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APPOINTMENTS TO THE PUBLIC SERVICE IN THE POST-APARTHEID SOUTH AFRICA AND THE NEED FOR CONSTITUTIONAL CHECKS AND BALANCES[1]

> We have not yet evolved a society in which the natural urges to achieve private gain at public expense have been replaced by a spontaneous devotion to public service. Patronage and nepotism are social diseases endemic in all human societies...[2]

Pick a lesser developed country at random and leaf through almost any study tracing that country's post-colonial development and looming large amongst the reasons for its failure to meet its true potential will be a discourse on corruption in and maladministration by the civil service. In the light of the social importance of this problem one might have assumed that the parties to the South African

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[1] The bulk of the research for this article was completed during internships with the American Civil Liberties Union (ACLU) in Los Angeles and the International Centre for the Legal Protection of Human Rights (INTERIGHTS) in London in 1991-2. The writing of this article would not have been possible had I not had access to the library facilities available in those cities I wish to extend my thanks to the ACLU and INTERIGHTS for hosting me during my stay and to the International Human Rights Internship Program in Washington for their sponsorship. I am also grateful to Anselm Ondinkalu of the Civil Liberties Organization of Nigeria for his explanations of some of the intricacies of Nigerian constitutional development and to Alfred Cockrell and Peter Hathorn for their useful comments on the first draft of this article. Responsibility for the arguments and conclusions expressed here is, however, solely my own.

[2] EN Gladden *The Civil Service of the United Kingdom 1855-1970* 184.

constitutional drafting process would have devoted considerable attention to an examination of constitutional mechanisms aimed at attempting to ensure that the future civil service will evolve into a constructive force well adapted to meet the challenges that lie ahead. Unfortunately this has not been the case.[3]

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[3] Recent exposés of further widespread corruption in government have focused public and press attention on the need for remedies. The partially televised public hearings for appointments to the SABC board in May 1993 gave South Africans a taste of an open and accountable system of appointments. The Democratic Party is however the only participant in the Multi-Party Negotiations Process who has to date made any constitutional proposals dealing with the procedure to be adopted in the appointment process. (*Democratic Party Response to the Fifth Report: Constitutional Issues* 9 July 1993.) The DP's submissions are discussed in the conclusion to this paper. The ANC, noting 'the apparently bottomless pit of corruption that characterises the administration of the present government', has stated that: 'We need to build strong institutions, independent of government, to ensure that corruption is rooted out ... for without such structures there can be no true democracy in South Africa.' (B Ngcuka of the ANC Constitutional Committee, *Cape Times* 23 March 1993.) The ANC however has not yet made any proposals aimed at attempting to impose controls over a root cause for the prescence of corrupt and incompetent public servants, namely insufficient checks and balances in the appointment process. Instead it has concentrated on institutions such as the Ombud which, while performing a valuable function, can only attempt to mitigate the severity of the consequences of having allowed too many incompetent or corrupt officials to have been appointed in the first place. The SA Law

This paper seeks to discuss some of the problems which might arise should the future SA Constitution not address the issue. Constitutional checks and balances aimed at reducing the effects of nepotism and corruption in the appointment process are discussed with reference to the experience of the UK and the USA. The problem of the tension arising out of the simultaneous application of affirmative action and merit principles in appointments and promotions is discussed with reference to Nigeria and India. The constitutional function of a Civil Service Commission is described as well as the models which may be adopted. The vexed issue of appointments of persons who violated human rights is referred to. What follows in conclusion are some tentative submissions on preferable constitutional options.

The first brand of mischief that is the concern of this essay is political corruption. In the context of public office the following are usually identified as the main types of corrupt behaviour : bribery (use of a reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit) and misappropriation (illegal appropriation of public resources for private uses). The second brand of mischief that concerns us is maladministration, that is incompetence and inefficiency in the public service. The two problems are obviously inextricably linked as a public service which allows for nepotistic appointments of persons lacking competence, or a public service which tends to only grant export licences in under six months when the wheels are greased, will generally not be characterised by efficiency or competence.

Commission in its examination of the administration of the state makes no proposals and appears to view the present statutory regime (discussed hereunder) as adequate. (*Project 77, Constitutional Models* (1991) 183-5 of the summary.)

CORRUPTION AND MALADMINISTRATION IN THE AFRICAN AND SOUTH AFRICAN CONTEXT

In a leading text Robert Williams states that corruption is popularly viewed as the outstanding characteristic of African public life and that even if the accuracy of this perception is open to question there are many students on African affairs who believe that corruption has a profound and damaging effect on economic performance, administrative effectiveness and governmental authority.[4] Evidence suggests that many African countries display precisely those combinations of institutional and political characteristics and socio-economic conditions most likely to ensure that corruption will flourish.[5] These characteristics and

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[4] R Williams *Political Corruption in Africa* (1987) 1-2.

[5] Williams op cit note 4 at 2. Nepotism is obviously not unique to Africa and there are some who argue that ethnic nepotism - favouritism towards kin - is today the predominant universal social cleavage for the simple reason that we are predisposed to support our kin as throughout history this has been highly advantageous in the struggle for survival (see generally, T Vanhanen *The Politics of Ethnic Nepotism - India as an Example* (1992)). A myriad of factors may influence perceptions of what constitutes an ethnic group and thus provide a basis for ethnic nepotism. Ethnic groups may be both widely and narrowly defined and the ebb and flow of history may determine which level of ethnic group becomes politically relevant (ibid at 13). Thus, for example, in India before independence the cleavage between the British and the Indians was originally the most important social cleavage. In the period immediately prior to independence the Muslim/Hindu cleavage became more important and since independence, in addition to religion,

conditions include the following:

* To generate support nationalist leaders were obliged to assert that when they came into power the material conditions of the indigenous populations would improve substantially. When they came into power they were obviously under pressure to deliver. The most urgent and compelling source of this pressure was the party officials and activists anxious to taste the fruits of public office as recompense for their assistance in securing independence.[6] As they were 'owed' jobs by the party they obviously did not see the need to apply for civil service posts by the ordinary merit system. (This approach is based on the perception that 'the spoils of victory belong to the victor'.)[7]

* To the extent that African officials often find themselves to be part of a wider kinship network which confers reciprocal rights and responsibilities they may find themselves in a delicate position. Where they have managed to obtain the education (which landed them their jobs) because of the support of their extended family or local community then they may be under a powerful social expectation to use the resources of public office to help relatives and friends now in need.[8] Williams in fact says that to many officials this is the only natural and proper thing to do and failure to do so is a violation of basic social

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cleavages based on language, cast and tribe have acquired importance (ibid at 13).

[6] Williams op cit note 4 at 44.

[7] See further the discussion below on the development of UK and USA civil service law.

[8] Williams op cit note 4 at 45.

expectations.[9]

* The boundaries of most African states were drawn by reference to largely arbitrary and artificial criteria. In consequence 'the nation' which the government employee is supposed to be serving may well be, in the absence of any widely shared concepts of citizenship or national interest, a somewhat vague and meaningless abstraction. Viewed as such it is easier for the public servant to perceive of the state's resources as a legitimate target for diversion and redistribution according to a different set of modalities than those described in the official handbook.[10]

* Western theory has it that because bureaucrats enjoy high job security they will be satisfied with less remuneration than may be available in the private sector. African officials do not however enjoy the job security of their Western counterparts. Reasons for this include the periodic purges which may accompany regime changes and the potential for the bankruptcy of the state and/or super-inflation to erode savings and pensions. This shorter time horizon may provide a powerful incentive to exploit the fruits of office while they last.[11]

For the purposes of this article it suffices to say that in a future South Africa some or all of the above-mentioned factors are likely to be present.

