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GENERAL COUNCIL OF THE BAR OF S A

COMMENT

ON THE TWELFTH REPORT

OF THE

TECHNICAL COMMITTEE ON

CONSTITUTIONAL ISSUES

INTRODUCTION

1 This report has been prepared by the chairman of the General Council of the Bar of South Africa with the assistance of advocates E Bertelsmann SC, S F Burger SC, H J Fabricius SC, J C Froneman SC, J J Gauntlett SC, G L Grobler SC, A C le Roux SC, G J Marcus and D N Unterhalter.

2 The purpose of this report is to comment on the twelfth report of the Technical Committee on Constitutional Issues dated 2 September 1993. We would at the outset respectfully acknowledge and congratulate the committee on the careful consideration, scholarship and draftsmanship underpinning the twelfth report. It is also our conviction however, that the model it proposes is fundamentally flawed. We are deeply concerned that it will fail in the ideal of securing justice and the rule of law in the simplest, most workable and least costly way.

3 The key issues we propose to address are,

- whether we should have a single stream, parallel stream or split stream court structure;

- whether the appellate division should be at the apex of that structure or whether there should be a

specialised constitutional court of final appeal above it and

- the manner in which judges are to be appointed.

4 We shall lastly comment on various other important but miscellaneous issues.

SINGLE STREAM, PARALLEL STREAM OR SPLIT STREAM STRUCTURE

5 We agree with the Technical Committee that the possible court structures to be considered are the following :

5.1 **A single stream structure**

This is a linear structure much like the one we have at present. All cases proceed along the same stream which flows from the magistrate's court to the supreme court and from there to the appellate division. This structure may also include a specialist constitutional court as court of final appeal above the appellate division. Not all cases of course enter the stream at the lowest level and go all the way to the highest. Unimportant cases may be confined to the first or second stage. Important and urgent cases on the other hand, may enter the stream only at the second or third stage.

5.2 **A parallel stream structure**

In this structure, there are two completely separate, parallel streams. The first is the ordinary system of courts in which general issues are adjudicated. The second is a separate system of courts, parallel to the first, with exclusive jurisdiction to deal with constitutional issues.

The twelfth report does not favour such a system. We agree that it is unworkable. Constitutional issues do not arise in isolation. More often than not, the constitutional issue will merely be one of a number of issues in the case. This system will require any such a case to be adjudicated along both streams. That would be quite unworkable.

5.3 **A split stream structure**

This is a hybrid of the single stream and parallel stream structures. All cases start off along a single stream. Somewhere along the line, the stream however splits with general issues going in one direction and constitutional issues in another. Many possible models can be devised. The one favoured by the twelfth report is a good example. A single stream flows from the magistrate's court to the supreme court but then splits into a general stream and a constitutional stream. General issues go from the supreme court to the appellate division as final court of appeal. Constitutional issues go from the supreme court to the constitutional court as final court of appeal. (Certain important constitutional issues leapfrog the magistrate's court and supreme court altogether and go directly to the constitutional court as court of first and

final instance.) In such a system, cases giving rise to general and constitutional issues may have to go from the magistrate's court to the supreme court and from there to the appellate division for the adjudication of the general issues and to the constitutional court for the adjudication of the constitutional issues.

6 The twelfth report does not explain its choice of a split stream structure. It advances arguments in paragraph 3.7 in support of a separate constitutional court, but never explains why that court should be positioned alongside the appellate division rather than above it. Its model is in our respectful view fundamentally flawed :

6.1 We understand the spirit of the proposed new constitution to be permeated by a determination to restore the rule of law and to secure fundamental human rights. This ideal will not be achieved by any piece of paper, however eloquent the words it might contain. The ideal will only be achieved if we develop a human rights culture, respected, nurtured and enforced at every level of every branch of government.

