue to do so

1. A concern was raised that the term "for up to nine years" may be too imprecise.

2. A view was expressed that extension for four years means that the 4 oldest judges would leave the system, and that there was a conceptual problem with this, because it could mean that the younger judges would return to the Supreme Court, and give decisions on issues on which they had already made binding decisions.

3. Another view was expressed that regarding the present Constitutional Court members, a period of longer than 7 years was opposed, and that there were particular needs regarding the transition requiring judges to retire. The speaker suggested a lottery, the possibility of an extension of service of some judges, and the appointment of additional judges.

4. A view was expressed that the requirement of 9 years was inconsistent with the scarcity of resources, would detract from the independence of the judiciary, and would mean persons would have to find other options after their term.

5. With reference to the barnote that it was under consideration to extend by four years the terms of all but the 5 elder Constitutional Court judges, a view was expressed indicating concern that such

limits be placed on the terms. It was noted that in Germany the limit was 12 years but the view was expressed that this was not reasonable; in the USA the limit was 40 years, presumably because it was felt that by that time a person would be out of touch with the development of society.

6. Another view was expressed that the present legal judges of the Constitutional Court have been the beneficiaries of apartheid and that the period of 9 years was slightly too long.

7. Another view was expressed that the time of transition it was impossible to establish longer terms, but the experience gained by the present judges in the allotted periods would be important and that the CA was not bound to the earlier limitation on term.

2.10 Section 103: Removal

1. It was agreed and referred for technical refinement that there may be an internal contradiction between Subsection (1) and Subsection (2), the first mentioned stating a judge "may" be removed, whereas the last mentioned stating the President "must remove" this judge.

2.11 Regarding the question whether there be a national Attorney General, and if so, what his or her role or functions

1. Submissions were invited on this question. It was not discussed because it was agreed the meeting close at the agreed upon time

3. CLOSURE

The meeting closed at 15h30.

ATTENDANCE

Association of Law Societies
- **VAN VUUREN Mr A L J**
- **LEON Mr**
- **BURMAN Mr D**

Black Lawyers Association
- **MOLOTO MOLAMU Ms P**

Constitutional Committee Sub-committee
- **EGLIN Mr C W**
- **GREEN Mr L M**
- **MOOSA Mr M**
- **HOFMEYER Mr W**
- **DE LANGE Mr J**
- **GIBSON Mr D**
- **SCHUTTE Mr DPA**
- **VAN HEERDEN Mr F J**

Constitutional Court
- **ACKERMANN Judge L W H**
- **CHASKALSON Judge (President) A**
- **MOHAMED Judge J**

General Council of the Bar
- **BLIGNAULT Advocate A P**

Hoexter Commission
- **MARAIS Mr G**
- **O'CONNELL Mr R A**

Independent Panel of Experts
- **KRUGER Mr J**
- **MURRAY Ms C**
- **SEDIBE-NCHOLO Ms P**

Judiciary other than Constitutional Court
- **CORBETT Chief Justice**
- **FRIEDMAN Justice J**

Lawyers for Human Rights
- **SALOJEE Mr R**

Legal Resources Centre
- **TRENGROVE Advocate Wim**

National Association of Democratic Lawyers
- **ZINTL Mr S**
- **SALDANHA Mr V**

Technical Advisor Theme Committee
- **OLIVIER Judge P J J**

University of the Western Cape Community Law Centre
- **STEYTLER Mr N**

University of Cape Town Law Faculty
- **CORDER Mr H**

University of Stellenbosch Law Faculty
- **ERASMUS Mr H J**

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 31 JANUARY 1996

RE: SUPPLEMENTARY INFORMATION ON PROSECUTORIAL AUTHORITY IN CANADA AND AUSTRALIA (INCLUDING MEMORANDUM ON ATTORNEY-GENERAL/PROSECUTORIAL AUTHORITY, 20 SEPTEMBER 1995, WITH TENTATIVE DRAFTS)

CONTENTS

1. INTRODUCTION

After submitting a memorandum on the Attorney-General/Prosecutorial Authority (dated 20 September 1995) to the Chairpersons and Executive Director of the CA, the Panel was requested by specific members of the CC to furnish more information on the situation in Canada and Australia. Members of the Panel again consulted literature available in South Africa and also communicated with experts in the two countries.

The practical workings of models of foreign systems are not always easily fully understood from theoretical research and consultation, though. Regarding the Commonwealth in particular, the recently decided Namibian judgment (Ex Parte AG Case No. SA 7/93, 13/7/1995) quoted Edwards, in a paper on "Emerging Problems Defining the Modern Role of the Office of the Attorney General in Commonwealth Countries", as stating that "(a) review of the existing systems operating at present ... produces a somewhat bewildering series of alternate arrangements, the nature of which cannot be

fully understood without references to the prevailing political context of each individual country".

Differing degrees and variations of decentralization which prevail in federal systems, as well as the often complex relationship between federal and provincial criminal law and law enforcement, and between criminal law and other law with criminal implications, further complicate the picture.

2. CANADA

2.1 General

The administration of justice in Canada has unitary as well as federal characteristics (Hogg 162). The powers of the national Parliament include the authority to legislate "for the peace, order and good government of Canada" and exclusive legislative authority over "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters" (S 91(27)). Responsibility for the administration of justice (including prosecutions) in the provinces is constitutionally allocated to individual provinces. Provinces may legislate on "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts ..." (S 92(14)). Federal Parliament has the power to establish federal courts (S 101). Federal courts include the Supreme Court of Canada and the Federal Court of Canada.

Criminal law is a federal responsibility (unlike in some other federal systems). Criminal law has been codified in a federally enacted Criminal Code. The argument in eg. the USA and Australia that criminal law should reflect local conditions and sentiments was rejected by the "fathers of the confederation" in favour of a national body of law (Hogg 467-468). The definition and borders of "criminal law" are not always entirely clear, though. Other federal statutes also have criminal implications and provincial legislatures have the power to enact penal laws for the purpose of enforcing otherwise valid provincial laws (S 92(15)). The establishment of criminal courts is expressly included in provincial powers and excluded from federal powers (S 91(27); S 92(14)).

2.2 The prosecution

At federal level the senior law officer of the crown is the Minister of Justice of Canada, who is a member of the federal cabinet and of the federal Parliament and is also *ex officio* Her Majesty's Attorney General (AG) of Canada. In terms of legislation the AG is responsible for the management and direction of the Department of Justice, the senior civil servant in which is the Deputy Minister of Justice. This officer is also *ex officio* Deputy AG of Canada. Below the Deputy Minister are two Associate Deputy Ministers of Justice, with the rank

and status of a deputy head of department, one of whom has special responsibility for litigation. Through this officer federal prosecutorial staff are accountable to the Deputy Minister and to the Minister.

Beneath the Associate Deputy Minister is an Assistant Deputy Minister with special responsibility for the "criminal law" side of the Department, and beneath him or her is a Director of Criminal Law, who heads a team of full-time prosecutors in the "Criminal Prosecutions Section" in Ottawa.

Criminal prosecutions which fall within the jurisdiction of the federal Minister of Justice and AG are undertaken by Crown Counsel attached to the Department. The federal Department of Justice maintains a staff of full-time Crown Counsel located in regional offices in eight major urban centres. Each regional office is headed by a Director. These Directors, together with the Director in Ottawa, are responsible to the Assistant Deputy AG (Criminal Law) (Stenning 157-158).

In British Columbia, e.g, the senior law officer of the Crown, is the AG of the province, who is also a member of the provincial cabinet and the provincial legislature. He or she is assisted by a Deputy AG. The public prosecutorial functions of the Ministry are directly supervised by an Assistant Deputy AG who heads the Criminal Justice Branch of the Ministry. Within the Branch is a staff of Crown Counsel deployed through regional centres in the province. In other provinces similar structures are in operation, with some differences as to detail. In Alberta, e.g, there is also a Solicitor General (SG), who is a member of the provincial cabinet and the provincial legislature. The responsibilities of the SG relate primarily to the police and correctional services in the province. In Saskatchewan there are, beneath the Minister of Justice (and AG) and Deputy Minister of Justice (and Deputy AG), an Associate Deputy Minister and General Counsel, Criminal Law, as well as a Director of Public Prosecutions (DPP), who heads the Public Prosecutions Branch of the Ministry. Provincial Ministers of Justice (AGs) are not subordinate to or under the supervision of the Federal Minister of Justice (AG).

All public prosecutorial functions in the Yukon and Northwest Territories are the responsibility of the federal Department of Justice, which maintains regional offices in these territories (Stenning 158-166).

The power to prosecute is exercised on provincial as well as federal level. For the most part, the Criminal Code is enforced by the provinces and the decisions to investigate, charge and prosecute are matters of provincial policy. As stated above, Section 92(14) of the Constitution authorizes provincial policing and prosecution of offences under the Criminal Code, although there is (unexercised) concurrent

federal power as well as on the basis that federal legislative power over the criminal law (or any other subject matter) carries with it the matching power of enforcement (Hogg 467-468).

Thus prosecutions under the federal Criminal Code, as well as under provincial penal statutes, are undertaken by the above-mentioned prosecutors in each province. Prosecutions of offences under federal statutes other than the Criminal Code (e.g. under narcotic control legislation), as well as the offence of conspiracy to commit such offences, are undertaken by federal prosecutors, employed by the federal Department of Justice. Before 1969 the division of functions between provincial and federal prosecutors rested on informal agreement between the federal and provincial governments. In 1969 the division was reflected in an amendment of the Criminal Code, in effect formally substituting the federal AG for the provincial AG in respect of stipulated classes of offences. It was thus an explicit assertion of federal legislative authority over the prosecutorial function, which raised the question whether the federal Parliament had the authority to legislate concerning the prosecution of offences under federal statutes. This constitutional issue has been dealt with in a number of court decisions, and has apparently now been answered in favour of the federal Parliament's authority. (See, e.g. Hogg 511-514, as well as the Hauser, CN Transportation and Wetmore - cases.)