A further set of factors which should set the constitutional lawyer's alarm bells ringing is South Africa's particular history. One of the pillars on which the Afrikaner nationalist struggle was fought was the exclusion of

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[9] Ibid.

[10] Ibid at 46.

[11] Ibid at 120.

Afrikaners from the better posts in the civil service. A central organizational pillar in this struggle was the Broederbond - an efficient and highly structured nepotism machine if ever one existed. There is no doubt that the Bond viewed the civil service as one of the spoils of the National Party victory in 1948. In fact the Broederbond proudly claimed the promotion of its members in the civil service and 'semi-civil service' as one of its major successes: ' with the help of our own political leaders, success was achieved in opening the way to the top of these services ... for culture conscious Afrikaners'.[12] Cloete writes that in the late 1940's and the 1950's English speaking civil servants were purged from many departments and over time this process has led to 'virtually, an exclusive white bureaucracy'.[13] Corruption has also been rife - the 'Info scandal'; the perennial resignations of Cabinet-Ministers caught with their fingers in the till; the vast sums of unaudited taxpayers

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[12] Broederbond internal document, *Ons Taak op die Staatkundige Terrein* (Our Task in the Constitutional Field) (1972). Quoted in I Wilkins and H Strydom *The Super Afrikaners* (1980) 18. As an example of the explicit nepotism employed by the Bond, see Circular 6/77/78 of August 1977 : "The attention of friends involved in education in the Transvaal is drawn to the fact that in the new education structure provision is made for the appointment of a head of department for vocational guidance at each school.
It is of the utmost importance that these posts ... are manned by teachers with the right attitudes... Friends are asked to apply for these key positions."(Wilkins & Strydom at 23). It should also be noted that the selection process would almost certainly have been controlled by the Bond.

[13] F Cloete 'The State Policy Machine' in R Lee (ed) *Transition to Democracy, Policy Perspectives* (1991).

moneys handed to various murky organizations and bogus front companies linked to the 'state security' apparatus in the absence of adequate or any controls - all bear testimony to a system tarnished with a history of corruption. The parallel 'black government' structures - the black local authorities, the Bantustan governments, the Houses of Delegates and Representatives - by their very nature have laid a weak foundation for those hoping for a future with a 'clean administration'. The only real reward for participation in these structures was financial gain and it could thus hardly be expected that these institutions would be staffed by people with a strong devotion to public service.[14]

THE RSA CONSTITUTION ACT 110 OF 1983

The present statutory regime creates little in the way of checks and balances in the appointment process. The Constitution vests all powers in relation to the appointment and removal of Ministers, Deputy Ministers and public servants in the State President.[15] The power to appoint or remove public servants may be delegated by the State President and in terms of s 8 of the Public Service Act 111 of 1984 general powers of appointment and promotion are conferred on the relevant Minister or Provincial Administrator

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[14]For a contrary view on the SA public service see JNN Cloete 'The Bureaucracy' in A de Crespigny & R Schrire (eds) *The Government & Politics in SA* (1978). Cloete is of the view that although 'it has been customary for classified posts ... to be filled by Whites' nepotism has been almost non-existent! (at 66). Cloete is also of the view that SA has been fortunate as the cases where the 'evils' of nepotism and victimization have been revealed 'are so rare that they have been condemned on all sides'. (at 74).

[15]Sections 24, 27 and 28.

or their delegate. In appointments or promotions due regard must be given to qualifications, merit and efficiency of the candidate.[16] The Commission for Administration is empowered to make recommendations concerning all matters affecting the employment of public servants.[17] Although public servants may be members of political parties they may not use their position as public servants to promote or prejudice the interests of any political party.[18]

THE UNITED KINGDOM

> 'The real "Second Chamber", the real "constitutional check" in England, is provided, not by the House of Lords or the Monarchy, but by the existence of a permanent civil service, appointed on a system independent of the opinion or desires of any politician and holding office during good behaviour.'[19]

Our interest in Britain is twofold. First, we are concerned with the political developments of the mid to late 19th century as it is these developments that gave rise to the model on which the civil service in English speaking

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[16]Section 10(1)(b) of Act 111 of 1984.

[17]Section 3 of Act 111 of 1984 read with Act 65 of 1984.

[18]Section 19 of Act 111 of 1984.

[19]G Wallas *Human Nature in Politics* (1948) 262. For a contrary view see W Plowden 'Whitehall and the Civil Service' in R Holme & M Elliot (eds) *1688-1988 Time for a New Constitution* (1988). Plowden notes that as the power of British civil servant to act as a constitutional check on improper conduct depends on convention and not law the complacent view that the civil service does or could act as an effective constitutional check is naive (at 183-95).

countries is based. Secondly, those who might be inclined to believe that rampant patronage and nepotism are endemic to Africa, can take heart from the fact that a similar disease once afflicted Britain causing the drafters of the Northcote-Trevelyan Report of 1854 on the Organisation of the Permanent Civil Service to make the revolutionary suggestion that appointments and promotions to the public service should be based on merit and qualifications.[20] The overwhelming method of appointments at that time was patronage, pure and simple. The Report noted that this method had the result that the:

> [T]he civil service did not attract the ablest men, but instead it was sought after by the unambitious, indolent or incapable ... The result was that the Service suffered both in internal efficiency and public estimation.[21]

In the year after the Report a Civil Service Commission was established to give effect to the 'merit system', as it is now known. The system of holding open competitions for posts was also introduced and by these methods the patronage system was gradually undermined or destroyed.[22]

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[20]R Chapman *The Higher Civil Service in Britain* (1970) 23.

[21]Quoted in Chapman op cit note 20 at 26.

[22] Chapman op cit note 20 at 32. The word undermined is probably more accurate as I'm not sure that one can hope to destroy patronage. Certainly there are those who would say that ex-Oxbridge students are more likely to be appointed to top Whitehall posts than graduates of other universities. Even though this is patronage it is of a vastly different form from that which plagues Africa. In the UK the complaint is not that unqualified and incompetent people are being appointed as a

The current legal position is that with certain exceptions no person may be appointed to a permanent position until his or her qualifications have been approved by the Civil Service Commissioners and they have issued a certificate of qualification in his or her favour.[23] The most important 'exempted posts' are those where the holder is appointed by the Crown.[24] The Commissioners, while responsible to Ministers as regards general recruitment policy, are completely independent of Ministers in matters concerning the recruitment of individuals.[25] The general conduct of civil servants is not governed by statute but by 'a general code of conduct' setting out standards of acceptable behaviour.[26]

As almost all British civil service law is contained in conventions it is submitted that our principal interest should be restricted to a narrow survey of the broad sentiments expressed therein. For the more concrete manifestations of

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result of patronage but that out of a set of candidates who are generally speaking *similarly competent* some are more likely to be appointed than others. The former form of patronage has very serious effects on the running of the country. The latter, although unfair between the candidates, obviously has fewer negative societal implications and thus does not need to be as zealously guarded against.