The most fundamental defect in the model proposed in the twelfth report, is that it fails to recognise that a fully-integrated system which engages our whole court structure including every court and every judicial officer, in the protection and enforcement of the constitution, must as a matter of principle be pursued. We cannot stress too much the need for every judicial officer and indeed every officer of the state, to be faced with and engaged in, the new constitutional order in which all state action is governed by law.

6.2 The model excludes the appellate division from the adjudication of constitutional issues altogether. This seems to us particularly unwise :

6.2.1 The impression that constitutional issues are not worthy of the attention of the highest court, will tend to undermine the status of the constitution.

6.2.2 Our best legal talent ought to be in the appellate division. We cannot afford to exclude them from the development of our constitutional jurisprudence.

6.2.3 There is a certain irony in any system which denies appellate division judges any say in constitutional matters whilst permitting provincial judges and even magistrates to adjudicate on constitutional issues. Provincial judges would be loath to accept appointments to the appellate division if it meant having to withdraw altogether from participation in the development of our constitutional jurisprudence.

6.3 The split stream will make for untold complication, delay and cost because cases with general and constitutional issues will often have to proceed along both streams. Take for example a simple case of an accused charged with the unlawful possession of dagga. He raises three defences. His first defence is that the section under which he is charged, is for one reason or another unconstitutional. The second is that the dagga was in any event not in his possession. The third is that the confession upon which the state relies, was extracted from him in breach of his "due process" rights under the bill of rights. It would be a common and relatively simple case which ought to be determined by a trial and perhaps one or at most two

appeals. Under the system proposed by the twelfth report, the adjudication of this case may on the other hand proceed as follows :

6.3.1 At his first appearance in the magistrate's court, the accused will raise his three defences and may apply to the magistrate in terms of section 91(3) for a postponement of the proceedings to enable him to make an application to the supreme court.

6.3.2 He will then apply to the supreme court in terms of section 91(4), for his first defence to be referred to the constitutional court. Because it raises the validity of an act of parliament, only the constitutional court may adjudicate on it.

6.3.3 The first defence will then come before the constitutional court comprising eleven judges. It may be necessary to adduce evidence on the issue. There may in other words be a fully-fledged trial which might last days, weeks or even months.

6.3.4 If the constitutional court rejects the first defence and upholds the validity of the section, the case will revert back to the magistrate's court for trial. There will again be a full trial, but this time on the second and third defences.

6.3.5 If the magistrate should dismiss the second and third defences and convict the accused, he would have a right of appeal to the supreme court. It would in turn adjudicate upon the second and third defences.

6.3.6 If the supreme court should also reject the second and third defences and uphold the conviction, the accused will be entitled to a further appeal if his defences are arguable. The second defence which raises a general issue, will have to go to the appellate division. The third defence which raises a constitutional issue, will however have to go to the constitutional court. There will in other words be two further court appearances in the appellate division and in the constitutional court.

There will have been seven court appearances in all, including two full trials, to dispose of what should be a relatively straightforward and rather minor criminal prosecution.

We are not suggesting that the adjudication of all criminal cases will be as convoluted. They will however often have that potential, a potential which might well be exploited by opportunistic litigants and their lawyers. It would make for untold complication, delay and cost.

6.4 The trend in other countries comparable to our own, with an Anglo-Saxon legal tradition and adversarial system, seems to have been to opt for a unitary structure. We have in mind countries such as the United States, India, Canada and particularly our Southern African neighbours Namibia, Zimbabwe and Botswana. The parallel stream and hybrid structures are common in Europe. We should be slow however to emulate them. Their legal heritage and culture is vastly different from ours. They have an inquisitorial system administered by career judges - concepts quite foreign to us. They operate by

and large in relatively affluent and homogenous societies. There is in other words no reason whatever to believe that their solutions would work for us.

7 We conclude that the hybrid structure proposed by the twelfth report, is unacceptable and that we should opt instead for a fully-integrated single stream structure.

APPELLATE DIVISION OR CONSTITUTIONAL COURT AT THE APEX?