As to the political accountability and control of prosecutorial authority (dealt with extensively by Stenning in Chapter 13), it could be noted that Stenning emphasizes that "all of those government Ministers who are ultimately responsible for the supervision and conduct of criminal prosecutions, and more generally the 'administration of justice', in their jurisdictions are nowadays members of their respective provincial or federal cabinets" (287). As to the nature and scope of such accountability and control, Stenning states: "While an Attorney-General, in the exercise of his prosecutorial authority, is thus seen as both accountable to and to some extent liable to control by, the legislature of the jurisdiction in which he holds office, it is important to understand the nature and scope of such accountability and control ... (a)n Attorney-General's accountability to the legislature is affected primarily through his liability to answer questions from members about the affairs of his department" (302). The accountability thus has an *ex post facto* character. Stenning points out: "Specifically, it is thought that if an Attorney General is to enjoy official independence from such political control or "pressure" by the executive with respect to his prosecutorial decisions in particular cases, it is equally important that he be recognised as enjoying a similar independence from such political control or "pressure" which may be exerted by members of the legislature. His accountability to the legislature with respect to prosecutorial decisions in particular cases, therefore, is seen as arising only after those decisions have been made." (302-

303). He also mentions that the line between proper accountability and improper "pressure" with respect to the exercise of prosecutorial authority in a particular case "may be a very fine one" (303).

3. AUSTRALIA

3.1 General

Justice and criminal law are - generally speaking - state matters. Unlike in Canada, where there is a federal Criminal Code, states in Australia have their own State Criminal Codes. The legislative powers of the Commonwealth (National) Parliament are listed in Section 51 of the Constitution, and include "the power to make laws for the peace, order, and good government of the Commonwealth" with respect to trade and commerce with other countries, taxation, fisheries, bankruptcy and insolvency, marriage, immigration and emigration, external affairs and several other matters. (Section 52 stipulates the exclusive power to make laws with respect to, e.g, the seat of government of the Commonwealth and matters relating to any department of the public service under the control of the Executive Government of the Commonwealth. Sections 106 and 107 recognize state Constitutions, subject to certain conditions.)

The Commonwealth has criminal jurisdiction under its above-mentioned (S 51) heads of powers. Other criminal jurisdiction is a state matter.

The judicial power of Australia is vested in the High Court of Australia and in other federal courts created by the Commonwealth Parliament, as well as in the state courts invested by Parliament with federal jurisdiction. Australian state and territory courts have original jurisdiction in all matters brought under state or territory statute laws, and in matters arising under federal laws, where such matters have not been specifically reserved to courts of federal jurisdiction. Most criminal matters, whether arising under Commonwealth, state or territory law, are dealt with by state or territory courts.

The Commonwealth does not have its own criminal courts. Each state and territory court system is organised and operates independently. However, within each system, which comprises both courts of general jurisdiction and certain specialist courts and tribunals, the courts are organised hierarchically according to the nature of the matters with which they may deal.

3.2 The Prosecution

As a result of public dissatisfaction with the prosecutions-related structures of government in the 1970s (related to allegations of corruption, amongst other things) radical reforms took place in

Australia over the last one and a half decades. The State of Victoria was first off the mark with the passage of its Director of Public Prosecutions (DPP) Act of 1982. On a federal or Commonwealth level, the positions of the prosecution is currently regulated by the Director of Public Prosecution (DPP) Act of 1983.

On federal or Commonwealth level the AG, who is a member of Cabinet, is as First Law Officer responsible for the Commonwealth criminal justice system. The AG's portfolio comprises the Department of State and a wide range of statutory and non-statutory agencies. The AG's Department is the central policy and coordinating element of the portfolio for which the AG, the Minister of Justice, the Minister of Consumer Affairs and the Portfolio Secretary are responsible. The Department and the various portfolio agencies have been grouped into six programmes, (at least in 1993 and 1994) namely legal services to the Commonwealth, Business and Consumer Affairs, Community Affairs, Administration of Justice, High Court of Australia and Maintenance of Law, Order and Security. The AG's Department serves three groups of clients, namely the portfolio Ministers and through them the Government, federal departments and agencies and the wider community. The Department comprises the Legal Practice, the Insolvency and Trustee Service, the Social Policy Group and a group of Semi-Autonomous Units. (For a detailed exposition of the structure and functions of the AG's Department, see the Department's Annual Report 1993-94.)

The above-mentioned DPP Act of 1983 established the office of the DPP and Associate DPP (S 5). The functions of the DPP include the institution of prosecutions on indictment for indictable offences against the laws of the Commonwealth (S 6(1)(a)). The DPP could also, with the consent of the AG, hold an appointment to prosecute offences against the laws of a state (S 6(1)(m)).

Branch offices of the DPP, each headed by a Deputy DPP, have been established in states such as Victoria, New South Wales, Queensland, Western Australia and South Australia. In Tasmania and the Northern Territory, where no DPP branch has been established, prosecutions have been conducted by the relevant office of the Australian Government Solicitor on behalf of the DPP.

The relationship between the Commonwealth AG and DPP is regulated by Sections 7 and 8 of the DPP Act of 1983. The DPP shall consult with the AG on matters concerning the DPP's functions and powers, when requested to do so (S 7(1)). The AG shall similarly consult with the DPP, when requested to do so. (S 7(2)). Section 8(1) states:

> "In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney-General, after

consultation with the Director, gives or furnishes to the Director by instrument in writing."

The directions or guidelines may relate to, *inter alia*, "the circumstances in which the Director should institute or carry on prosecution for offences" (S 8(2)(a)).

The DPP Act thus attempted to remove the prosecution process from the political arena by affording the DPP an independent status. The AG as First Law Officer responsible for the Commonwealth criminal justice system remains accountable to Parliament for decisions made in the prosecution process. notwithstanding that those decisions are made by the Director and lawyers of the DPP, subject to the AG's guidelines and the guidelines and directions may only be issued after consultation with the DPP, and must be published in the Gazette and tabled in Parliament. When the exchange of ideas has run its course, the instructions of the AG prevail. (Edwards ***The Office of the AG*** 8).

The AG's Section 8 power may be exercised in relation to particular cases (although in a second reading Parliamentary speech the then AG Senator Evans QC indicated that it would be very unusual for that to be done in relation to a particular case.) (See Commonwealth DPP ***Prosecution Policy of the Commonwealth*** 1-2.) (For details regarding the office of the DPP and prosecutions in the different states, see the *Commonwealth DPP Annual Report* 1994-95.)

The prosecutorial authority in states is similarly structured along the lines of an AG (who is an elected member of Parliament), heading a department, and beneath him or her a DPP.

In Queensland, e.g, an attempt has been made to separate the offices of AG and Minister of Justice. (See the *Report on Review of Independence of the AG of the Parliamentary Committee for Electoral and Administrative Review of the Legislative Assembly of Queensland*, December 1993.)

The DPP has the independent power to prepare, institute and conduct proceedings in the Supreme and District Courts. The AG may, as is the case on Commonwealth level, issue guidelines and directions, but Victoria (and states following its example, like Queensland and New South Wales) have legislated - in contrast to the Commonwealth position - that only general policy directives may be formulated, and not guidelines or directives in relation to individual cases. The written instructions must be published.

As a general rule any person has the right at common law (and in terms of the Crimes Act of 1914 and S 10(2) of the DPP Act) to institute a prosecution for a breach of the criminal law. In practice almost all Commonwealth prosecutions are instituted by

Commonwealth officers. Commonwealth authorities are responsible for prosecutions under Commonwealth heads of power (the above-mentioned S 51 of the Constitution.) The decision to initiate investigative action in relation to possible or alleged criminal conduct ordinarily rests with the department responsible for administering the relevant legislation. The actual investigation is usually carried out by the Australian Federal Police (AFP). Although an AFP or other Commonwealth officer has authority to make the initial decision to prosecute, the DPP has the responsibility to determine, independently from the investigators, whether a prosecution should proceed.

State authorities are responsible for investigating and prosecuting state matters, such as offences under a state criminal code or other state legislation. A state police officer may sometimes institute a prosecution for a Commonwealth offence. Such prosecutions are ordinarily carried on or taken over by the Commonwealth DPP, although there are exceptions to the general rule. If a person is charged with both state and Commonwealth offences, it may be appropriate for the matter to remain with state authorities, depending on certain circumstances. Where a prosecution related to a minor Commonwealth offence is brought in a remote locality where it would be impracticable for a DPP lawyer to attend, such prosecution may sometimes by way of exception remain with state authorities for reasons of convenience.

4. LITERATURE AND EXPERTS

* Attorney General's Department Annual Report 1995-95, Australian Government, Canberra.

* Commonwealth Director of Public Prosecution Annual Report 1994-95, Commonwealth of Australia, Canberra.

* Commonwealth Director of Public Prosecutions - Prosecution Policy of the Commonwealth, 1992

* Edwards JLJ "*The Attorney General and the Public Interest* 1984.

* Edwards JLJ "The Office of the Attorney General - New Levels of Public Expectations and Accountability" Meeting of Commonwealth Law Ministers, Commonwealth Secretariat 1993.

* Fernandes L "Profile of a Vague Figure : the South African Public Prosecutor" *SALJ*.

* Hogg PW *Constitutional Law of Canada* 1992 466-520.

* Prosecution Policy of the Commonwealth Canberra 1992.

* Stenning PC *Appearing for the Crown - A Legal and Historical Review of Criminal Prosecutorial Authority in Canada* (1986).

* Steytler N "The Position of the Prosecutorial Authority in the Final Constitution" Submission to Theme Committee Five, Submissions received as at 15/6/1995, Volume 12.