[23]Civil Service Order in Council 1969 Art 2. *Halsbury's Laws of England* 4 ed 804.

[24]Ibid.

[25]First Report of the Civil Service Dept 1969 (HMSO 1970) 21. *Halsbury's* op cit note 23 at 804.

[26] *Halsbury's* op cit note 23 at 807 para 1306.

these sentiments it is to the former colonies that we must now turn.

THE UNITED STATES OF AMERICA

> 'Civil service reform is always popular with the "outs" and never with the "ins", unless with those who have a strong expectation of soon going out.'[27]

Mindful of the needs for checks and balances in the appointment process the framers of the 1787 US Constitution provided in Art II, s 2, cl 2, that the President:

> '... shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, ... and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such Inferior Officers, as they may think proper, in the President alone, ... or in the Heads of Departments.[28]

Article II, s 2, cl 2, the Appointments Clause, however only provided a basis for a checking procedure for ensuring meritorious appointments to top posts (through what is now referred to as 'the confirmation process'). As regards the appointment of inferior officers the politicians of the New World would for the next century or so follow the patronage system favoured by their former colonial masters and in

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[27]Congressman Benjamin Butler 42 Congress 2 session at ix, quoted in A Hoogenboom *Outlawing the Spoils* 267.

[28] This provision also makes reference to judicial appointments. Questions concerning the procedure most suited to judicial appointments fall beyond the scope of this paper.

1865 the 'spoils to the victor' selection system was still viewed as being firmly entrenched.[29] After the assassination of President Garfield by a disappointed office-seeker it was apparent that legislative intervention was needed to undermine the predominance of spoils politics and Congress passed the Civil Service Act of 1883 ('the Pendleton Act') which required some jobs to be filled on the basis of merit and protected federal employees from being removed for political reasons.[30]

As might be expected the politicians immediately set about devising schemes to preserve their powers to bestow patronage and the struggle between those who seek to retain spoils politics and those who seek to extend the merit system continues to this day. Notable milestones in this process include:

* While the 1883 Act only covered a narrow range of jobs, over time, the merit system was extended to cover the overwhelming majority of federal employees who are now hired on the basis of criteria such as test scores, training, education and experience.[31]

* The establishment in 1912 of a Civil Service Commission to formulate rules to shield government employees from arbitrary dismissal. The Commission was replaced in 1979 by the Office of Personnel Management which now bears responsibility for maintaining the merit system.[32]

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[29] Hoogenboom op cit note 27 at 4.

[30] R Weissberg *Understanding American Government* 2 ed (1986) 348.

[31] Ibid.

[32] Ibid.

* The 1939 Hatch Act which bars employees from participating in partisan elections except by voting and the 1978 Civil Service Reform Act which guarantees the rights of employees to be union members and which offers protection against harassment and dismissal to 'whistleblowers' - civil servants willing to come forward to expose agency problems and abuses to Congress and the media.[33]

The most notable and unique contribution of the US system is, it is submitted, the confirmation process. The Appointments Clause was inserted in the Constitution with the intent to deny Congress any authority itself to appoint those to whom substantial executive or administrative authority is given by statute.[34] The framers feared that to grant the power of appointment to Congress would place too much power in the hands of the legislative branch.[35] Accordingly the President would select officers as a check on Congress and Senate would confirm or reject his selections as a check on the President.[36]

Before discussing the confirmation process in greater detail it is noted that confirmation is not required for of the vast majority of appointments. It is only required for

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[33] Ibid at 349, 364.

[34] *Buckley v Valeo* 424 US 1 129 (1976)

[35] Ibid. In either event appointments were (and are) not a legislative function.

[36] 'The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny.' (*Buckley* supra note 34 at 121.)

appointments to 'top jobs'.[37] The balance are exempt and the criteria used to demarcate the division between exempt and non-exempt positions are discussed below.

(a) The confirmation process

> [T]he confirmation process [is] an arrangement which permits a group of elected men and women to tell the President when he is too far offside in his proposed appointments ...[38]

Where confirmation is required practice has established two general procedures for filling public office by action of the President and the Senate. In the case of an office located in one of the states, one or both of the senators from that state will inform the President of one or more appointees who they prefer; when the President has been given a name acceptable to him he will submit a nomination to the Senate and the Senators will by majority vote approve or disapprove of the nomination, ordinarily acceding to the wishes of the Senators of the majority party in the relevant state.[39] With offices that do not fall within this practice of 'Senatorial Courtesy', the President will

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[37]There are over 2.8m federal civil servants. I am advised that the confirmation process applies to somewhere between 500 and 1000 appointments.

[38]Charles Hyneman *Bureaucracy in a Democracy* (1950) 185.

[39]Hyneman op cit note 38 at 179. The hearing will be before the relevant Senate committee concerned with the sphere of governmental activity in which the appointee would perform his functions. The Senate is not obliged to accept the recommendation of the committee which held the hearing.

obtain advice as to potential appointees where he pleases and will then nominate his preference; the Senators will then approve or disapprove by majority vote, their inclination to approve or not being determined by the nature of the office in question and the sympathies or otherwise of the majority to the president.[40]

The object of the system is more one of deterrence rather than a scheme whereby conflictual relations between competing organs of state power are provoked. As the President is aware that Senate approval is required he will usually not risk the embarrassment that would ensue from a rejection. He will thus pass over some hopefuls whom he might otherwise have appointed and it is at this stage that one would expect that an incompetent claimant to the rewards of patronage may be expected to be less optimistic about his or her career prospects than would be the case under a different system. For, as obligated to his faithful client as the President may be, both he and his client may be aware that his appointment would be politically impossible.

If the system has not operated as a deterrent and our hypothetical ambitious incompetent is indeed nominated then the Senators in opposition will make sure that the issue is aired in public and a fight at the top levels of government will then ensue. [41]

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[40]Hyneman op cit note 38 at 180.

[41]There are no doubt some, schooled and content in the less robust methods of behind closed doors appointments, who view the US system as somewhat unseemly and in bad taste. As Hyneman op cit note 38 at 184, however points out: 'A fight at the top levels commands public interest. This is the way the nation gets its political education. A sharp debate over the qualifications of a man for high

The most important objection to the process is that it may cause competent nominees who are supported by the President and the majority of the confirming body to reject nomination as they are unwilling to risk the abuse which they fear may be visited upon them.[42] This is by no means what usually happens, but it does happen from time to time.[43] There is no convincing evidence that fear of undeserved embarrassment or abuse has had a significant effect on the availability of candidates for public office and even if it has this possible negative factor is greatly outweighed by the positive impact of the confirmation procedure.[44]

A further argument in support of the necessity for democratic scrutiny over top appointments is derived from an analysis of the way in which the modern state has evolved. The once popular assumption of the relationship

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office may give the people more understanding of the functions of an administrative department and more appreciation of what government might do for them than they would acquire in a lifetime from less sensational disclosures.' In addition it should be added that the appointment of incompetent figures to positions of power is to my mind far more unseemly and has consequences of longer duration than a political dog fight.

[42]Hyneman op cit note 38 at 186. This situation is most likely when the opposition are spoiling for a fight with the President and the nominee becomes for the time being the prime recipient of the attack.

