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CONSTITUTIONAL COURT FOR SOUTH AFRICA

by

N R L Haysom

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A CONSTITUTIONAL COURT FOR SOUTH AFRICA

by

N R L HAYSOM

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This paper was presented to the 'Judges Conference', Valley Lodge, Magaliesberg, 26 July 1991. It does not purport to make a new contribution to the debate on the nature of a constitutional court. Its modest purpose is to summarise the debate as it is taking place within political and academic circles. The reproduction of this paper is in response to requests for copies of it at and after the Conference. The paper relies on articles by Professors Johan van der Westhuizen and Kader Asmal, as well as discussions at the above conference. Comments, criticisms and suggestions will be welcome.

A CONSTITUTIONAL COURT FOR SOUTH AFRICA

INTRODUCTION

The inquiry into to whether a constitutional court would be appropriate for South Africa is not new. The inquiry has however, become more public, more urgent and less hypothetical over the past year. Within the last year the President's Council Committee for Constitutional Affairs has endorsed the establishment of a constitutional court as a conflict-resolving mechanism in a future South Africa.[1]

The Constitutional Committee of the African National Congress has concretely advanced a constitutional court in both its draft proposals on a

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[1] Constitutional Systems PC 1/1990 (1990) Government Printer.

structure for a new South Africa[2] and in its draft bill of rights.[3] More recently, this Committee and the Centre for Applied Legal Studies hosted an international conference to explore both the concept and modalities of a constitutional court, in the company of jurists from both commonwealth and constitutional court jurisdictions, attended by the broadest range of South African legal institutions.[4] In academic circles Professors Dugard,[5] van der Westhuizen,[6] Honoré[7] and Trackman,[8] from South Africa, Oxford and Canada,

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2 Constitutional Principles and Structures for a Democratic South Africa African National Congress Constitutional Committee (1991).

3 A Bill of Rights for a New South Africa ANC Constitutional Committee (1990) Art 16.

4 Conference on "A Constitutional Court for South Africa" Magaliesberg 1-3 February 1991, ANC Constitutional Committee and Centre for Applied Legal Studies, University of the Witwatersrand.

5 See CJR Dugard Judicial Power and a Constitutional Court CALS (1990).

6 J van der Westhuizen The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas with reference to the German Experience Paper presented at the Conference on "A Constitutional Court for South Africa" Magaliesberg 1-3 February 1991.

7 A Honoré Address to the University of Cape Town Graduation Ceremony printed in UCT News Vol 17 No 2 October 1990 at 5-6.

8 L Trackman A Constitutional Court for South Africa Unpublished (1990).

respectively have publicly proposed a constitutional court for the new South Africa. Strangely no response to this debate has been forthcoming from the organised legal profession, nor - but perhaps understandably - from the judiciary. This paper amounts to little more than a Cook's Tour, an introduction to the debate so far. Let me begin immediately by identifying the four propositions upon which the case for a constitutional court in a new South Africa largely rests. These are :

1.1 The political arrangements in a new South Africa will incorporate inter alia a justiciable bill of rights and accordingly both the new constitution and the bill of rights will require a body or an agency to protect and enforce them even as against parliament.

1.2 The existing courts lack the necessary legitimacy and/or representative quality to play this central, political/constitutional role, and, further, that the method of appointment of judges and the existing structure of the profession suggest that this state of affairs will continue for years to come.

1.3 Existing judges and the pool of counsel from which judges are drawn are neither

equipped nor capable of discharging the function of a constitutional court.

1.4 The court which is to exercise the function of a guardian of the constitution should be one which breaks with the past and can accordingly be regarded as an institution that is symbolic of the new order.