Note on Experts: Should the CA consider to invite experts to Cape Town, two persons could be recommended:

* The Panel has consulted, by correspondence, with **Prof PC Stenning** of Canada, the author of the above-quoted book **Appearing for the Crown.**

* **Prof Cheryl Saunders**, dean of the Melbourne Law School, was recently in South Africa and participated in discussions with the Panel on various matters.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 20 SEPTEMBER 1995

RE: ATTORNEY-GENERAL/PROSECUTORIAL AUTHORITY

SUMMARY

1. On the premise that the prosecutorial authority shall be constitutionalized and that agreement has been reached on the requirement that such authority shall be independent and impartial, the Panel took account of and analyzed *inter alia* the history of the office of the Attorney General (AG) in South Africa, the situation in some other legal systems, submissions made to the CA (also with regard to practical considerations about crime control and effectiveness) and the relevant Constitutional Principles (CPs).

2. The aim was to determine the nature of the prosecutorial authority in order to reach conclusions on issues such as the meaning and scope of its independence, as well as how to ensure such independence, the burden of political responsibility and accountability and the question whether this authority should be exercised by a national functionary, or by independent provincial prosecutorial heads.

3. Comparative research indicates that a variety of models are followed in the world, that prosecutorial authorities are seldom totally independent of all branches of government and that different degrees and methods of political responsibility, accountability and independence exist. In no legal system known to the Panel is the prosecutorial power exercised only on a provincial level by functionaries who are totally independent from any national control or direction.

4. In a recent Namibian judgment it was found on an interpretation of the Namibian Constitution, *inter alia*, that direct ministerial control and intervention (as was the case in South Africa before 1992) is not in accordance with the imperatives of the constitutional state, but that the minister (or AG as a Cabinet member) must be informed and bears "final responsibility" for the office of the prosecutorial authority.

5. Historical and comparative evidence and an analysis of the duties of a prosecutorial authority suggest that the nature of this office is neither of a purely executive nor a purely judicial nature, but rather quasi-judicial or *sui generis*.

6. Against this background, and in view of the relevant CPs, it is recommended that:

6.1 the prosecutorial authority should be structured nationally, with provincial or regional offices responsible to a national AG, rather than having an independent AG for each province;

6.2 the prosecutorial authority should be independent, impartial and immune from political manipulation, but also fully accountable;

6.3 the political responsibility of the government for crime control and related matters should be taken into account in formulating models regarding the prosecutorial authority;

6.4 effective mechanisms regarding appointment, tenure and reporting should be designed to ensure the aforementioned;

6.5 new titles or terminology deserve consideration.

7. Three draft texts are put forward for the purposes of discussion.

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1. INTRODUCTION

1.1 During a debate in the Sub-Committee of the Constitutional Committee on Friday 8 September 1995, the Chairperson of the CA requested the Panel to formulate an opinion on the "Attorney-General" (AG).

The Panel based the interpretation of its mandate on the draft text (with footnotes) of 25 August 1995, included on pages 14-15 of the relevant documentation, as well as the debate around this draft text in the Sub-Committee.

1.2 The Panel's recommendations and other remarks are thus based on the assumption that a draft constitutional text on the AG is to be discussed by the CC. **The Panel was not requested to express an opinion as to whether or not the office of the AG or prosecutorial authority ought to be constitutionalized.**

1.3 It was accepted that agreement had been reached on the independence (and presumably impartiality) of the AG. (See 1(2) of the draft text, with footnote 4, on page 14 of the Sub-Committee documentation.)

1.4 The Panel was specifically requested to do comparative research regarding the position of the prosecutorial authority in other countries. It was regarded as useful to include a brief summary of the history of this office in South Africa.

1.5 Against this background, the Panel reflected on the nature and functions of the office, its relationship with the executive and with Parliament (and thus the possible meanings of "independence" and "accountability") and desirable degrees of "centralisation" and "devolution", including the question as to whether or not the prosecutorial authority in South Africa should be exercised by a National Attorney General (NAG), or separately and independently in each of the provinces. These questions were examined in the light of the submissions received from political parties, AGs, judges, lawyers' organisations and other role players. The relevant Constitutional Principles and practical considerations which govern effective enforcement of the law, crime control and prevention and prosecution of criminals were taken into account, as well the sensitivities which surround this issue because of the existing situation in South Africa.

1.6 One aspect which could cause some confusion is the different meanings attached to terms such as "attorney-general", "solicitor-general", "director of public prosecutions" and "prosecutor-general" in various jurisdictions. Some of these will be clarified below, e.g. in

the comparative section. In South Africa some lack of understanding on the side of the public also occurs, because of the use of the term "attorneys-general" for people, who are not actually attorneys, but state advocates and other prosecutors in criminal proceedings. The designation "state attorney", for those acting as attorneys for the state in civil cases increases the confusion. The present terminology is the result of historical developments. New terminology deserves consideration.

2. HISTORY AND DUTIES OF THE AG IN SOUTH AFRICA

2.1 The office of the public prosecutor in South Africa dates back to the Dutch colonial era. Soon after 1652 a 'Fiscal' was appointed, to investigate crimes and to prosecute offenders. His authority was later widened to include the duty to report even the Governor to the authorities in the Netherlands. Later the office was made subordinate to the local Government. During the Batavian period (1803-1806) the title 'Fiscal' was changed to 'Attorney-General'. The AG was appointed by the Dutch Government and his authority to prosecute was subject to approval of the court.

2.2 When the British occupied the Cape in 1806, they reintroduced the title of Fiscal. The Fiscal was also vice-president and acting president of the Court of Justice, as well as chief of the police. The Fiscal was theoretically independent, but in political cases the colonial government communicated with him. The office of AG was instituted only in 1828, to act *inter alia* as public prosecutor. The AG was also a political office. In 1874 it was recommended by a Commission that the AG should cease being a member of the government and rather be a permanent member of the crown, independent from the ministry.

2.3 AGs in the old republics of the Transvaal and Orange Free State and in Natal were responsible for public prosecutions, held several other senior executive posts (including chief of police and prisons) and were even allowed to practice privately.

2.4 When the Union of South Africa was formed, the power to prosecute was entrusted to four AGs, one for each province. All other functions of the previous AGs were taken over by the Minister of Justice. No provision for ministerial control over the AG or for accountability to Parliament existed.

2.5 In 1926 - apparently after an AG declined to prosecute a man called Jollie who tried to derail a train carrying Justice Minister Jan Smuts - the final control over prosecutions was removed from the AGs and vested in the Minister of Justice. This was done both because public servants were not responsible to Parliament, and for reasons of

policy.

2.6 Because of the intolerable burden of accountability which this arrangement placed on the Minister, the AGs were in 1935 again vested with the power of prosecution, subject to the direction and ultimate control of the Minister of Justice, who was a member of the Cabinet.

2.7 In terms of the General Law Amendment Act of 1957 and Section 3(5) of the Criminal Procedure Act 51 of 1977, the AG exercised his authority subject to the control and direction of the Minister of Justice "who may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions". (Former Ministers of Justice often stated that interference would seldom take place, and only when national interests were involved. Allegations and suspicions of political interference, or of AGs vigorously and keenly pursuing the policies of the government, often came to the fore.)

2.8 The Attorney-General Act 92 of 1992 changed the position. The President appoints an AG for the area of jurisdiction of each provincial division (and the WLD) of the Supreme Court. The Minister of Justice appoints deputy AGs. However AGs are no longer subject to the control and directions of the Minister. The Minister coordinates the functions of AGs and can at most request an AG to furnish information or a report and to provide reasons regarding matters handled by the AG. An AG must submit a report to the Minister annually, and such report must be tabled in Parliament where the Minister can be questioned on it. The President can remove an AG from office only when requested to do so by both of the houses of Parliament. Thus AGs are independent from the government to the extent of being free to argue before the Constitutional Court that legislation is constitutional, although the government may believe that it is not. (In such cases the government may appoint lawyers to argue against an AG, as happened in the recent capital punishment case.)

2.9 Section 108 of the interim Constitution of 1993 vests the authority to institute criminal prosecutions on behalf of the state in the "attorneys-general" of the Republic. The area of jurisdiction, qualifications, powers and functions of AGs are left to be prescribed by law. Section 241(4) reflects the position of AGs holding office immediately before the commencement of the Constitution.

2.10 Several other laws also contain references to the office of the AG. The most important duties of the AG are to: decide whether or not to institute criminal proceedings (including the weighing of evidence, consultation with witnesses, instructions to the police and

prosecutors and advice and guidance to prosecutors); conduct prosecutions in the Supreme Court; consider representations from the public; provide opinions in review cases at the request of judges; comment on proposed legislation.

2.11 The office of the AG has been a powerful one. The courts not only showed considerable respect for decisions of AGs and were not inclined to interfere in, control, or even comment on the exercise of their discretion, but even accorded high praise to this office[1]. An AG has the right to prevent the granting of bail in certain circumstances, without the court being able to question this decision.[2] An AG furthermore has the power to order the detention of a witness under certain circumstances.[3]

3. COMPARATIVE PERSPECTIVE

3.1 A variety of models and possibilities exist in the world. Many of these are obviously linked to the history and constitutional arrangements in different countries, as well as to specific characteristics of different systems of law and legal administration. With regard to the Commonwealth, for example, it has been stated that "(a) review of the existing systems operating at present ... produces a somewhat bewildering series of alternate arrangements, the nature of which cannot be fully understood without reference to the prevailing political context of each individual country."[4]

3.2 It is clear that an ideal prosecutor's role that could serve as a model for all criminal justice systems does not exist. Existing differences relate to the method of appointment (or election), the political nature of the office and the relationship between the office and the government of the day, the way in which the discretion to prosecute is exercised, and the degree to which the prosecutor's office is centralized and hierarchically organized. With regard to the last issue, it can be noted that where a criminal justice system is dominated by a policy of uniform law enforcement, great emphasis will usually be placed on comprehensive and rigid central supervision. If, however,

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1 James JP in S v Hassin 1972(1) SA 200(N)

2 S 21 of the Criminal Law Second Amendment Act 126 of 1992; S 61 of the Criminal Procedure Act 57 of 1977

3 S 185 of the Criminal Procedure Act 51 of 1977

4 Edwards, in a paper on 'Emerging Problems in Defining the Modern Role of the Office of the Attorney-General in Commonwealth Countries', quoted in the recent Namibian case (see below).

a criminal justice administration is governed by the idea that prosecution should conform with what is considered desirable on a local level, the individual prosecutor needs some degree of independence.[5]

3.3 No example could be found of any federal or other system where a national competency such as justice is exercised only on a sub-national level, or where provincial prosecutorial authorities operate in the absence of or independently from a national or federal authority, as far as the enforcement of national or federal law is concerned.