8 The fully-integrated single stream structure that we propose, would at least comprise the magistrate's court, supreme court and appellate division. It may end there or have a constitutional court above the appellate division as court of final appeal on constitutional issues. The purpose of this chapter is to consider whether there is sufficient justification for the creation of such an additional layer at the top of our court structure.

9 The twelfth report advances the following arguments in support of a separate constitutional court in paragraph 3.7 :

9.1 **"Adjudication on constitutional issues, including disputes between different organs of the state, requires a specialised knowledge of constitutional law coupled with an understanding of the dynamics of society."**

The same can be said of almost branch of law. Our experience and that of all the countries with the same legal heritage and tradition, is that it makes for better jurisprudence to have a single ultimate court of appeal staffed by the best judges with

jurisdiction in all matters. It makes for better jurisprudence firstly because the best judges are usually more able than even the specialists and secondly because a single ultimate court of appeal is necessary to harmonise the various branches of law which do not and cannot exist in isolation.

Constitutional law in particular, impacts upon every other branch of law. It is consequently of fundamental importance that our court of final appeal on constitutional issues, should be staffed by judges expert not only in constitutional law, but also in all other branches of law.

Every judge requires "an understanding of the dynamics of society." The suggestion that constitutional law experts are more likely to have such an understanding, is unfounded.

It would in any event not be necessary to create a separate court even if the adjudication of constitutional matters required specialist expertise. Such expertise could be brought to bear upon constitutional issues in other ways, for instance by a constitutional chamber of the appellate division such as the one described in the memoranda of the chief justice of 8 and 13 September 1993.

9.2 **"If the constitutional court is established as a chamber of the appellate division, the chief justice has to decide which chamber will hear cases in which there are both constitutional and non-constitutional issues."**

We agree that it would be undesirable to leave this decision up to the chief justice. However, it need not be done. The chief justice could for instance be required to refer every appeal to the constitutional chamber in which a constitutional issue is raised which is not frivolous and might be decisive.

9.3 **"Given the crucial nature of its tasks, the constitutional court should be able to establish its own identity and its own legitimacy, distinct from that of the appellate division. It should be the court of final instance for all cases dealing with constitutional issues. It should have its own judges, appointed according to procedures which need not necessarily be the same as those followed in the appointment of other judges. It should have its own rules and procedures, appropriate for constitutional litigation, which need not necessarily be the same as the rules and procedures of the appellate division. It should be able to establish its own identity and its own legitimacy."**

This is a series of assertions which do not seem to us to be self-evidently valid. The court of final appeal in constitutional matters does not need to have "its own identity". It obviously needs to enjoy legitimacy, but does not need to have "its own legitimacy". It similarly does not need to have "its own judges" or "its own rules and procedures". Whilst some special rules and procedures may have to be created for the exigencies of constitutional litigation, that can easily be accommodated within the existing structures. It does not by any means necessitate the creation of a separate court.

Under the new constitution with its justiciable bill of rights, our courts will of course have to perform a new and sometimes overtly political function. It will require a new and markedly different approach. It will nevertheless be vitally important that the constitution be dealt with and be seen to be dealt with, as serious law by a court of law, lest the impression be created of a malleable socio-political charter at the mercy of a quasi-political tribunal.

9.4 **"The appellate division ordinarily sits in panels of three to five judges to enable it to deal with its extensive workload. A constitutional chamber should be composed differently and should function on the**

basis that all the constitutional judges sit in all the cases that come before it."

We agree, but it does not necessitate the creation of a separate court. The judges' proposal as modified in the chief justice's most recent memorandum, for instance meets this point.

10 A new constitutional court will be able to make a fresh start unencumbered by any association with the existing court structure which lacks legitimacy in the eyes of many. It would be able immediately to establish its legitimacy by the appointment of a bench representative of both genders and all the races of our society. This is in our view a valid consideration and an important one, particularly because it offers a solution to the legitimacy crisis in the short term, which would otherwise only be possible in the medium to longer term.