CONSTITUTIONALISM

The inquiry into the virtues of a constitutional court always takes place within the context of the political philosophy of 'constitutionalism'. It does not take place solely as a textual analysis of the quality of the judgments of various courts as argued before some mythical appeal court in the sky. Constitutionalism, the belief that political power must be exercised subject to the constitution, and be subject to review by a body discrete from parliament, is a relatively new innovation in the Republican tradition.[9] Constitutionalism distorts the traditional notion of the separation of powers, wherein the legislature enacts laws on the basis of an

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[9] See K Asmal Constitutional Courts - A Comparative Survey Paper presented at the Conference on "A Constitutional Court for South Africa" Magaliesberg 1-3 February 1991 at 2.

electoral mandate, the executive enforces the laws and the judiciary simply applies the laws. Under constitutionalism, it is the constitution not the legislature which is supreme. The most vehement opposition to the constitutional court, particularly in Europe, derives precisely from the tension between majoritarian democracy and constitutionalism. Thus in both the United States and in Germany criticism has been directed at the highest court in that it is -

> "a supreme legislator, a third chamber of parliament, a shadow cabinet and an extra-parliamentary opposition".[10]

Rule by the people, it is alleged is subverted by the rule of a dozen or so wise men. These wise men - to quote two German critics:-

> "always have the last word. What the court decides even with a narrow five:three majority, no person can change. It can declare elections invalid ... it can ban political parties ... Karlsruhe judgments bind the federal government ... as well as the courts and the organs of all

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[10] Van der Westhuizen op cit note 6 at 10.

states. They reach out into the last office into the last house".[11]

In the United Kingdom and in Scandinavia the traditional belief in parliamentary sovereignty in combination with a sceptical or even hostile view of a conservative and rights- illiterate judiciary continues to prevent the adoption of a bill of rights (although this has also be attributed to the absence of a rights culture in these countries, or the belief in the UK that the fairminded British don't need bills of rights, or that they regard themselves as 'subjects' and not as 'citizens'). In short the constitutional court, it has been argued from the right and left respectively, 'politicises justice' or 'judicialises politics'. It is an unelected third chamber of parliament acting as a negative legislator.

In response constitutionalists argue that one vital element of democracy is the constitutional protection of the rights of political minorities, that the groundrules of society are paramount and must be put beyond temporal electoral majorities, that the fundamental values of the society need to be enshrined, guaranteed and promoted both in the written constitution and in civic culture.

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[11] R Lampbrecht and W Mallanowski Richter Machen Politik (1979) at 11-12 as translated by Van der Westhuizen and cited in his article op cit at 31.

More recently a growing appreciation of the need to protect and nurture the institutions of civil society and a critical assessment of the statism which has dominated political practices and theory in the recent past have served to strengthen the constitutionalist impulse. As Mauro Cappelletti succinctly summarises the motivation for the constitutionalisation of human rights - 'the ideal of our time'.

> "The main challenge has been ... the difficulty in recognizing the legitimacy of judges, often unaccountable to the people, to control and invalidate the enactments of the elected representatives of the majority of people. Yet, apart from the fact that this objection presupposes a perfect system of representation, which much too often is not the case, the philosophy of human rights and modern constitutionalism mandates exactly this: that judicial review is intended first and foremost to ensure the fairness of the political process, hence its representativeness, and to do so even against manipulations by current majorities or ruling minorities; also, that certain basic rights and freedoms -- such as the right to life, to dignity, to association, to a fair trial -- must be protected

even against majoritarian will."[12]

Of course all these remarks apply to the principle of judicial review and not only to its most centralised form which is the constitutional court. However it is this tension which must provide the context for a debate on the court, including the modalities and arrangements necessary for the institution. The constitutional court is indeed the 'laat lammetjie' of constitutionalism. Although its first manifestation is in the case of Marbury v Madison[13] in 1803 in which Marshall C J declared that the constitution prevailed over other legislative enactments, this was to have little impact internationally until the next century. Like movie comedies, it was to be an American speciality until after the Second World War.[14] But in the last 20 years constitutional courts have become an increasingly dominant form of the expression of the constitutionalist impulse. Even the United States Supreme Court is now perceived

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[12] Mauro Cappelletti The Future of Legal Education - A Comparative Perspective Paper presented at the Conference on "The Future of Legal Education in South Africa" Pretoria October 1991.

[13] Marbury v Madison 5 US (1) (Cranch) 137 (1803).