3.4 Some examples which bear out the above conclusions can be briefly mentioned.

3.5 In Commonwealth countries several 'models' seem to be followed. The summary of these (with reference to authors on the topic[6]) taken with some amendments from the recent Namibian judgment referred to below, is useful to some degree:

3.5.1 Model 1

Prosecutions are directed by a public servant who is not subject to the direction or control of any other person or authority. This person may be referred to as an AG or Director of Public Prosecutions (DPP). In some jurisdictions the prosecuting authority (or AG) will have other functions as well (such as advising on legislation). Systems exemplifying this model include those in Kenya, Sierra Leone, Singapore, Pakistan, Sri Lanka, Malta, Cyprus, Western Samoa, Bahamas, Trinidad and Tobago, Botswana and the Seychelles.

In other jurisdictions the DPP is responsible only for prosecutions. This model to some extent exemplifies the classic Commonwealth pattern which the United Kingdom Government consistently sought to incorporate in the independence constitutions of many colonies. Following independence in many countries, this particular provision was changed to bring the DPP under the direct control of the AG or Minister, to secure Ministerial responsibility. Jamaica and Guyana, however, have retained the total independence of the office of DPP.

3.5.2 Model 2

The AG is a political appointment. He or she is a member of the

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5 Herrmann 535 - 538

6 E.g. Edwards; also see Rose and Paul 57-58.

Government but, although holding Ministerial office, does not sit regularly as a member of the Cabinet. The AG of England and Wales typifies this particular model.

3.5.3 Model 3

The AG is a member of the Government and, as such, is normally included in the ranks of Cabinet Ministers. In some jurisdictions, though this is by no means a universal practice, the office of the AG is combined with the portfolio of Minister of Justice (or similar title). Most of the Canadian provinces and the Canadian Federal Government have adopted this model. Other countries that fall within this category include Australia (both the states and the Commonwealth Government), Nigeria and Ghana. Where, in these jurisdictions there exists a DPP (or its equivalent), the DPP is, in the ultimate analysis, subject to the direction and control of the AG.

3.5.4 Model 4

The DPP is a public servant. In the exercise of his or her powers he or she is subject to the directions of the President but to no other person. This is the situation in Tanzania and which prevailed in Ghana during the latter stage of the first Republic from 1962 to 1966.

3.5.5 Model 5

The DPP is a public servant. Generally the DPP is not subject to control by any other person but if, in his or her judgment, a case involves general considerations of public policy, the DPP must bring the case to the attention of the AG, who is empowered to give directions to the DPP. This model is applicable in Zambia alone at present. In Malawi, the DPP is subject to the directions of the AG. If, however, the AG is a public servant, the Minister responsible for the administration of justice may require any case, or class of cases, to be submitted to him or her for directions as to the institution or discontinuance of criminal proceedings.

3.5.6 **In summary** it could be said that the general power to prosecute in Commonwealth countries may vest either in an independent public servant or in a member of government. In the later case the term AG is normally used.

Issues regarding the separation of powers, independence and accountability are addressed differently and no conclusive solution is offered. However, even in federal systems within the Commonwealth justice as a national competency is never exercised on a provincial level only. In Canada, for example, where the administration of justice

is a federal matter, the Minister of Justice who is a member of the Cabinet and of Parliament is the ex officio AG of Canada. The Deputy Minister of Justice is the senior official in charge of the Department of Justice and also the ex officio Deputy AG. Provinces have AGs and deputy AGs. In Australia where justice is a state competency the federal AG is a member of the Cabinet under whose directions the federal DPP falls. After some reform to safeguard the prosecutorial office against political manipulation, the Australian DPP still performs his or her functions subject to directions or guidelines from the Minister or AG. Such guidelines are furnished in writing and published in the Government Gazette, after consultation with the DPP.

Ministerial responsibility regarding the prosecutorial function has been part of the Westminster tradition. The responsible Minister, often called the AG, is a member of the Cabinet and the legislature and is responsible to the executive and to Parliament and thus reflects the interests of the public. The actual prosecutorial power is then exercised by a DPP, who functions under the control and direction of the AG. Because of the danger that the prosecutorial power may be abused for party political purposes, the Commonwealth office sought to make the prosecutorial authority entirely independent of the executive and legislature when drafting constitutions for newly independent Commonwealth countries in Africa and the Carribean. As indicated above, ministerial responsibility has been reintroduced in some of these systems.

3.6 In Germany the federal prosecutorial authority is headed by the Federal Prosecutor ('Generalbundesstaatsanwalt') who is appointed by the federal Minister of Justice. This office is an 'independent organ of the administration of justice' but is accountable to the Minister of Justice.

Each of the 'Länder' or provinces of the Federal Republic also has 'Generalstaatsanwälte', who is accountable to the Minister of Justice of the "Land". In many 'Länder' these are political officials, a fact which has been subjected to some criticism.

The federal Minister of Justice lays down policy guidelines. The 'Bundesstaatsanwalt' does not lay down policy for the 'Länder', but may intervene to take specific cases over from a 'Land' in cases of national and federal interest, such as drug trafficking, hijacking, or terrorism.

In particular cases of national importance (e.g. involving foreign nationals or relations) the federal prosecutor may seek advice from the Minister, and the Minister can even instruct the prosecutorial authority not to prosecute in particular instances. Apparently this rarely if ever

happens in practice and the possibility of such ministerial intervention has been criticised by some German commentators.

The situation in Continental Europe is generally not very different from the above. In Eastern Europe there has been a recent trend towards a greater degree of independence than before, away from party political control.[7]

3.7 In the United States of America the federal and state prosecuting systems are entirely separate.

3.7.1 The federal AG in the US is the head of the Department of Justice, akin to our Minister of Justice. As head of this department, he or she has authority over all functions of the Department, including 93 US attorneys' offices around the country which are responsible for federal prosecutions.

The office of the AG is not specified in the US Constitution. Legislation stipulates that the US AG shall be appointed by the President subject to Senate confirmation.

The US Attorneys for each of the 93 federal districts are also appointed by the President, subject to Senate confirmation. These US Attorneys run large offices that deal with the federal government's civil and criminal litigation in their district. Traditionally they have a great deal of autonomy but they are subordinate to the AG and to the head of the Washington office's criminal division. The AG does not supervise day-to-day running of these offices.

In theory at least, the institution of the Grand Jury provides a check on the political nature of the federal prosecuting authority. All prosecutions for felonies must be initiated by a Grand Jury indictment. In practice the Grand Jury generally confirms the prosecutor's charging decisions.

The 'Solicitor General' (SG) is also appointed by the President, subject to Senate confirmation. He or she is in charge of representing the government before the Supreme Court. The SG functions as an advocate and not, like the AG, as an executive policy-maker.

3.7.2 Each of the separate states in the US is free to organize its justice functions as it wishes. In most, but not all, states, the

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[7] Herrmann 533 and in general.

AG is an elected official with almost no authority over criminal prosecutions. Instead, a state AG functions as the state's civil attorney (akin to South Africa's 'state attorney').

Prosecution in state matters (i.e. not federal offences) is usually a county level function. Each county typically elects its own 'district attorney' (DA) who, once elected, has complete autonomy with respect to the organization of the office and its operations. (DAs hire staff, organize their offices into whatever departments they choose, promulgate prosecuting guidelines, exercise supervision etc.) In most states the only limit on a DA's autonomy is the Governor's power to remove him or her in cases of gross corruption.

Elections are usually five yearly. If a DA is defeated, the successor is free to reorganize the office entirely. However, now many staff positions within DA offices have civil service protection and therefore staff cannot be fired for political reasons.

3.8 In **Namibia** a recent judgment of the Supreme Court[8] addressed, *inter alia*, the relationship between the government and the prosecution. The offices of the AG and 'Prosecutor General' (PG) are constitutionally recognized. The office of the AG, who is (but need not be) a cabinet member, is recognized by the Court to be a political one, because the appointment of the AG by the President is political, just like the appointment of the Prime Minister and Ministers. In contrast, the appointment of the PG by the President on the recommendation of the Judicial Service Commission in accordance with Article 32(4)(a)(cc) of the Constitution suggests that the functions of the PG are quasi-judicial in nature. The court approached the issue of the relationship between the AG and the PG from the angle of constitutionalism and the constitutional state, and by looking at comparative material.

The Court held that the former Section 3(5) of the South African Criminal Procedure Act of 1977 (discussed earlier in paragraph 2.6) is not the product of a "Rechtsstaat" and is not compatible with the "Grundnorm" relating to the separation of powers. It paves the way for executive domination and state despotism and represents a denial of the cardinal values of the Constitution, the Court found.

The Court also held that although article 87 of the Constitution gives

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[8] Ex Parte AG: in re the Constitutional Relationship between the AG and the Prosecutor-General Case No SA 7/93, 13.7.1995, per Mahomed CJ, Dumbutshena AJA and Leon AJA

the AG the final responsibility for the office of the PG, the AG does not have the authority to instruct the PG to institute a prosecution, to decline to prosecute, or to terminate a pending prosecution in any matter. The AG also does not have the authority to instruct the PG to take or not to take any steps which the AG may deem desirable in connection with the preparation, institution or conduct of prosecutions. However, the AG does have the authority to require that the PG keeps him or her informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve aspects of legal or prosecutorial authority.