11 The latter consideration needs however to be weighed against the following countervailing considerations against the creation of a separate constitutional court :

11.1 It would address the legitimacy crisis in the constitutional court, but exacerbate the problem in all other courts equally in need of reform. We have a limited number of women and black people qualified

to assume judicial office at the highest level in the short term. If a separate constitutional court were to be created, they would be attracted to its bench. They could be better used for appointment to the appellate division. In that way, we would have the benefit of their talents, not only in the ultimate adjudication of constitutional matters, but also in the ultimate adjudication of all other matters. Their appointment to the appellate division would at the same time address its legitimacy crisis.

11.2 Constitutional law impacts upon all other branches of law. It is consequently essential that the adjudication of constitutional matters be undertaken by judges with expert knowledge, not only of constitutional law but also of all other branches of law. The judges best equipped for the task, ought in other words to be the judges of the appellate division.

11.3 A further layer in our court structure, would be costly. Not only would society have to bear the cost of the court and its staff, but litigants would also have to bear the cost of the further complication and delay brought about by an additional layer in our court structure.

11.4 It is again of some significance that the countries which share our Anglo-Saxon judicial heritage and our adversarial system, have not opted for separate constitutional courts, either within or at the apex of their court structure. We again point to the examples of the United States, India, Canada, Namibia, Zimbabwe and Botswana.

12 We are on balance not in favour of a separate constitutional court above the appellate division. A model such as the one described in the chief justice's memoranda, seems to us to be preferable.

THE APPOINTMENT OF JUDGES

13 This is a vital issue. The legitimacy of our courts and the quality of our jurisprudence, will be vitally dependent upon the process by which our judges are appointed.

14 The most important qualities of a judge are an independent spirit, impeccable integrity and the highest ability. The process for the appointment of judges, should in other words be one which is not only able but also naturally inclined, to select judges with these qualities.

15 The process for the appointment of constitutional court judges proposed in the twelfth report is in our view wholly inappropriate, whether for appointment of judges to a constitutional court or any other court. Our principal objection arises from the fact that the process is entirely in the hands of politicians :

15.1 The process would not tend to select judges of independent spirit. On the contrary, it would be inclined to prefer and select judges in favour with the politicians who select and appoint them.

15.2 The process does not have a built-in ability to assess the integrity or ability of candidates. It would consequently also not be naturally inclined to select judges of highest integrity and ability.

15.3 Our experience in South Africa has been that politicians abuse the power to make judicial appointments. The temptation to do so will be infinitely greater under the new constitution which endows our courts with immense powers and requires of them to play a vital and sometimes overtly political role. It becomes more important and not less so, that the politicians not be allowed to dominate their selection and appointment. The process suggested by the twelfth report, will inevitably result in political horse-trading. Judges will in fact be, and will be seen to be, appointed for their political inclination rather than their judicial qualities. The quality of the bench and its standing would be seriously undermined.

15.4 There is in any event in our view no justification for the distinction made by the twelfth report, between the appointment of judges to the constitutional court and the appointment of other judges.

16 We would suggest instead that all judges be appointed by an independent Judicial Services Commission. We do not have fixed ideas about the composition of such a body. There seems to be broad consensus that the interest groups represented on it, should comprise the judiciary, the executive, parliament, the legal profession and the law schools. The number of representatives of each of those interest groups and the manner of their selection, is a matter of detail open for discussion. The suggestion embodied in section 93 of the annexure to the twelfth report, seems for instance to be broadly acceptable except for the parliamentary representation which is unduly loaded.

17 The twelfth report justifies its proposal for the appointment of judges to the constitutional court, by emphasising that parliamentary participation in the process of appointment "could provide the necessary legitimacy." We have already explained why we do not favour its proposal. If it should however be felt necessary to engage parliament in the process, the same result could be achieved by a process whereby,

- an independent Judicial Services Commission rather than a joint parliamentary committee, nominates judges for appointment and

- those nominees are then submitted to parliament for approval and endorsement.

The latter process would at least ensure that the candidates are nominated for their independence, integrity and ability rather than their political inclination.