[14] Louis Favoreu 'Constitutional Review in Europe' in Louis Henkin and Albert J Rosenthal (eds) Constitutionalism and Rights. The influence of the United States Constitution abroad (1990) at 40.

predominantly as a constitutional court and in India there are indications that their highly regarded Supreme Court may establish a constitutional division.[15] Constitutionalism is now recognised, says Tony Honoré, as the 'most radical shift in the ideology of public life'.[16]

While it may be difficult to prefigure the exact constitutional arrangement which will operate in a new South Africa, there seems to be substantial consensus that a new South Africa will adopt a constitution enshrining a bill of rights which in turn will guarantee equality, non-discrimination, a multi-party democracy and judicial review. The African National Congress which has been the principal flag-bearer for majoritarian democracy has itself produced developed proposals in this regard.[17] What are the implications of these proposals for the courts?

In brief, the courts which are entrusted with the power of judicial review and enforcing a justiciable bill of rights is likely to have some or all of the following powers: (I confine, for the purposes of this paper, its

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15 The Hon Mr Justice Bhagwathi C J The Role of the Courts in Protecting Human Rights in other Countries Speech delivered at the Conference on "A Constitutional Court for South Africa" Magaliesberg 1-3 February 1991.

16 A Honoré op cit note 7 at 5.

17 Constitutional Principles See note 2 at 15-16.

power to constitutional law issues, and exclude general public law jurisdiction).

1. The power to perform anterior and abstract review of legislation, that is to scrutinise bills and draft legislation so as to verify that it conforms with the constitution.

2. The power of a posteriori review, that is the right to set aside existing common law and statute duly passed by the legislature.

3. The power to reverse or invalidate the actions, decisions and programs of government officials and agencies, and, possibly, the exercise of private powers. Some of these issues will be the focus of intense societal conflict - abortion, affirmative action sunset clause, States of Emergency, the legality of political parties.

4. The duty or right to prevent the state from abandoning programs or legislative frameworks for the implementation of socio-economic rights, referred to as the principle of 'prohibition of retrocession' (ie the State cannot dissolve frameworks for legal aid, national health care).

5. The power to resolve conflicts between competing fundamental rights such as the right to gender equality vs the right of cultural or

religious freedom. Thus the court will prioritise or rank fundamental rights.

6. The right or duty to compel the state, not only to take executive action but to establish a legislative framework to protect or assert rights, as the Portuguese Supreme Court has forced the Portuguese parliament to do in order, for example, to regulate the use of computer technology which infringed upon the privacy of individuals.

7. The power to regulate foreign policy issues related to the constitution, as the German court has done.

These are indeed formidable responsibilities which are imposed upon the institution which has to perform these tasks. The courts will undoubtedly occupy a central place on the political stage. This is all the more the case in a situation where the new constitution is a negotiated constitution in which the constitution represents not only the ideals of the new society, and also a social compact securing guarantees for all groups and individuals. The court, which will be the guardian of this constitution, will have to enjoy the trust, even if not the approval, of the participants in the legal system. In constructing such an institution to fulfil this pivotal role in the political arrangements we should single out the virtues we would expect of this institution.

Such an institution, in order to discharge its duties and meet its expectations should be 'accountable' in the special sense that Edwin Cameron gives to this notion.[18] Cameron suggests that the courts should be sensitive to the ideals of the majority as expressed in the elected legislature, but without civility to it or subjugation of the principles of law. They should be sensitive to the needs of 'public development and social rights without sacrificing private entitlement'. They should be receptive to public mores and public opinions without abandoning the individual who may be aberrant from both. They should express themselves clearly on matters of principle and be willing to contain executive abuses.

They should also be able to develop a reasoned human rights jurisprudence, mindful of and in line with international human rights instruments. It is in this overall context that the constitutional court has been advanced as an institution capable of fulfilling this central role. Existing courts should not be automatically disqualified from performing this function. However it is in regard to their perceived inadequacies that, for example Professor Honoré, has argued that a constitutional court would be preferable. This brings us to the second and third propositions.

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[18] Edwin Cameron 'Judicial Accountability in South Africa' (1990) 6 SAJHR 251 at 265.