The Court concluded as follows:

> "Thus interpreted, the office, (of the Prosecutor General) appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility for the office. In this regard it is my view that final responsibility means not only financial responsibility for the office of the Prosecutor-General but it will also be his duty to account to the President, the Executive and the Legislature therefor. I accept that on this view of the respective Articles the "final responsibility" may be more diluted and less direct but it is nevertheless still possible for such responsibility to be exercised provided that the Attorney-General is kept properly informed. On this view of the matter the Constitution creates on the one hand an independent Prosecutor-General while at the same time it enables the Attorney-General to exercise final responsibility for the office of the Prosecutor-General. The notions are not incompatible. Indeed it is my strong view that this conclusion is the only one which reflects the spirit of the Constitution, its cardinal values, the ethos of the people, and articulates their values, their ideals and their aspirations. It also is entirely in accordance with the "uniquely caring and humanitarian quality of the Constitution....

I would add only this. I would strongly recommend that, these issues having been settled, the Attorney-General and the Prosecutor-General adopt the English practice of ongoing consultations and discussions which would be in the best interests of the cause of justice and the well-being of all the citizens of Namibia."

Thus in Namibia the PG, who is the prosecuting authority, is recognized as independent. With regard to accountability, the "final responsibility" lies with the AG as a member of government. The meaning and content of "final responsibility" is not made very clear.

The court's recommendation that the AG and PG should consult and discuss on an ongoing basis is presumably intended to fill this gap, although the court does not state what their consultation and discussions should cover.

3.9 Finally, attention may be drawn to two different basic principles which provide the basis for prosecutorial policies and are applicable in different legal systems, namely the legality principle and the opportunity principle. The primary premise of the first is mandatory prosecution, or that prosecution must take place in all cases in which sufficient evidence exists of the guilt of a suspect and in which no legal hindrances prohibit prosecution. The prosecution can thus exercise only limited discretion. The opportunity or expediency principle, on the other hand, does not demand compulsory prosecution and allows for discretion even when proof exists, e.g. not to prosecute children, old, or ill people. In South Africa the opportunity principle applies (as in Belgium, Denmark, France, Great Britain and the Netherlands). The legality principle applies in Australia, Germany, Italy, Portugal and Spain, amongst others. Both systems have advantages and disadvantages. The opportunity principle allows for unlimited discretion which contains the potential for corruption, discrimination, arbitrariness and political manipulation. The legality principle protects the prosecution against these, to some extent, but is rigid and sometimes even unworkable. Discretion also creeps in under the guise of unlikelihood of conviction. Prosecuting guidelines may to some extent capture the advantages of both these principles.

4. SUBMISSIONS RECEIVED

4.1 The first advances the notion that there ought to be nine independent AGs in the country, one for each province, and that there is no need for a NAG or coordinating officer. The second broad view is that national coordination and policy guideline determination are essential to a proper administration of criminal justice in South Africa, that a national office should be established and that provincial offices should be under its authority.

4.2 There is considerable agreement amongst the submissions that the AG (or AGs) ought to be independent and thus not susceptible to political control or manipulation, that no AG ought to be obliged to obey a political directive in relation to a specific case, and that no Minister ought to be able to give instructions to an AG on the withdrawal of a case.

4.3 On the other hand the need for political responsibility and accountability is also stressed. To be able to prevent and control crime, the government of the day must have a say in the formulation

of prosecutorial policy. The prosecutorial authority furthermore needs to be accountable in a real way as far as its sensitivity towards constitutional values, the policy of the government and the needs of the community are concerned. A balance thus has to be found between independence and accountability.

4.4 Although those who have made submissions agree that the AG ought to be accountable, there are differences in regard to precisely how the balance between independence and accountability should be attained. Those parties who advance the view that there ought not to be a national AG appear to link this position to the fear that a national AG would in some way render that office more susceptible to political manipulation and compromise the independence of the office of the AG. There are also differences in regard to the person or body to whom such an AG should be accountable.

4.5 In addition to their reliance on the concern for the independence of the office which is described above, the AGs (and in particular the Association of State Advocates of SA) rely in their submissions, on what they contend to be the practical ineffectiveness of a national AG. Indeed, they suggest that there may be no work for such an AG at all, or at the other extreme that such a national office may be overburdened with too many complaints and other such matters to handle.

4.6 None of the parties who made submissions to the CA directly indicated the relevance of the Constitutional Principles (CPs) contained in Schedule 4 of Interim Constitution in a determination of this issue. While it cannot be doubted that many of those who made submissions had the CPs within their focus when submissions were made, the submissions did not refer to the CPs.

4.7 Overall there seems to be considerable agreement amongst those who made submissions that a prosecutorial system for South Africa ought to be:-

4.7.1 independent from political control, manipulation or intimidation

4.7.2 impartial

4.7.3 effective

4.7.4 sufficiently uniform to ensure equality before the law

4.7.5 sufficiently flexible to ensure that local and regional needs can be taken into account

4.7.6 accountable, in a way which is not superficial.

5. A SUGGESTED APPROACH; A DEFINITION OF PROSECUTORIAL POWER IN RELATION TO FUNCTIONAL AREAS; THE RELEVANT QUESTIONS

5.1 Questions such as whether there should be a NAG and how this NAG, or several AGs, should be appointed and be accountable but independent, have to be examined in relation to the broader theoretical background defining the nature of prosecutorial power and placing this in its appropriate context. The debate is not assisted by reference to AGs as persons appointed to do certain work. The question is not whether there ought to be nine independent AGs or whether these nine persons should be controlled by and made accountable to one NAG. The question is rather whether the country requires a single prosecutorial authority sufficiently flexible to cater for provincial and local variation, or whether there is need for nine independent prosecutorial authorities in this country.

5.2 The precise extent and limits of prosecutorial power have undergone considerable change over the past centuries in relation to independence, accountability, responsiveness, and so on. It is not necessary to go into the details of these changes. Suffice it to say that the power to prosecute (which is a state power) has often been seen as a necessary extension of good government and therefore as the exercise of an executive power and function. On the other hand, theorists have tended to emphasize the discretionary and decision-making aspects of the AG and have tended to classify them more as judicial functions. The latter view has sought to draw sustenance from the important duty of the prosecutor and to place all material before a court, whether such material is favourable to the state case or to the accused. These view are relevant to the determination of the earlier mentioned balance between independence on the one hand and political responsibility and accountability on the other, as well as to the application of the Constitutional Principles.

5.3 It is now accepted that the function of a prosecutorial authority has both executive and judicial elements and that this function is more properly described as quasi-judicial[9] or even *sui generis*.

5.4 Although there are difficulties in classifying the prosecuting power and function as purely executive or judicial, it is clear that it is aimed at crime prevention, crime control, the achievement of stability and the attainment of justice in SA. It can therefore not be doubted that

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9 See the definition by Leon AJA in the Namibian Attorney-General case (p. 11)

it falls within the sphere of the administration of justice and therefore within the functional area of justice.

5.5 In this regard, it may be significant to mention that only one of the parties required justice or the administration of justice to be within the competence of a province. Indeed, the submission from the Association of State Advocates of SA specifically disavows any contentions that justice ought to be a provincial competence.

5.6 **The rest of this memorandum will address two distinct but closely related questions, namely (1) whether the prosecutorial authority in South Africa should vest in independent and separate provincially based offices, or in a national office (possibly with its functionaries organized on a provincial basis) and (2) what methods could be used to best ensure the independence of the prosecutorial authority, as well as its accountability within the context of political responsibility.**

These questions are approached by taking into account the relevant Constitutional Principles, the recent Namibian judgment and practical considerations put forward in the earlier mentioned submissions.

6. THE RELEVANT CONSTITUTIONAL PRINCIPLES

6.1 No Constitutional Principle (CP) directly refers to the AG or prosecutorial authority, but several CPs are relevant. It is necessary to determine the cumulative effect of the relevant principles. The existence of or need for separate and independent prosecutorial authorities on a provincial level is not indicated by the CPs. **It would seem that a single prosecutorial authority is preferable, provided that questions regarding practicality, local and regional needs, independence, accountability and the abuse of power can be adequately resolved.**

6.2 CPI provides for equality in a sovereign state. The concept of equality underlies the entire Constitution and may be regarded as fundamentally important moral imperative of the Constitution. Apart from being referred to in the Preamble, the importance of equality is implied by CPII and CPIII.

6.3 In particular CPV commands an equitable legal system in which there is equality before the law. This principle militates against the notion of prosecutorial systems in different provinces operating unevenly, subject to different policy guidelines, or differentiated by the application of discretion in accordance with widely varying considerations. We understand that the proposal of those parties which do not favour a NAG is that policy guidelines may well be laid down by the Minister or some national functionary charged with this

responsibility. Full weight must of course be given to this, but it must be borne in mind that policy guidelines would, by their very nature, be broad and susceptible to varying interpretation by several separate and totally independent AGs.

6.4 CPVI requires a separation of powers amongst the judiciary, the legislature and the executive, while CPXVI requires government to be structured at national, provincial and local level. We have already pointed out that the powers and functions exercised by a prosecutorial authority cannot be compartmentalized into one or other of the above categories. However, these two principles facilitate a consideration of this question by reference to the criteria in terms of which powers are to be allocated to the national and to the provincial respectively as contained in Principle XX and XXI.

6.5 CPXX juxtaposes the criteria of financial viability against administrative efficiency, and national unity against legitimate provincial autonomy and cultural diversity. We do not understand that those who favour nine independent AGs contend that this is necessary on account of legitimate provincial autonomy. The argument seems to touch on the cultural diversity element contained in the principle to the extent that emphasis is placed on different practical realities in certain of the provinces. The principle requires national unity to be balanced against cultural diversity and can be most adequately catered for in a judicial system which accommodates both.