[43]Ibid.

[44]Ibid. In either event it is submitted that an ability to stomach criticism is a quality that should attach to persons seeking high office.

between elected officials and the bureaucracy was that the elected officials enacted the laws and the bureaucrats merely enforced them. In contemporary government the line between 'making the law' and 'administering the law' has almost disappeared. Many, if not most, laws are written in broad terms that delegate considerable discretionary power to the agencies that administer the laws, transforming in many instances the applicable 'inferior enactments' (be they regulations, rules or administrative circulars) into the very laws which impact most directly upon the lives of the voting public. That being so it is submitted that greater democratic control over the very officials who oversee this law making process is required and a step in the right direction is to require confirmation of their appointments.[45] The submissions previously advanced in favour of confirmation by the Senate would apply equally if appointments had to be approved by the principal legislative body, Congress. In fact

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[45] There are few safeguards in place in South Africa for control over administrative rulemakers. For a comparative analysis see L Baxter *Administrative Law* (1984) 201-15. Under the present system in SA the principal check that does exist is that subordinate legislators are required to submit their legislation to a senior administrative official for approval. As parliament has seen fit to entrust senior officials with important lawmaking functions (which functions the electorate entrusted to parliament itself) it is now necessary to require greater democratic control over the appointment of these powerful subordinate legislators. One tried and tested way of doing this is to make the process by which they are appointed more open and accountable through insisting on confirmation procedures. If the voting public is not being given the right to elect this class of lawmakers then they, at the very least, have the right to scrutinize the reasoning behind parliament's decision to appoint.

to some this would be preferable inasmuch as Congress passes the laws that describe the activities which the administrative bodies are expected to administer and it may thus be expected that Congress should have the right to ensure that the officials who direct the administrative establishment would do so in sympathy with the objectives of the legislature. [46]

(b) Exempt and non-exempt positions

While appointments to the lower ranks in the civil service require the application of standards to ensure that suitable persons are appointed on merit, there are obviously better ways of achieving this object than by requiring review by the legislative body itself as it can be safely assumed that the members of a future South African parliament will not have the time required to give careful consideration to appointments to these posts.

Should the future SA constitution provide for a confirmation process attention will have to be given to the question of which appointments should be exempt from this requirement. In the US the method for determining who is to be classified as an 'inferior officer' and thus exempt from the requirement of Senate confirmation is principally established by reference to the desirability of confirmation and not an established concept or legal definition of 'inferior

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[46]Hyneman op cit note 38 at 184. It would appear that the framers of the Constitution placed confirmation in the hands of the Senate to give the President the benefit of an advisory council and not in the hand of Congress as this would have amounted to a degree of legislative scrutiny out of kilter with the overall design of the Constitution as one of executive rather than legislative supremacy (see Hyneman at 185).

officer'.[47] When Congress in creating new administrative establishments decides where the authority to appoint should be located it is not guided by any consistent theory but by a consideration of applicability of the following three principles[48]:

1 Where is the post's position in the hierarchy? If the statute creating the administrative agency confers the kind of authority which empowers the officials concerned to exert the kind and amount of authority which enables them to direct and control the officials below them, then this is a factor indicating that the officials should fall within the confirmatory class.

2 Does the official have the kind of authority over policy which can substantially influence the character of governmental action?

There are many officials who, while not necessarily having the powers referred to in (1), still wield substantial influence over policy.

3 Would the official occupy a position of sufficient prominence such that if he or she were to make a fool of himself or herself in the eyes of the public it would embarrass the government? Should this be so Congress would not be willing to entrust the screening entirely to administrative officials, even where the appointment is regulated by legislation and supervised by the Office of Personnel Management.

Examples of positions subject to confirmation include the following: the heads of every Cabinet-Level Department ('the Secretary') and their undersecretaries; the top administrators of the independent executive agencies

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[47]Ibid at 188.

[48]Ibid at 188-97.

(examples being the CIA, NASA and the EPA); and the top administrators of the independent regulatory agencies (examples being the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC)).[49]

It is recommended that the future South African Constitution provide for a confirmation procedure to be adopted for senior appointments. The American experience with the system has been highly positive and there appears to be no reason why it should not be compatible with our future system of government. The mechanics of the introduction of a confirmation procedure, including draft provisions, are discussed in the conclusion to this paper.

AFFIRMATIVE ACTION AND THE CIVIL SERVICE - THE APPROACH IN NIGERIA, INDIA AND SRI LANKA

On the one hand there can be no doubt that because apartheid has created serious inequality in the allocation of positions in the civil service affirmative action programmes

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[49]See Weissberg op cit note 30 at 345-6. For the sake of completeness it is noted that there exists a category of posts which are exempt both from confirmation and competitive civil service rules. These top executive posts, which in other countries would usually be filled by senior career civil servants, are explicitly reserved for non-career political appointees who do not enjoy job protection and may be dispensed with by an incoming former opposition party (ie a certain numbers of posts are available where 'jobs for pals' may be handed out with relative impunity.) There appears to be little commendable in the idea of providing for 'zones' where patronage is implicitly sanctioned. For a critique of the political appointments system see : H Heclo *A Government of Strangers : Executive Politics in Washington* (1977).

will be needed to undo existing inequalities.[50] On the other hand there is also no doubt that merit is universally as the principal determinant of equality of opportunity both as regards initial employment and subsequent advancement in the public service. At this stage of the constitutional debate in South Africa no-one doubts that there will be constitutional recognition of the need for a programme to remedy past inequality. The challenge that faces us is how to formulate provisions which blend merit and affirmative action in a socially and legally satisfactory manner. For, as our case studies will demonstrate, the form that such constitutional recognition takes in societies ridden by ethnic conflict can have a significant impact on not only the functional ability of the civil service itself but also on whether competing groups may be willing to continue to view their continued participation in the nation state as being in their interests. Where there is large scale unemployment a position in the civil service is a limited resource and one must accept that the perception will develop in the minds of those who have been passed over that a certain group, (however defined in the popular consciousness), which exert great influence over central or regional state structures, is managing this national resource in an unfair and impartial manner. The question here posed is how best to manage this inevitable problem.

Otherwise stated, and seen from the perspective of the constitutional draftsman, the crucial question is: 'Should the derogation from the merit principle allow for some form

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[50]Of the 3239 top posts (where the income of the incumbent is R75 000 pa or more) in the civil service in SA (excluding TBVC) only 4.5 per cent were held by coloured persons or Indians and only 0.6 per cent by Africans. Only 4.74 per cent of the 6914 managerial posts were occupied by women of any race group. See Inaugural Lecture of Professor GF Lungu *Cape Times* 29 June 1993.

of quota system which explicitly recognises the existence of previously disadvantaged groups (the traditional method) or can a more subtle yet workable approach be taken?'