There is no need to belabour the point that our judiciary is overwhelmingly composed of elderly white males. What does needs to be stressed, however, is that this position is likely to remain for decades. It is not only the judiciary that can be characterised in this fashion. The legal profession as a whole is open to this criticism. In view of the method of judicial appointment and the fact that recruits are drawn from a relatively small group of experienced practitioners, it will take years before blacks, who are in any event denied access to a significant range of challenging civil litigation, will percolate through to the limited pool of senior counsel from whom judges are selected. In one sense, a representative bench is important for the trust, the credibility it inspires. (It is important for ordinary people to claim the court as their 'own' court.) Furthermore, the presence of persons of different gender, race or colour on the bench, is important for jurisprudential reasons, for the perceptions and understanding they bring to bear on the subject matter of litigation. For example, a Canadian judge, describes how the presence of women on a formerly all-male bench, challenges male perceptions on a range of issues.[19] While a program of radical affirmative action would be welcome, this should not be confused with appointing candidates who have a real and authentic contribution to make to a constitutional court especially

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[19] L Arbor, Address to the Conference of the Society of Advocates, Durban, July 1991.

because of the different requirements expected of members of such a court. One of these requirements would be an understanding of the life experience and vision of ordinary South Africans.

There is a second sense in which the present judiciary may be perceived to be unrepresentative. If, as Pius Langa has suggested,[20] the lack of legitimacy of the Supreme Court is occasioned not so much by the colour of the incumbents, but by the undemocratic constitution in terms of which they are appointed and because of the laws they enforce, then it is also appropriate to mention that many South Africans believe that the judiciary is not politically representative, (or are politically unrepresentative). Its members are not in touch with the realities under which their fellow South Africans live. The special constitutional place of the court requires that the incumbents should not be seen as the residue or the legacy of the ancien regime. Their judgments should not bring the institution into disrespect when its unpopular decisions are seen as a reflex of old racist instincts rather than a reasoned defence of the values enshrined in the constitution of the new South Africa. To be sure, upholding those values will not always be popular - such as tempering the retributive urge for punishment, upholding the rights of aliens,

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[20] P Langa Mechanisms for the Appointment of Judges Paper presented at the Conference on "A Constitutional Court for South Africa" Magaliesburg, 1-3 February 1991.

criminals, or preventing discrimination against women, homosexuals, members of unpopular sects or political parties.

The third proposition questions whether the very training, experience and qualities which go to make up a Supreme Court judge are necessarily the qualities that one would look for in a constitutional court member. Let us disregard the record of the judiciary in matters of civil liberties (while recognising the exceptional and exemplary humanists amongst them). Let us disregard the dominance of the positivist tradition in South African jurisprudence. Let us for the moment disregard a judicial tradition of executive-mindedness. Many constitutional lawyers make the point that many (certainly not all of our judges) would be out of place in a court of constitutional review. The fact of the matter is that the task of performing the function of a constitutional court requires a very different approach from that of conventional adjudication. It requires much more than a close reading of the text. Human rights clauses, for example, are expressed differently. They are expressed in broad, idealistic, programmatic forms. For example, exceptions or qualifications to a fundamental right may be constitutionally permitted only where they are "consistent with an open and democratic society". Adjudicating on the validity of such a limitation requires a working knowledge of international human rights jurisprudence. Creative interpretation requires an understanding of the spirit of the

constitution, maybe the political viewpoints prevalent in society, and perhaps a sensitivity to the conditions under which people live. This is not to suggest that some of our judges could not perform such a function now, or that others could not rise to the challenge. The issue is whether members of the court which is required to perform this function should be recruited in the limiting way that existing appointments to the Supreme Court are. Appropriate or suitable persons may be found outside not only the ranks of senior counsel or the bench, but indeed outside the ranks of legal practitioners.

The final argument in favour of a constitutional court for South Africa proposes that the institution which is given the responsibility of acting as a last word on all actions, laws and deeds of public and private bodies, should be one which represents a clean break with the past. It is no accident that in Portugal, Spain, Germany and Italy the impetus for a constitutional court arose from the need to distance the new political order from the old fascist one. This important institution needs to symbolise the new. There is a need for political and constitutional institutions to be legitimate and hence build confidence and stability, to be a factor of unity and not of division in a new South Africa. The guardians of the new constitution, which is society's expression of its highest aspirations, should reflect the new consensus. Furthermore, in Germany, Italy, Spain and Portugal it was emphasised that there should be no suspicion of a

link between the role the judges had played under despotic dictatorships and the role they were required to play in the new constitutional court. In regard to non-constitutional matters this factor is not as important. Indeed the argument may run the other way, emphasising the need for certainty and continuity in rules regulating contract etc.