6.6 CPXXI 1 appears to encapsulate the subsidiarity principle and requires a consideration of effectiveness. It has been contended that the appointment of a NAG would render the system ineffective in as much as all decisions in regard to whether or not a prosecution should be instituted, if required to be taken nationally, would cause a degree of malfunction (referred to as 'chaos' in certain submissions). Careful consideration however reveals that there is already a great deal of delegation in the provincial functioning of the prosecutorial system. AGs are assisted by a number of deputies who, in turn, rely on a number of senior prosecutors stationed at various courts throughout the particular province. Each of these persons take appropriate decisions at the appropriate level in terms of appropriate authority. The principle of appropriate delegation - if reasonably applied - would not render the system ineffective merely by reason of the appointment of a national prosecutorial officer. (The federal prosecution system in USA, described in 3.7 above, provides a telling example.)

The prevention, control and prosecution of crime is a matter which has significant national implications. National standards of prosecution are necessary as is the need to determine minimum standards by

which prosecutors would operate throughout the country. Serious economic crimes could well have implications for economic unity. The interrelationship between crime and national security is obvious. There is also the question of inter- provincial crime as well as the issue of a crime committed near a border between provinces A and B which the AG of province A is not prepared to prosecute because of the particular need of that province. This decision not to prosecute could well be to the prejudice of province B.

6.7 CPXXI 6 requires a power to be allocated to a province where the power concerns the specific socio-economic cultural needs of the community or the general well-being of the inhabitants of the province. The exercise of prosecutorial power does not usually concern itself with the specific socio-economic or cultural needs of the community, although it sometimes might. It is true that effective prosecutions do contribute to the general well-being of the inhabitants but it is difficult to see how this aspect of crime control would contribute to the well-being of the inhabitants of a province as distinct from the well-being of the inhabitants of the country as a whole.

6.8 Prosecutors would clearly be part of the Public Service which means that CPXXX which calls for an impartial, efficient and career-orientated public service is of some relevance.

6.9 Finally, account should be taken of CPIV which requires that the Constitution should be supreme and binding on all organs of state. At least some of the actions and decisions of organs of state or persons exercising prosecutorial authority would be justiciable, which could go a long way to address concerns in regard to the consequences of the improper exercise of power by any prosecutorial authority. Furthermore, this CP is a reminder of the general implications of constitutionalism, which was addressed *inter alia* in the Namibian judgment dealt with below in the context of independence and accountability.

7. PRACTICALITY AND LOCAL AND REGIONAL NEEDS

7.1 We have already referred to the argument that the appointment of a NAG would result in ineffectiveness, because decisions in regard to prosecutions, would need to be taken nationally.

7.2 In practice, decisions would be taken at the appropriate level depending on the policy guidelines and approach adopted by the authority concerned. The Constitution might deal with this by ensuring that the prosecutorial authority is obliged to put an effective system in place. Administrative restructuring might be necessary but our future constitutional dispensation should not be limited by

difficulties which current practices or arrangements might create.

7.3 It is perhaps more practical and effective for one AG to account either to the Minister or to Parliament and to be questioned in regard to the functioning of that authority than for nine AGs to do so separately. (This aspect is dealt with under **'Political Responsibility and Accountability'** in 8.2 below.)

7.4 The NAG would be responsible for the investigation and prosecution of national crime.

7.5 The NAG would have the final authority to prosecute or not to prosecute. In practice, however, the NAG, like provincial AGs today, would rarely be called upon to make that decision personally. The right of every person to obtain a decision from a provincial AG is in practice satisfied by a decision of the provincial prosecutorial system taken at an appropriate level. So, for example, relatively junior prosecutors take decisions not to prosecute in cases of minor assault.

7.6 The NAG would have the ultimate responsibility to establish and maintain standards. Furthermore the national office would probably be responsible for a full investigation of and decision on cases concerning national economic unity and national security.

7.7 There is no indication that independent provincial AGs will be more suited to take legitimate local and regional needs and differences regarding e.g. cultural diversity and crime patterns into account than a national prosecutorial authority with regional deputies. Some cultural differences, e.g. related to concepts such as public morality, may be catered for by provincial legislation. Differences regarding crime patterns and geographical factors (such as proximity to national borders) could be taken into account in the formulation of a national policy regarding national crimes, or even in regional policies on matters not covered in national guidelines. Relevant differences could furthermore also exist on a local level. These should be taken care of by prosecutorial discretion within the context of a national policy and surely does not necessitate the independence of local prosecutors from provincial AGs. Again the federal prosecution system in the USA is instructive. Although all US Attorneys are under the authority of the US AG, they have considerable discretion over prosecuting decisions in their districts.

7.8 Of considerable interest in this regard is the submission of the Director of the Office of Serious Economic Offences which brings to light the contention that, that office too, should be upgraded to that of AG with the required independence and impartiality. A national prosecutorial officer is perhaps a more objective way of dealing with

the difficulty concerning the status of the Director of this office.

8. POLITICAL RESPONSIBILITY, ACCOUNTABILITY, INDEPENDENCE AND ABUSE OF POWER

8.1 General

As indicated earlier, CPIV states that the Constitution shall be the supreme law of the land and thus - together with the other CPs - emphasizes the concept of constitutionalism and the nature of the constitutional state. In the recent Namibian judgment discussed earlier the implications of constitutionalism for questions regarding political responsibility, accountability, independence and abuse of power were analized. The conclusions of the court need not be repeated here. Useful guidelines could be derived from this judgment (although the situation in a constitutional state such as Germany does seem to differ from the answers of the court to the specific questions dealt with in the case).

8.2 Political responsibility and accountability

8.2.1 The Minister bears the political responsibility for issues related to prosecutorial policies. Therefore the Minister should have the duty to determine and issue policy guide-lines in respect of the prosecutorial authority in an open and transparent manner. However, the Minister cannot instruct the prosecution as to whether or not a particular prosecution should be instituted, because of the implications this would have for the independence of the prosecutorial authority. The Minister is accountable to Parliament.

8.2.2 It is clear that the AG must be fully accountable. One possibility for dealing with the needs of political responsibility and accountability, is to require the AG (or AGs) to submit regular reports to the Minister, who has to table such reports in Parliament. Both the Minister and the AG should then be required to appear before an appropriate Parliamentary Committee for questioning. Thus the Minister would be held accountable for policy issues and the AG for the practical implementation of policies, and the exercise of prosecutorial discretion.

8.2.3 Appropriate questioning, if sufficient evidence is available, could thus expose the AG, should he or she not exercise his or her powers in accordance with the Constitution, or if he or she unreasonably disregards the policy guidelines, or fails to duly take the interests of the community into account. Parliament could thus play an indirect role in the formulation

and observance of policy. The consequent publicity would also operate as a measure of control over these functions.

8.2.4 In order not to leave the Minister unprotected, unreasonable disregard of policy guidelines should perhaps result in an investigation by the Judicial Service Commission or similarly independent body, or a Parliamentary committee, where appropriate.

8.2.5 As stated earlier, the issuing of guidelines could to some extent capture the advantages of the legality principle, without doing away with the opportunity principle.

8.3 Independence

8.3.1 There seemed to be some suggestion during a debate in the CC Sub-Committee that something more than independence of the prosecutorial authority from political control was required. However, this position was not further explained. We are not able to conceive of the independence of a prosecutorial authority other than by reference to that authority not being subject to political manipulation or control. As the Namibian case indicates, the provision in the Constitution for the independence of this function ought adequately to guard against the possibility of political interference.

8.3.2 Independence can also be established by determining an appropriate appointment mechanism. If appointment by the President is not regarded as sufficient for independence, the Judicial Service Commission or another similarly independent body or an appropriate Parliamentary committee could be the appointment agency.

8.3.3 Security of tenure in respect of certain members of the prosecutorial authority is also relevant to the question of independence. We suggest that dismissal should be effected only by the Judicial Service Commission (or other such body) if there is proof of incapacity, incompetence or misconduct in relation to the performance of the function.

8.4 Prevention of abuse of power

8.4.1 Some of the submissions make the point that the disadvantage of having a central prosecutorial authority is that too much power will be concentrated in one person.

8.4.2 Part of the resolution of this perceived difficulty lies in the fact

that the conduct of the prosecutorial authority is subject to the Constitution and that some prosecutorial conduct could thus be challenged in court.

8.4.3 A further fear that the head of the national prosecutorial authority (though appointed by the Judicial Service Commission or some such mechanism) might surround him or herself with provincial prosecutorial heads who would be answerable to him/her and would do his/her bidding to the disadvantage of the country as a whole. This can be overcome by providing that all senior members of the prosecutorial authority, such as perhaps provincial heads, should be appointed by and subject to dismissal by the Judicial Service Commission.

8.4.4 This would mean that the provincial heads of the prosecutorial system would have a status and protection of their own despite the fact that they will be accountable to the national head in a manner appropriate to the relationship between the national head and the provincial head. Provincial heads of prosecution will also be protected from being isolated and singled out for criticism based on perceptions regarding their independence and even integrity, which could happen in a system with nine separately independent AGs.

9. RECOMMENDATION:

In summary it is recommended that

9.1 there should be a single independent, impartial and accountable prosecutorial authority for the Republic;

9.2 this prosecutorial authority could be structured at national and provincial level, but need not be (details of structures could be left to legislation);

9.3 the national and provincial heads of this prosecutorial authority should be appointed by the JSC (or other such body) and should have appropriate security of tenure;

9.4 the Minister of Justice could issue policy guidelines and should also be accountable for such guidelines and related policy decisions.

10. NOMENCLATURE

A difficulty which need to be resolved before a draft can be attempted is that relating to the names to be given to particular positions.

The problems connected to the term "Attorney-General" have been referred to in paragraph 1.6.

In the draft below the terms "Director of Public Prosecutions" and "Deputy Director of Public Prosecutions" are used merely for the sake of convenience. Another term which may be considered is "Prosecutor-General", which is used in Namibia.

11. TENTATIVE DRAFTS

The following drafts are put forward merely for the purposes of discussion. The main differences relate to the question as to how much detail is to be included, or left to the legislature. The order of presentation does not represent any preference on the part of the Panel.

DRAFT A

"Prosecutorial Authority

1. The prosecutorial authority of the Republic shall be independent and impartial and shall function without fear, favour or prejudice.