NIGERIA

> Corruption, indiscipline and needless arrogance not only abound in the Nigerian civil service; it has become an abode for mediocrity, laziness, apathy, avoidable narrow mindedness, nepotism, favouritism and tribalism on a stupendous and incredible scale.[51]

Nigeria has since independence experienced a long history of attempts to convince competing groups of the benefits of commitment to the federal cause. The process has included evolution towards a strong decentralization component which has led to the increase in the number of 'states' from an initial 3 to a current 21 and, of particular interest to our study, the institutionalization of the 'federal character' principle.[52]

The federal character principle was incorporated into the 1979 Constitution with the aim of ensuring that 'there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in ... [the] ... government [of the federation] or in any of its agencies'. Derogation from the principle of equal opportunity in employment in the civil service was provided for by allowing for the imposition of 'disability or restriction or ... [the

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[51] *Sunday Times* (Nigeria), 9 November 1965, quoted in AL Adu *The Civil Service in Commonwealth Africa* (1969).

[52] Daniel C Bach 'Managing a Plural Society: The Boomerang Effects Of Nigerian Federalism' (1989) 27 (2) *J of Commonwealth and Comparative Politics* 220-1.

granting of] any privilege or advantage that, having regard to its nature and to special circumstances pertaining to the persons to whom it applies is reasonably justifiable in a democratic society'.[53] The 1992 Constitution explicitly provides that the composition of the officer corps and other ranks of the armed forces and recruitment to the public service and other federal institutions must reflect the 'federal character' of the Nigerian state.[54]

The principle was (and is still) applied in a context where the populace saw themselves as Hausas, Yorubas, Igbos and so on first and foremost and secondly as Nigerians. The federal character principle owes more to the theory of consociationalism than federalism as it is the former theory which submits that one way of managing the deep divisions in a plural society is to ensure that appointments to the public service should be proportional.[55] 'Federalism' in this context is really a euphemism and ultimately the criterion by which the beneficiaries of positive discrimination, or the victims of negative discrimination, are identified is ethnicity.[56]

Politicians wishing to promote their sectional interests used appointments to government positions as a much favoured way of distributing patronage, often under the pretence of promoting the federal character of Nigeria.[57] Quotas were used as a cover for the partisan or arbitrary allocation of state resources. Posts had to be

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[53]Section 29(2)d.

[54]Section 217.

[55]Bach op cit note 52 at 239.

[56]Ibid at 238.

[57]Ibid at 224-5.

created to ensure proportionality and by 1983 the total number of ministerial portfolios at federal and state level came to more than 350.[58] Between 1981 and 1983 employment in the public sector increased from 2.1 to 3.7m.[59] Bach notes that while an emphasis on merit as the criteria for appointment and promotion will not ensure honesty and efficiency in the public service, the Nigerian experience demonstrates that :

> [T]he statutory allocation of ... national resources along quota lines acts as a boost to the development of corruption and clientelism. These practices are ruinous for the country's economy and carry little spillover effects for the mass of the population.[60]

INDIA

In identifying the beneficiaries of positive discrimination the Nigerian constitution makes no attempt to take into consideration the economic condition or social status of the

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[58]Ibid.

[59]Ibid. By 1981 Nigeria had 515 Permanent Secretaries, ten times as many as Britain.

[60]Op cit note 52 at 226. See also A Gboyega in PP Ekeh and EE Osaghae (eds) *Federal Character and Nigerian Federalism* (1988) '...Pragmatically, the application of the principle is ... creating political tensions as many, if not most, Southern public servants believe its main purpose is to deprive them of jobs for the benefit of Northeners. This belief is also shared by most unemployed people of southern origin. It is also responsible for frustration among some public servants whose career expectations are adversely affected by the need to reflect the federal character. Above all, it does serious damage to the esprit de corps of the service.'

individual beneficiaries. State nationality is the determinant. The Indian Constitution however identifies historically unfavoured socio-cultural categories in the population as the class whose interests are to be promoted. Article 16 provides:

> 16 (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
>
> (2) No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them (sic), be ineligible for, or discriminated against in respect of any employment or office under the State.
>
> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to ... appointment to an office under the Government of, or any local or other authority within, a State..., any requirement as to residence within that State...prior to such ... appointment.
>
> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the state.

Art 16(1) applies both to initial employment and subsequent promotion but Art 16(4) only to the reservation of initial appointments in favour of backward classes.[61] Article 16(4) is an enabling provision conferring a discretionary power on the State to make reservations in favour of backward classes. It confers no constitutional right upon members of the backward classes nor any corresponding duty upon the State to make reservations.[62] A prohibition on reservation in the case of posts requiring a high degree of

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[61] *General Manager v Rangachari* A 1962 SC 36 (42).

[62] *Rajendran v Union of India* A 1968 SC 507 (512-3).

efficiency is therefore not unconstitutional.[63] Backward classes for the purposes of Art 16(4) are (i) a class of citizens who are backward socially and educationally, and (ii) who are not adequately represented in the services of the State.[64] Caste may be a relevant consideration but may not be the sole or dominant test for social backwardness.[65]

The provision was inserted because centuries of oppression reduced these sections of the community to a life of serfdom and in earlier periods it was State policy to keep them out of public employment.[66] They were not viewed as being well placed to gain by the inclusion of equality as a fundamental right in the Constitution due to their inability to compete in a system of open competition.[67] Article 16(4) was thus intended to operate as a transitory measure 'till such time when they could stand on their own legs'.[68] Due to this historic inequality seats are also reserved in the national and state legislatures for the 'scheduled castes'.

Legislating for positive discrimination in favour of the 'backward classes' no doubt represented a sincere attempt to redress past and present discrimination via legislation which, as regards the public service, put the State in a better position properly to target deserving persons than is

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[63]Ibid.

[64]*Trilokinath v State of J & K* A 1967 SC 1283 (1285).

[65]*Chitraleka v State of Mysore* A 1964 SC 1823.

[66]Dr Narayanan Nair *The Civil Servant under the Law and the Constitution* (1973) 50.

[67]Ibid.

[68] Ibid at 51.

the case under the Nigerian Constitution. Potentially noble social engineering schemes backed by force of law must however be assessed by reference to their social impact and in this regard Gunewardene[69] notes as follows:

> The upper-caste Hindus have frequently revolted against reservation of seats and quotas for backward classes. In Gujarat the anti-reservation riots of 1985 sparked off by ... quota increases for backward classes left 200 people dead. In Tami Nandu, caste Hindus claim that the quota system ... actually perpetuates discrimination.... Caste has become a force even at regional level. ... Several politicians have given into claims of caste groups merely for political gain in the upcoming elections. For instance, in June 1989, "a high profile, three month drive to fill 35 000 central government vacancies for scheduled castes and tribes" was launched. ... Likewise in Tamil Nadu, under pressure from the Vanniar group, the existing fifty per cent quota for backward castes was subdivided into twenty per cent for the most backward castes ... and thirty per cent for all other backward castes. It is generally assumed that backward caste representatives will only represent their own caste interests, while high-caste or dominant-caste representatives will be leaders for the entire community.

Menski comments that the Indian 'spray-can system' which aims to give preferential treatment to large groups by using quotas involves:

> [P]romising too much to too many people, raising expectations in the process which, if not fulfilled, are turning dreams of benefits into nightmares of communal riots. Such violent disturbances, now reported almost daily, appear to be motivated by religious and communal fanaticism, but are more often simply over access to scarce resources in the context of reservation policies.[70]

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[69] 'The Caste System: A Violation of Fundamental Human Rights' (1990) 1 (1-2) *Human Rts LJ* 44.