MISCELLANEOUS COMMENTS

18 The purpose of this chapter is to raise miscellaneous matters of some importance unrelated to the issues of principle dealt with above. We direct our comments at particular provisions of the draft embodied in the annexure to the twelfth report.

19 **Section 87(2)**

In terms of this section read with section 90(4), the constitutional court is made a court of first and final instance, in all matters relating to,

- the validity of an act of parliament;
- constitutional disputes between organs of the state;
- compliance of the constitution with the constitutional principles contained in schedule 7;
- whether any matter falls within its own jurisdiction; and

- any other matter provided for in the constitution or any other law.

We would suggest that this list be reconsidered for the following reasons :

19.1 It is ordinarily highly undesirable for any court to be a court of first and final instance. It always makes for better jurisprudence if the evidence, the issues and the arguments are sifted and synthesised in a court of first instance before the matter gets to the court of appeal. That is so particularly where evidence needs to be adduced. The constitutional court ought therefore not to be constituted as a court of first instance except in the most exceptional cases where it cannot be done otherwise.

19.2 It is in any event inappropriate and quite impractical to engage the full constitutional court comprising eleven judges, in any matters which require evidence to be adduced. Not only is the constitutional court an inappropriate vehicle for that purpose, but it would also risk getting bogged down in a single case for days, weeks or months.

19.3 Any provision in terms of which the constitutional court is constituted as the only court with jurisdiction in certain matters, would be open to abuse. For instance, in terms of section 87(2)(c), the constitutional court is constituted as the only court with jurisdiction to determine the validity of an act of parliament. It means that, if a litigant were to contend that an act of parliament is invalid, his mere contention would entitle him to a hearing in the constitutional court, however frivolous and unfounded the contention might be, because no other court would have jurisdiction to adjudicate upon it. Section 87(2)(f) is another example. A litigant need merely contend that some issue falls within the jurisdiction of the constitutional court, to entitle him to a hearing before that court, however frivolous and untenable his contention might be. The potential for abuse is obvious.

20 **Section 88(2)(d)**

This section is ambiguous but seems at least open to an interpretation which would permit people without any legal qualification at all, to be appointed to the constitutional court. We find it objectionable. An

appropriate legal qualification is in our view a necessary prerequisite for high judicial office. A variety of other skills obviously often need to be brought to bear upon the adjudication of matters before any court. The necessary expertise can and should however be introduced by way of evidence and need not vest in the presiding judicial officers.

21 **Sections 88(3) and (4)**

We have already voiced our fundamental objection to the procedure for the appointment of judges to the constitutional court described in these sections. We raise them again however merely to point to further deficiencies.

The proposal in section 88(4), to overcome a deadlock in the parliamentary committee, seems to us unworkable. If the division in the committee should for instance be 60:40, the mechanism would fail because there would not be two defined groups of 75% and 25% of the committee, to exercise the power to nominate the eight candidates and two candidates respectively as envisaged in the section.

22 **Section 97**

Attorneys-General hold important and powerful positions. It is undesirable that they be subject to executive control. We would suggest that their independence be constitutionally entrenched, for instance by providing for their appointment by an independent tribunal such as the Judicial Services Commission and for some security of tenure.

CONCLUSION

23 Our comment on the twelfth report may in conclusion be summarised as follows :

23.1 The hybrid split stream court structure proposed in the twelfth report is wholly unacceptable. A fully-integrated single stream structure is preferred.

23.2 Such a structure may either have the appellate division at its apex or a separate constitutional court above it as final court of appeal on constitutional matters. There is something to be said for both. The structure with the appellate division at its apex is on balance preferred.

23.3 The appointment of **all** judges should vest in or at least be controlled by, an independent Judicial Services Commission. It should not be open to political manipulation.

23.4 We have various miscellaneous comments on other aspects of the model proposed in the twelfth report.

24 We urge the Negotiating Council to permit us to appear before it to present our report and deal with such issues as might arise from it.

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