2. The prosecutorial authority shall vest in the office of

   (a) a national Director of Public Prosecutions and

   (b) a Deputy Director of Public Prosecutions in respect of each of the provinces of the Republic.

3. The National Director and each of the Deputy Directors of Public Prosecutions shall be appointed by the President acting on the advice of the Judicial Service Commission, with due regard to appropriateness of qualification, representativity, impartiality and independence, and the need for accountability.

4. The Director and Deputy Director of Public Prosecutions may be dismissed only on a recommendation by the Judicial Service Commission based on a finding of incapacity, incompetence or misconduct of any of the offices concerned.

5. No person or authority shall interfere with the performance of the functions of the prosecutorial authority.

6. All organs of state shall provide the prosecutorial authority with all the assistance and protection necessary for the effective performance of its functions.

7. The Minister may make policy guidelines for the performance of functions of the prosecutorial authority. Such guidelines shall be published in the Government Gazette."

DRAFT B

"Prosecutorial Authority

1. The authority to institute criminal prosecutions on behalf of the state shall vest in the Director of Public Prosecutions of the Republic.

2. The prosecutorial authority/DPP shall be independent and impartial and shall function without fear, favour, or prejudice and no person or authority shall interfere with the performance of its/their functions.

3. The prosecutorial authority/DPP (and Deputy DPPs?) shall be appointed by the President acting on the advice of the Judicial Service Commission with due regard to appropriate qualifications, independence and representativity.

4. After consultation with the DPP the Minister of Justice may issue guidelines for the prosecutorial policy in an open and transparent manner.

5. The prosecutorial authority/DPP shall submit regular reports to the Minister and be accountable to Parliament.

7. The jurisdiction, powers and functions of the prosecutorial authority/DPP shall be regulated by national law."

DRAFT C

"Prosecutorial Authority

1. The authority to institute criminal prosecution on behalf of the state shall vest in the Director of Public Prosecutions of the Republic.

2. The prosecutorial authority/DPP shall be independent and impartial and shall function without fear, favour, or prejudice and no person or authority shall interfere with the performance of its/their functions.

3. The jurisdiction, powers and functions, accountability, appointment and tenure of the DPP/prosecutorial authority shall be regulated by national law."

12. LITERATURE CONSULTED

(In addition to submissions made to the CA)

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* Bloch SL "The Early Role of the Attorney General in our Constitutional Scheme : In the Beginning there was Pragmatism" *Duke LJ 1989 561*

* Edwards JLJ "The Office of the Attorney-General - New Levels of Public Expectations and Accountability" Meeting of Commonwealth Law Ministers, Commonwealth Secretariat 1993

* Edwards JLJ *The Attorney-General, Politics and Public Interest 1984*

* Felkenes GT *The Criminal Justice System. Its Functions and Personnel 162 - 182*

* Fernandez L "The South African Prosecution Service: The Way Ahead" unpublished discussion paper 1995

* Fernandez L " Profile of a Vague Figure : the South African Public Prosecutor" *SALJ*

* Frank H"Staatsanwälte als politische Beamten" *DRIZ* Nov 1987 449

* Herrmann J "The Role of the Prosecutor or Procurator - Synthesis Report" *International Review of Penal Law.* Criminal Justice and Human Rights : Central and Eastern Europe and Former USSR 1992 533

* Martin L "Die Bundesanwaltschaft beim Bundesgerichtshof" in Glanzmann and Faller Ehrengabe für Bruno Heusinger 1968 85

* Rose & Paul

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* Tak PJP"The Legal Scope of Non-Prosecution in Europe" HEUNIE Finland 1986 26

* Yutar P "The Office of the Attorney-General in South Africa" *SACC* 1977 135

CONSTITUTIONAL ASSEMBLY

30 January 1996

To: Members of the Constitutional Committee Sub-Committee

From: Hassen Ebrahim

Re: Abstract Review: A Survey of European Constitutions

Please find attached for your information additional documentation prepared by the Constitutional Assembly's Research Department on Abstract Review.

P. O. Box 15. Cape Town. 8000
Republic Of South Africa

Tel: (021) 245 031. 403 2252 **Fax**: (021) 241 160/1/2/3. 461 4487. **E-mail**: conassem@iaccess.za

TO: The Directorate

FROM: The Research Department

DATE: 24 January 1996

RE: ABSTRACT REVIEW: A SURVEY OF EUROPEAN CONSTITUTIONS

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1. INTRODUCTION

The constitutional committee has yet to decide whether or not there should be a constitutional provision allowing ordinary members of parliament to refer bills to the constitutional court for a decision on their constitutionality. A number of European countries have experimented with similar mechanisms. In many of these countries jurists and scholars continue to debate the merits and operation of this type of system. In Europe, however, the issue is usually discussed within the context of a much broader debate about the role of the constitutional court and, in particular, its abstract review jurisdiction over legislation.

2. GENERAL COMMENTS ABOUT ABSTRACT REVIEW

2.1 A constitutional court with the jurisdiction to review legislation in the abstract is required to consider and rule on the constitutional validity of legislation without there being an actual dispute about the application of a law in a particular case (cf concrete review jurisdiction, discussed below in 2.2).

2.2 Abstract review must be distinguished from concrete review. In the case of concrete review, a judge, faced with the obligation of applying an allegedly

unconstitutional law to the facts of a case has to decide whether or not the law concerned is unconstitutional. (cf the following works generally for a discussion of the two different models of review: J Nowak, R Rotunda, J Nelson Young, Constitutional Law (3ed) 1986; South African Law Commission: Report on Constitutional Models, Projects 77; Brewer-Carias Judicial Review in Comparative Law 1989; M Capelletti Judicial Review in the Contemporary World 1971.)

2.3 There is however more than one species of abstract review. Abstract review of legislation is a broad concept which encompasses two qualitatively distinct types of review procedures, broadly distinguishable according to whether the subject matter of the court's jurisdiction is 'law in making' (Bills) or 'law in force (Acts).' Where Bills are the object of such review the procedure is commonly referred to as 'prior control' or 'preventive review'; where it is legislation in force, it is called 'suppressive' or 'posteriori' review.

2. RATIONALE FOR "ABSTRACT REVIEW"

2.1 The difference between abstract and concrete review is a conceptual one. Whereas concrete review is closely associated with the protection of particular interests, abstract control is primarily intended for the protection of the general interest which a community has in the observance of the legal or constitutional order. (cf Prof. Helmut "Decisions of the Constitutional Court and Their Effects, in the European Commission for Democracy through

Law publication" (1994) 84 The Role of the Constitutional Court in the Consolidation of the Rule of law.)

2.2 Two arguments are usually raised in support of abstract review, both of which are critically examined in the sections that follow:

(i) The first argument is premised on the principle of constitutional supremacy and a particular understanding of the role played by the constitutional court in regard to legislation.

(ii) The second argument is that abstract review protects minority parties against oppression by the majority. (cf. Brewer-Carias Judicial Review in Comparative Law 1989 at 256, for the view that this was the basis for the referral mechanism introduced into the French Constitution in 1974.)

2.3 The first argument requires some elaboration; it runs like this. The Constitution is the highest law, to which all laws and official acts must conform. It articulates the basic norms and values upon which state and society are based. For this reason it follows that all laws must conform to the Constitution. The legislature is required to make laws which conform to the constitution, and a failure to do so, resulting in an unconstitutional law, can be challenged without the necessity of a concrete challenge to the application of that law in a particular case. It is the task of the constitutional court to defend the constitution, and one aspect of that task is to ensure

that legislative norms are constitutional. (cf Lopez Guerra, "The Role and Competence of the Constitutional Court", in European Commission for Democracy through Law,(1994) 84 The Role of the Constitutional Court in the Consolidation of the Rule of Law at 20.)

2.4 The view that the defence of the constitution is the primary responsibility of the constitutional court is widely accepted. The constitutional court is a court in the formal sense but, unlike ordinary courts of law, its primary concern is not the adjudication of disputes between litigants. The constitutional court's main role is to ensure that all public power is exercised in terms of the Constitution. A core aspect of this role is ensuring that the policy norms contained in legislation conform to the norms in the constitution, and to strike them down where they do not. Abstract control of legislation then is, at least arguably, one manifestation of the constitutional court's principle duty.

2.5 In general, it would seem that abstract review procedures have a restricted scope of operation - abstract review is designed to remove immediately apparent unconstitutionality in legislation. For this reason, many constitutions impose restrictions on the type of legislative instrument which can be taken on review, set time limits for review, or limit standing to invoke the jurisdiction of the constitutional court to important state offices. (cf Guerra op cit para 2.3 at 25.)

2.6 The practises of the European constitutional courts show however that abstract control over legislation is only one of the constitutional courts functions. Constitutional courts not only defend, but also readily interpret the constitution, a role which is often specifically provided for in the constitution. Their interpretative role requires constitutional courts to develop constitutional principles and guidelines for resolving disputes between public institutions and to assist state organs in the exercise of their powers and functions. Overall, the largest portion of their work load consists of adjudicating real disputes on constitutional matters, which much of the time concern challenges to legislation. (Guerra op cit para 2.3 at 26.)

2.7 The second argument, to the effect that abstract control of legislation is a means of protecting minorities from possible tyranny by the majority, has proved to be a more controversial basis upon which to found support for a system of abstract review. The main point of concern is that this procedure can be used to frustrate the passage of laws. The result of which would be general political instability and the creation of a partisan political climate. Critics of abstract review therefore stress the potential for conflict between a system of abstract review and the principle of representative democracy.

2.8 In addition to this concern, a number of other points are often raised as counters arguments:

(a) Preventive review is not consistent with the doctrine of the separation of powers between the legislative, executive and judicial branches of

government. If control exists over draft laws, then the court is sharing in the exercise of legislative power.

(b) Abstract review requires a court to pronounce upon the viability of policy considerations in legislation. There is thus the risk of the Court being exposed to the claim that it is usurping the legislatures constitutional function.