[70] WF Menski 'The Indian Experience and its Lessons for Britain' in BA Hepple (ed) *Discrimination: The Limits of the Law* (1992). Malaysia, modelling its affirmative action

SRI LANKA

Further evidence of the relationship between quotas and the promotion of civil unrest in divided societies is to be found in Sri Lanka. In Sri Lanka provision for affirmative action in favour of the Sinhalese majority was made in the sphere of university admissions and public sector employment.[71] Ethnic quotas were introduced in the absence of multi-ethnic consensus against Tamil wishes and in accordance with the desires of the majority.[72] Samarasinghe views the Tamil movement towards separatism and the ongoing war as being largely a response to the powerful negative political impact of these policies.[73] Samarasinghe describes the most important lesson that may be learnt from the Sri Lankan

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provisions on the Indian Constitution, also used quotas in favour of the majority Malay population at the expense of the minority Chinese and Indian segments. Race riots which led to the suspension of Parliament in 1969 were blamed on Malay discontent that positive discrimination was only benefitting a small group of the ruling elite. Positive discrimination is now regarded as such a volatile issue that it is an offence under the Sedition Act to discuss reform of the relevant provisions of the constitution. On Malaysia see C Thompson 'Legislating Affirmative Action : Employment Equity and Lessons from Developed and Developing Countries' in C Adams (ed) *Affirmative Action in a Democratic South Africa* (1993).

[71]SWR de A Samarasinghe 'Sri Lanka: Affirmative Action and Equity in a Multi-Ethnic Society' (1993) 6 *Development and Democracy* 45.

[72]Ibid at 51.

[73]Ibid.

experience as follows:[74]

* If the purpose of the affirmative action programme is to ameliorate socio-economic inequity then they are best focused on under-privileged social classes rather than ethnic groups. One advantage of so doing is that if properly targeted the programme may avoid the problem that ethnic based policies often end up favouring the more privileged members of that group and not historically disadvantaged individuals. In addition, in a plural society it is easier to develop intergroup consensus for a programme to favour the under-privileged rather than an ethnic group.

* Affirmative action programmes should be strictly temporary measures aimed at remedying the imbalance as swiftly as possible so that affirmative action becomes redundant. A sunset clause which pressurises policy makers to act within a specified period may be useful in this regard.[75]

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[74]Ibid at 52.

[75]See also Randall Kennedy 'Discussion on the American Experience' (1993) 6 *Development and Democracy* 74. Kennedy notes that most people in the USA are in favour of affirmative action as a temporary measure but that conceptions of 'temporary' differ vastly - for some it means two years, others a generation and for others, several generations. In the absence of a sunset clause it may become politically impossible to remove affirmative action as '[p]eople's expectations grow around what is in place'.

COMMENTARY

The experiences of India, Nigeria and Malaysia strongly suggest that legislation which provides *legal justification* for quotas creates scope for the expansion of the politics of ethnic nepotism of the worst kind. In addition it is submitted that any reference in the provision dealing with the public service to the creation of 'programmes' and the like may create unrealistically high expectations and demands for the creation of employment. Our case studies show that failure to meet these expectations may result in civil unrest in volatile societies.

Our study of Sri Lanka also shows how ethnic quotas in favour of the ethnic majority and at the expense of a competing ethnic minority may cause that minority to view secession from the nation state as being in its best interests.

Article 3(b) of the Law Commission's proposals,[76] Arts 13 and 14 of the ANC's Working Draft,[77] Art 23 of the Namibian Constitution and Art 8(2) of the Third Draft Constitution of the RSA[78] would allow for quotas and use of the language there employed in not recommended.

Part of the problem with all of the aforementioned proposals is that they attempt to simultaneously provide for the need for affirmative action in both the private and public sectors. This is to be avoided as in each case the purpose of

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[76] *Interim Report on Group and Human Rights* (1991).

[77] Reproduced in (1991) 7 *SAJHR* 110.

[78] *10th Report of the Technical Committee on Constitutional Issues to the Negotiating Council* August 1993.

legislative intervention differs considerably. The future government of South Africa will be sympathetic to the need to restructure the public service to accommodate those previously discriminated against. As far as the public sector is concerned we do not require legislation which is aimed at forcing a future government to act to the benefit of the majority. Different considerations arise in the case of the private sector and the constitution will require provisions tailor-made to remedy past discrimination in this sector.[79] Constitutional permission for the use of quotas in the *public sector* has its rationale in the need to protect oppressed *minorities* against future discrimination. They are a sledgehammer for use in a hostile environment. In our context a legislative scalpel could be designed to achieve restructuring and in so doing we might be better equipped to avoid the problems which have resulted elsewhere from the use of over-broad legislation. An attempt at a satisfactory draft proposal is contained in the conclusion to this paper.

CIVIL SERVICE COMMISSIONS

The South African equivalent of the body usually referred to as a Civil Service Commission is the Commission for Administration. Civil Service Commissions ('Commissions') are the principal central government organ responsible for the maintenance of the efficiency of the public service. Commissions traditionally exercise considerable powers in relation to the making of appointments to and promotion in the public service. The extent of their powers varies from country to country but a common feature in developing countries (and some developed countries) is for the powers that be to lean on the Commission in an attempt to promote the prospects of the beneficiaries of their patronage. If the

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[79]Discussion of the form of legislative intervention appropriate to the private sector is beyond the scope of this paper.

Commissioners and their powers are not constitutionally protected they are exceedingly vulnerable to improper overtures and Adu recommends that unless a country has reached the point where the politicians appreciate that the administration's task is to be impartial and that selections and promotions are to be on merit the Commission requires constitutional protection.[80]

A further factor that then requires consideration is whether the Commission should be: (a) principally an advisory body within a framework where the power to appoint, promote and discipline is vested in the president or the cabinet and the president then delegates powers to the Commission to act executively in respect of all posts bar those which he deems to be of sufficient importance to warrant his personal attention ('the weaker model')[81]; or (b) a body with complete executive responsibility over appointments, promotion and discipline in respect of all posts except those of sufficient importance to warrant direct appointment by the president or the cabinet (with or without the added check of sanction via confirmation) ('the stronger model').

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[80] Adu op cit note 51 at 143. The Law Commission submits, without reasons, that the present statutory regime, which provides no constitutional protection, should be retained (see SALC *Project 77 - Constitutional Models* (1991) 185). The report here referred to is the summary of the full report which has not yet been published. The possibility exists that the full report may contains a motivation for the view that constitutional protection is unnecessary.

[81] Examples of a constitutionally created Commission whose powers are essentially advisory in nature are to be found in the Ghanian, Tanzanian and Namibian Constitutions.

The stronger model provides the greatest protection against patronage and nepotism as the Commission is not in law subject to the will of the president or cabinet members and would thus 'remove temptation from the paths of Ministers who would otherwise yield to the pressure of party agitation for rewarding political zeal with plums of office in the Civil Service'.[82] Inasmuch as Ministers are required to execute their policies through these very officials it should be accepted that they may wish to have some share in the appointment and promotion process. Under the stronger model they are not prevented from attempting to make their preferences known. Their legal power to interfere is however constitutionally barred. Adu notes that if they perceive themselves as being incapable of exercising their proper responsibilities by operation of the system they become inclined to find means of circumventing the constitution in order to achieve control.[83] This is not however an argument which should lead one to conclude that the weaker model is preferable as the tension which is here referred to arises naturally out of the application of the separation of powers doctrine, the success of which is dependant on the ability of the administrators of the competing organs of state powers to conduct themselves in a manner not calculated to tip the apple cart. Under the stronger model Commissioners will, like the judges on the Constitutional Court, be required to exercise their powers judiciously.