In summary, South Africa will need a strong court. A strong court that must be willing and capable to make unpopular decisions. It cannot do so if it lacks the confidence which comes from its failure to enjoy the trust and support of the citizens. Dumbutshena C J was able to hand down decisions on questions regarding fundamental rights of citizens, which were unpopular with the ruling party, and with many others.[21] He was, I suspect, able to withstand the storm precisely because he could not be accused of being a lackey of the old regime. Today the principles formulated in those decisions are now cherished and lauded by Zimbabweans. The legitimacy of the court is all the more pertinent when the court is asked to adjudicate on socio-economic programs. Thus the constitutional court addresses the inadequacies of the existing legal system by allowing for more appropriate appointments, a more representative bench, a bench better equipped to foster and develop a human rights culture.

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[21] See, for example, Minister of Home Affairs v Austin 1986 (4) SA 281 (ZS).

This survey would be incomplete were I not to mention that many proponents of a constitutional court for a future South Africa argue that the court is itself a high point in constitutionalism. They argue that the inquiry into the appropriateness of a constitutional court does not do 'justice' to this institution if it is simply regarded as an expedient remedy to the shortfalls in the existing legal system. The court is much more than a shortcut to affirmative action. The experience in countries like Portugal, Spain, Italy and Germany is that the court has played an important, even crucial political function in those countries than the judgments that they have handed down. In Germany for example, the court enjoys higher legitimacy than parliament itself, as recent polls have indicated.[22] Vital Moreira, a former judge on the constitutional court of Portugal affirms that a constitutional court in that country has played the role of a national symbol of justice and is more highly regarded than the ordinary courts.[23] The court has built confidence in the constitution itself. It has done more, says Louis Favoreu, to build a rights culture in those continental countries than any political or educational

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22 Van der Westhuizen op cit note 6 at 12. In 1983 the FCC was rated at 74% 'trustworthy' in comparison with 48% for the churches, 12% for newspapers and 61% for parliament.

23 V Moreira The Operation of the Constitutional Court in Portugal Paper presented at the Conference on "A Constitutional Court for South Africa" Magaliesburg, 1-3 February 1991.

institution.[24]

CRITIQUE OF THE CONSTITUTIONAL COURT STRUCTURE

Many of the criticisms of the court are concerned with defending the existing court structure and ensuring its continuation in a future South Africa. It is argued that it is possible to promote a program of affirmative action leading to an increased percentage of women or black members of the bench. It is argued that it would be more preferable for reasons of stability and continuity to persist with institutions which people know and recognise, rather than to import an institution which is foreign to our legal culture. It is argued that the ordinary judiciary and its approach to adjudication would alter substantially under a new constitution.[25] I do not dismiss these criticisms but it is more important to deal at this point with the substantial criticisms directed at the court structure itself rather than atavistic defences of the existing order which manifest, it seems, a resistance to change.

There are two principle criticisms directed at the

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[24] Favoreu op cit note 14 at 58.

[25] E Mureinik Concerns About a Constitutional Court Paper presented at the Conference on "A Constitutional Court for South Africa" Magaliesberg, 1-3 February 1991.

court. The first relates to the political appointment of members of the court. This concern raises the fear that a constitutional court is a mechanism which dodges judicial review through the fixing of the court and the appointment of 'Yes Men' to rubber stamp government actions. Such a system is not constitutional review at all. The second criticism relates to the segregation of constitutional law from the rest of the substantive law or what Vital Moreira called 'court apartheid'. Both these issues are important. They are best handled in a review of modalities of the operation of, and appointment to, the court.

CENTRALISED OR DECENTRALISED CONSTITUTIONAL REVIEW?