(c) The court might be required to choose between conflicting political positions when reviewing draft legislation, its decision will thus always be politically controversial.

(d) Abstract review is not the most effective means of protecting minorities. The overall system of political participation and the safeguards afforded to fundamental rights offer adequate protection to minority parties and interests.

(e) Deciding the Constitutional validity of a Bill on the basis of a hypothetical case is not sound judicial process. Judges are better able to reach a correct decision on the constitutional validity of a statute if they have before them a real complaint concerning the actual effect of a statute in practice.(cf "European Commission for Democracy through Law" (1990) Meeting with the presidents of constitutional courts and other equivalent bodies at 28)

3. ABSTRACT REVIEW IN COMPARATIVE PERSPECTIVE

3.1 European constitutions variously provide for concrete and abstract review (both species). It would be beyond the scope of this study to provide a thorough assessment of the concrete review jurisdiction of European courts. This section deals with examples of preventive and abstract review in foreign constitutions. In regard to the former, emphasis has been given to countries which give standing to ordinary politicians.

3.1.1 **Preventive review:** Of the European Constitutions which provide for abstract review comparatively few give standing to ordinary politicians to petition the Constitutional Court to review the constitutionality of Bills. Notable amongst the countries which do are France, Hungary, Portugal and Rumania. The procedures in these countries are discussed below under the headings of (a) the type of legislative instrument subject to abstract review, (b) standing, (c) the stage in a bills life during which referral is possible, (d) what happens to the bill on review, (e) procedures for review, and (f) the consequences of a declaration of unconstitutionality.

(a) The type of legislative instrument subject to abstract review

(i) Different countries have different types of legislative instruments, not all of them familiar to our legal system. The French constitution for instance draws a distinction between the referral of organic laws and

other laws. Organic laws must be submitted to the constitutional council by the Prime Minister for a ruling on their constitutionality after they have been passed but before they have been promulgated, whereas other laws may be so submitted. Organic laws are, 'laws, as determined by their object, dealing with the status of particular bodies which the constitution has provided for or which are necessary to implement constitutional provision' (South African Law Commission: Constitutional Models Project 77 at 1187.)

(ii) In general, these countries provide for the preventive review of Bills as we know them.

(b) Standing

Standing is generally limited to the important organs of state and a percentage of ordinary politicians:

France: The President, the Premier, the President of the National Assembly, the President of the Senate or 60 deputies or 60 senators. The number of members of each house is provided for by organic law. (cf Art 25.)

Hungary: The Constitutional Court's jurisdiction is invoked 'by motion of Parliament, its standing committee or at least 50 members of Parliament. (cf Art 33(1) ACC.)

Portugal: The President, the Prime Minister or 1/5 of the members of the Assembly of the Republic 'in active duty,' may request the Constitutional Court to assess preventively the constitutionality of 'any decree submitted to the President for the purpose of being promulgated as an organic law' (Art 278(4)). This request must be made 8 days from the date on which the decree to be promulgated was received by the President (Art 278(3) read with Art 278(6)).

Rumania: The jurisdiction of the Constitutional Court may be invoked upon notification by the President, the President of either chamber of parliament (Chamber of Deputies and the Senate), by the government, the Supreme Court of Justice, by a number of at least 50 deputies or at least 25 senators (Art 144). The Constitution provides that the number of Deputies and senators must be established by an electoral law (Art 59(3)).

(c) The stage in a Bill's life during which referral is possible

(i) In most countries, referral is only possible once a Bill is passed but before it is signed and promulgated. (Article 61 French Constitution; Article 278 Portuguese Constitution; Art 144a Rumanian Constitution.)

(ii) The Hungarian Constitution would appear to permit review even before the final vote has been taken on a Bill. (Art 32/A of the Constitution read with Section 33(1) of the Act on the Constitutional

Court of 1989.) However, the Hungarian Constitutional Court has imposed limitations on the justiciability of Bills. The court has held that a Bill must be exempt from further modifications before it is ripe for pre-enactment review. The rationale for this approach would appear to be that until then the issues under dispute will not have crystallised sufficiently to allow a comparison to be made with the constitution. (cf Klingsberg "Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights" (1992) 41 Brigham Young University Law Review at 55; 61.)

(d) What happens to the Bill while on review?

(i) The main consequence is that the promulgation of the Bill is suspended until such time as the Court has decided the question of its constitutionality. (Arts 10, 46 and 61 of the French Constitution.)

(ii) The legislative process on the Bill however need not be terminated.

(e) Procedures for review

A Constitution may require the Constitutional Court to decide the matter on an expedited process, which may take the form of either routine or urgent procedures. The French Constitutional Council for instance must make its ruling within a time limit of one month, which period may be reduced to eight days, at the request of the government, in the case of an emergency. (Art 61 of the French Constitution). The Portuguese Constitution requires

the Constitutional Court to hand down its ruling within 25 days of hearing the case. This time-limit may be shortened by the President for urgent reasons. (Art 278(8) of the Portuguese Constitution.)

(f) The consequences of a declaration of unconstitutionality

(i) A provision declared unconstitutional may not be promulgated. (Art 61 French Constitution; Art 279(1) of the Portuguese Constitution).

(ii) An exception to the rule against promulgation is where the Constitution permits the enactment of an incomplete text and the unconstitutional portions are severable. (Brewer-Carias op cit para 2.2 at 256-257.)

(iii) In most cases, a Bill must be returned to the appropriate legislative chamber for reconsideration or to remove the unconstitutionality. (Art 33(2) of the Hungarian Constitution; Art 279(1) of the Portuguese Constitution; Article 145(1) of the Romanian Constitution.)

(iv) In some cases, the legislative body can override the Courts decision on the basis of a 2/3 majority vote. (Art 279(2) of the Portuguese Constitution; Art 145(1) of the Romanian Constitution.)

3.1.2 **Suppressive Review**: The suppressive variant of abstract review is found in Germany, Hungary, Italy, Portugal, Spain

Germany: The Federal Constitutional Court can review the formal and material compatibility of federal or Land legislation with the Constitution or on the compatibility of Land legislation with other federal legislation at the request of the Federal Government, a Land government or 1/3 of the members of the Bundestag. (Art 93(2).)

Italy: The constitution of Italy entrenches both direct and indirect review. The right of direct access is limited: to the State in the case of a challenge to regional legislation, the regional governments in the case of a challenge either to state legislation or the legislation of the regions. (K Asmal "Constitutional courts- a comparative survey" in (1991) 24 CILSA 330.)

Hungary: Anyone, including individuals who wish to remain anonymous, can file petitions for review of enacted law. (Art 32/A(3) read with Art 1 ACC).

Portugal: The unconstitutionality of any provision of enacted law can be the object of a request formulated before the constitutional court by the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney-General, or 1/5 of the members of the Assembly of the Republic. (South African Law Commission: Constitutional Models, Project 77 at 1186.)

Spain: The Constitutional Court is competent to hear appeals on the grounds of unconstitutionality against laws and regulations having the force of law.

(Art 161). The following are eligible to lodge an appeal of unconstitutionality: The President, the Public Defender, fifty Deputies, fifty Senators, the executive corporate bodies of the Self-Governing Communities and their Assemblies. (Art 162.) The decisions of the Constitutional Court are published in the State Gazette, together with the dissenting votes, if any. Such decisions are binding from the day following their publication, and no appeal may be brought against them. Unless otherwise stipulated, that part of the law not affected by the unconstitutionality remains in force. (Art 164.)

7. ABSTRACT REVIEW IN SA INTERIM CONSTITUTION AND DRAFT TEXT

7.1 The interim Constitution and the draft text as it stands both provide for forms of abstract review.

7.1.1 Section 98(2)(d) read with section 98(9) of the interim Constitution: conferring jurisdiction on the constitutional court to test the constitutionality of national and provincial Bills upon request by specified officers of the relevant legislative body acting on petition by 1/3 or more of all members of that legislative body.

7.1.2 Section 71 of the interim Constitution: Requiring the constitutional court to certify the draft Constitution for compliance with the Constitutional Principles before the Constitution can have force or

effect is a form of abstract review.

7.1.3 **Section 54(2) of the Draft Constitution:** Confers on the President the power to refer a Bill to the constitutional court prior to assenting to it where he has reservations about the constitutionality of the Bill but only after Parliament has first considered these reservations without accommodating them.

7.2 In a recent decision by the South African constitutional court, Zantsi v The Council of State and Others CCT/24/94 Chaskalson JP expressed certain reservations about courts considering an issue in the abstract. He said, 'it is not ordinarily desirable for a court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest.' These views did not relate to abstract review procedures of the kind discussed here, but to section 102(8) of the interim constitution, which allows a division of the supreme court to refer a constitutional matter raised in a proceeding before it to the constitutional court even though the case has been disposed of. These views nevertheless provide an interesting insight into the courts impression of abstract review generally.

8. OBSERVATIONS

8.1 A Constitution need not confer abstract review jurisdiction on a court in order to secure the supremacy of the constitution over legislation. Many

vibrant constitutional democracies only confer concrete review jurisdiction on their courts. In Europe abstract review, where it exists, is on the whole used less than concrete review.

8.2 Proponents of abstract review generally justify their position on the basis that abstract review is an extension of the constitutional court's role as defender of the constitution and constitutional supremacy. The argument is subject to qualifications, the most important of which is the principle of democracy: abstract review should not frustrate democratic decision-making.

8.3 Assuming it is agreed that the constitutional court should have abstract review jurisdiction, two questions must then be answered:

8.3.1 At what stage of a legislative instruments' life should testing be permitted.

8.3.2 What kind of mechanism should be included in the constitution?

8.4 The first question involves a decision about which of the variants of abstract review should be adopted. The second question relates to the actual formulation of the mechanism. International practise shows that a broad range of mechanisms are available, including expedited procedures and legislative overrides. Foreign constitutions also provide different review procedures for different types of legislative instruments.