It is submitted that the Commission is constitutionally protected the future constitution and that the strong model be used. A draft of the provisions that could be used to achieve this is contained in the concluding section.

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[82]Adu op cit note 51 at 139.

[83]At 139-40.

APPOINTMENTS: PERPETRATORS OF GROSS VIOLATIONS HUMAN RIGHTS

In all countries where gross violations of human rights were commonplace and a change of regime has occurred the question of the suitability for public office of persons who were responsible for violations of human rights has been a sensitive issue. As regards officials who transgress after the inception of the new bill of rights in South Africa the position is not, in theory, particularly problematic. Public servants, including the police and the army, are under a duty to uphold the Constitution and the principle that persons who commit gross violations of human rights or other offenses that render them unfit to be appointed to public office or to continue in the employment of the state, should not be appointed or should not retain their employment, is not capable of being disputed. The issue which arises is whether this principle requires constitutional articulation. If it is not the government of the day will retain a discretion and our history has taught us that governments should not be trusted to 'do the right thing' when this issue arises. To attempt to ensure that in the future torturers, murderers and persons guilty of offences involving dishonesty should not be entitled to state employment or to retain their employment it is submitted that it would be preferable for suitable wording to be inserted in the Constitution to enable a party with standing to apply for a mandatory order preventing an appointment or to enforce a dismissal in the event of any future government being tempted to repeat the mistakes of the past.

It is however submitted that the Constitution is not the place where a shopping list of the various types of conduct which render persons unfit for public service should be set out. This task should be left to Parliament. The Constitution should nevertheless, in the light of the importance of the principle, state that persons guilty of gross violations of human rights shall not be entitled to enter

or remain in the public service. Draft proposals in this regard are made in this article's conclusion.

If the Constitution refers to persons 'guilty' of gross human rights abuses then this will be interpreted as a reference to persons found guilty in a court of law. In recent years a number of countries have had to deal with questions relating to the employment of persons who were responsible for human rights violations during the period in which the 'old regime' was in power but who were never prosecuted. There has been a tendency to attempt to side step this issue particularly where the transgressors are likely to be found in the ranks of both the old and new regime and the offenders are often people capable of seriously embarrassing political leadership by reason of the information at their disposal. The best way to keep them quiet is to keep them indebted by giving them a position in the new regime. Groupings such as Amnesty International have naturally opposed this practice and if South Africa is to avoid the negative precedent set by such appointments then it would be preferable to deal with the issue in the principal human rights instrument, the Constitution.

Recent events in Namibia have demonstrated that it would be foolhardy to expect an incoming ruling party to naturally steer clear of such appointments merely because of the political embarrassment that will result.[84] As a

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[84]In 1991 the Namibian Government appointed Jesus Hawala as Commander of the Army. Hawala was the subject of repeated allegations of gross human rights violations in SWAPO prison camps. He was appointed notwithstanding extensive opposition, within the ranks of SWAPO itself, from a host of international human rights groupings, European pro-SWAPO solidarity organizations and diplomats. The Government response was that as he had never been convicted of any human rights abuses it could

consequence of dynamics internal to the party, a ruling party may find itself politically incapable of avoiding such appointments. The issue is however not simple as the application of a universal across-the-board standard may give rise to legitimate calls for purges in the existing public service which some may view as detrimental to the process of national reconciliation between all South Africans.

The International Meeting Concerning Impunity for Perpetrators of Gross Human Rights Violations, convened under the auspices of the United Nations, met in 1992 to make recommendations on the attitude that countries in transition should adopt towards persons who committed serious human rights violations during the reign of the previous regime. In its report on the Meeting the International Commission of Jurists noted that history shows that when this category of violators benefits from impunity 'it opens the door to the worst kind of conduct and, thus, to new crimes against humanity and new violations of human rights'.[85] In its Appeal to Nations the Meeting noted:

* That absolute impunity is a denial of justice and a violation of international law; [86]

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not said that he was guilty. Applying the old two wrongs make a right dictum, it was also said that as the services of some 'bad guys' from the old regime had been retained it was only 'fair' to not discriminate against Hawala for this reason.

[85](1992) 49 *ICJ Review*.

[86] It is noted that the first inter-governmental body to address this issue, the Inter-American Commission on Human Rights, recently found that Uruguay's 1986 amnesty law violated basic principles of the American Convention on Human Rights and the American Declaration on the Rights of Man (Report No

* That the pre-eminence of human rights is a necessary base for a programme of national reconciliation;

* To the extent that national solutions involve restrictions on legal punishment to facilitate a transition to democracy decisions on appropriate restrictions should not be taken by the authors of the violations or their accomplices.

In South Africa, to facilitate the transition, impunity from prosecution has already been granted to a considerable number of perpetrators of gross violations of human rights. It however does not flow that the additional reward of state employment or retention of employment is a necessary corollary of such indemnity. National reconciliation does not demand this, for as the Meeting points out, reconciliation should be a process where the pre-eminence of human rights is advocated. The ground principle is simple: any person who committed gross human rights abuses is unfit to hold a position of authority as they have demonstrated by their past conduct that they abused the authority previously vested in them.

It is accordingly submitted that there should the constitutionally imposed bar on employment discussed above should also act against persons responsible for perpetrating gross violations of human rights prior to the inception of the constitution. In addition provision should be made for the creation of an independent tribunal for determining the cases of individuals whose suitability for employment or continued employment is in question. Wording to this effect is contained in the draft proposals which follow.

29/32). The case is discussed in *ICJ Review* at 73.

CONCLUSIONS AND RECOMMENDATIONS

Corruption and nepotism in the public service are endemic to all societies. South Africa's particular history of corruption and nepotism under the apartheid system of government and the experience of extreme forms of nepotism and corruption in many countries with comparable socio-economic forces at play during a phase in their development akin to that which we are about to enter highlight the necessity for an array of combative constitutional mechanisms. Drafting a constitution at the end of the 20th century puts us in the fortunate position where we are able to draw on the positive and negative experiences of our predecessors and create an amalgam of the mechanisms most likely to serve our needs.

Unlike the more established areas of constitutional law, such as that concerning the procedures necessary to ensure a fair trial, there exists no comprehensive studies drawing together the various threads that arise out of an analysis of comparative jurisprudence. My limited research leads me to conclude that the subject matter here discussed would be better dealt with by a doctoral thesis than by a short article. In the circumstances the draft provisions set out hereunder are tentative and are made in the hope of prompting further debate. The motivation for the bulk of the provisions is apparent from what has been stated above. Where necessary, I have inserted additional comments or clarifications by way of footnote.

Article A Presidential Powers of Appointment

(1) The President shall appoint all Cabinet Ministers, their Deputies, Ambassadors, Administrator-Generals and such further senior public servants (including senior officers in the police, the defence force and the prison service) as may be authorized by Act of

Parliament.[87]

(2) All appointments by the President pursuant to the provisions of sub-Article (1) hereof shall be made on the advice and with the consent of Parliament.[88]

(3) Parliament shall create special procedures for the exercise of its powers in terms of sub-Article (2) hereof which procedures shall include the holding of public hearings.[89]

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[87]It is not possible to create a list of every senior appointment which should require confirmation. The position would also change over time. The obvious positions are thus listed and it is then left to Parliament to determine which other positions should be subject to confirmation. I have included Cabinet Ministers. This is what occurs in the USA. I am aware that under the British tradition which we have inherited the practice would be to have no control over Cabinet appointments, the theoretical sanction for bad choices being via the ballot box. I am not convinced that checks and balances on the presidential power to appoint cabinet members are not warranted. If the President controls the majority he will not be unduly fettered. He may however be embarrassed should he attempt to appoint persons whose track record lays them open to attack or ridicule.

[88] The USA model refers to Senate as does the DP's proposal. In theory, the persons here listed perform the function of implementing Parliament's policies, which is why I have referred to Parliament and not Senate. It may however be expedient, or a function of a necessary division of labour, to confer the power on the Senate.

[89]The DP proposal is: 'The Senate shall have special powers to approve treaties and to approve senior appointments to public service (including the defence force and the police)

The Public Service Commission

Article B Establishment

(1) There shall be established a Public Service Commission which shall have the powers set out in Article C hereof.

(2) The Public Service Commission shall be independent and shall act impartially.

(3) The Public Service Commission shall consist of a Chairperson and x further members who shall be appointed by the President in accordance with the procedures set out in Article A hereof.

(4) Every member of the Public Service Commission shall be entitled to serve for a period of y years unless lawfully removed from office on grounds of mental incapacity or for gross misconduct, and in accordance with procedures to be prescribed by Act of Parliament. Every member of the Public Service Commission shall be eligible for reappointment.

Article C Powers and Functions

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and the diplomatic corps, recommended by a Senior Appointments Commission of the State'(para 2.4.3.2(b)). The ANC appears to support public hearings. Penuell Maduna of the ANC has stated that the reason their proposals make no reference thereto is 'because the issue is so new in this country. But we are looking into it now' (*Weekly Mail* 21-27 May 1993 13). In support of the procedure he states: 'Why should the public be treated like little mushrooms, kept in the dark and fed manure? [Through public hearings] we can inject transparency into the system, and do away with the mediocrity and corruption that has characterised 50 years of National Party rule' (ibid).

(1) The Public Service Commission shall appoint all members of the public service whose appointments are not herein otherwise provided for.[90]

(2) The Commission shall have such further powers and perform such further functions as may be assigned to it by Act of Parliament.

(3) The Commission may, subject to such conditions as may be prescribed by Act of Parliament, delegate any power or function entrusted to it by this Constitution.

Article D Equality of Opportunity

(1) There shall be equality of opportunity for all citizens in matters relating to appointments or conditions of employment in the public service.[91]

(2) All appointments to and promotions in the public

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[90]The model is thus one where the President makes the most important appointments - subject to confirmation - and the balance are appointed by the Commission or its delegate. It is noted that the power to delegate is that of the Commission and not Parliament - were this not so Parliament could easily, as occurs in the USA, 'blanket out' certain posts to remove control over certain appointments from the Commission and transfer it to Cabinet-Ministers. One could then end up with scattered patronage zones.

[91] The term 'public service' will require suitable definition and this definition will depend, in part, on the structure of Government agreed to in the Constitution. A further issue would be whether the definition should include a reference to local authorities.

service shall be on merit.[92]

(3) In determining whether an appointment or promotion is on merit regard may be had to the fact that persons within South Africa have been disadvantaged in their prospects of employment within the public service by past discriminatory practices and there accordingly exists the need to achieve a balanced structuring of the public service, the police force, the defence force and the prison service.[93]

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[92] Compare Art 33(2) of the Basic Law of the Federal Republic of Germany which sets out the concept of merit in greater detail: 'Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.'

[93] The wording here employed is based on the following considerations:

1 'That it is wrong in principle to discriminate in appointments and promotions in the civil service against citizens on grounds of race ... and, therefore, as soon as the imbalance in racial composition in the service is remedied, the policy should be one of merit being the only consideration' (Adu op cit note 51 at 118).

2 An appointment may be on merit where the applicant is able to demonstrate that he or she possesses the aptitude to perform adequately if appointed, but, due to past discrimination does not possess the qualifications of certain other applicants who were not previously disadvantaged. Some universities in South Africa already apply this process of selection and the wording here used is premised on the belief that it would empower the Commission to employ rational criteria aimed at positive discrimination to remedy the imbalance in the public service. Once the imbalance is redressed merit becomes the sole criteria. Until such time the Commission may well decide to set informal certain targets as a modus operandi.

(4) Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to appointments to any regional or local government office, a requirement as to residence within that region or locality.

Article E Abuse of Office

(1) During their tenure of office no public official shall use their position to directly or indirectly enrich themselves or to directly or indirectly benefit any person in a manner which is not fit and proper in the circumstances.[94]

(2) Abuse of office in the manner contemplated by sub-Article (1) hereof shall be an offence warranting dismissal.

(3) No person guilty of gross violations of human rights

However, if it is challenged to justify an appointment, it cannot rely on these targets for legal justification, and will have to demonstrate that the appointment was in accordance with the modified merit criteria authorized by the constitution.

3 It is undesirable and unnecessary to refer to race. In addition other forms of discrimination will also need to be taken into account, such as discrimination against women.

[94]The term 'public official' will require suitable definition. The wording here is an adaptation of Art 42(1) of the Namibian Constitution which refers only to Cabinet Ministers. Special provisions may well be required to regulate their conduct and that of MPs, particular as regards disclosure of Directorships, holdings in companies and other financial interests which may create a conflict of interests.

shall be employed, or shall retain their employment, as a public official.[96]

(4) For purposes of sub-Article (3) hereof the term 'gross violations of human rights' shall include, but shall not be limited to, acts of torture or any other act where the conduct complained of involved cruel, inhuman or degrading treatment of any person.

(5) In the event of the Government failing to dismiss any public official guilty of the conduct referred to in sub-Article (1) and (3) hereof the Ombudsman or any person shall be entitled to approach a competent Court to enforce the provisions of sub-Articles (2) and (3) hereof.

(6) A public official shall be under a duty to expose conduct in breach of sub-Articles (1) and (3) hereof and no public official shall be dismissed or in any way prejudiced in their conditions of employment as a consequence of their having made public conduct in breach of sub-Articles (1) and (3) hereof.

(7) Sub-Article (3) hereof shall apply in respect of offences committed prior to the coming into force of this Constitution.

(8) For purposes of sub-Article (7) hereof, the fact that a person has not been convicted of the alleged offence, whether by reason of indemnity, the extra-territorial nature of the alleged offence or for any other reason whatsoever, shall not in itself be conclusive of the fact that the person is not a person contemplated by sub-Article (3) hereof, and Parliament shall make laws for the creation of an Independent Tribunal for purposes of establishing

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[95] Reference to the international law of human rights or a phrase such as 'breaches of the fundamental rights herein contained' would be too wide as a number of minor transgressions could be construed as falling within the ambit of these terms.

whether the person is a person contemplated by sub-Article (3) hereof.