The most powerful criticism against the court is the critique of centralised judicial review. Centralised judicial review, known also as the 'Austrian Model', proposes a single court of judicial review to which all questions relating to the constitutionality of a law or of conduct is referred.[26] Decentralised judicial review,

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[26] Centralised judicial review is known as the 'Austrian model' as Austria was the first country to establish a constitutional court. It was established by the Austrian constitution of 1920 but the example was not followed in other European countries until after the Second World War.

otherwise known as the 'American System', confers upon all courts the right to entertain challenges to the constitutionality of a law. The problems such jurisprudential apartheid pose operates at two levels. In regard to the substantive law, it is argued that it is difficult to separate out constitutional law issues from other issues. And in any event the court which is seized of any matter at the time at which the constitutional issue is raised, would have to make a determination as to whether the issue is in fact a constitutional issue in order to have the case stood down pending the referral and determination of the constitutional law point. To do so requires non-constitutional courts to consider constitutional issues. Furthermore, it is argued, it is retrogressive to separate out constitutional/human rights issues from other substantive law issues. Such a system would deprive the substantive law of the beneficial effect of being linked to a rights jurisprudence.[27] As Mureinik points out:

> "Hire purchase agreements raise very important questions of justice, the resolution of which, the values in a good bill of rights could do much to assist. A bill of rights may well have a bearing on the court's approach to the interpretation of such an agreement and even to its validity. A bill of rights may indicate the relative weight to

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[27] Mureinik op cit note 25 at 8.

> assign to proprietary title ... countervailing claims of equity might also influence the general approach.
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> The conception of procedural justice to which the bill of rights subscribes might have a bearing on the proper judicial approach to repossession. And even if the bill of rights has no concrete bearing on the question for decision, the kind of justification thinking that it encourages may inspire the court to ask whether the contract before it and the claim arising from it are justifiable or unconscionable.
>
> Questions like that would be valuable in many corners of the law remote, on the face of it, from orthodox, constitutional adjudication."

The second level of criticism of centralised judicial review relates to judicial apartheid. Etienne Mureinik argues that there is much to be gained by requiring all courts to enforce human and constitutional rights. This has an educative effect on the litigants who appear before it as well as the officers who adjudicate upon the issues. The failure to allow decentralised adjudication on constitutional issues may also promote two irreconcilable and conflicting jurisprudential traditions. It may also promote the marginalisation of constitutional law as simply a specialist field of interest

to a limited number of practitioners and students. Louis Favoreu frankly acknowledges in his review that the American decentralised review has been more successful than the Austrian prototype in spreading constitutional rules throughout the organs of government.[28]

These criticisms largely fall away, however if one adopts a decentralised system of judicial review in which the constitutional court is simply the highest appeal court on matters of constitutional law only. Such a model has been proposed by Arthur Chaskalson.[29] In this model the chief justice (either as a member of the constitutional division of the appellate division or simply as chief justice) refers all constitutional issues arising out of cases which come before the appellate division to the constitutional division of the appellate division. And where the constitutional court exists as a further tier in respect of constitutional issues, the matters would simply proceed to this court on those issues. Such a division would also be able to entertain matters brought before it directly, for example, by way of anterior review. Portugal has such a hybrid system. Favoreu notes that a specialist court dramatically expedites and facilitates constitutional review even if a decentralised system is

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[28] Favoreu op cit note 14 at 40.

[29] A Chaskalson A Constitutional Court: Jurisdiction, Possible Models and Questions of Access Paper prepared for the Conference on "A Constitutional Court for South Africa" Magaliesberg, 1-3 February 1991.

followed. It can also be argued that the specialised constitutional court, even in a decentralised system, has an important role in freeing other courts from controversy. Cappelletti notes that where the highest court is a court of general jurisdiction, and also a final court of constitutional review, it tends - as in the USA - to avoid hot political issues such as the legality of the Vietnam war.[30] Not so the constitutional court.

APPOINTMENT OF JUDGES

It is important, at the outset, to distinguish the call for a 'representative' bench from a demand for a 'popular' bench. The latter is a more appropriate description of judicial institutions in which the official contenders are popularly elected, and generally compete for public support by mimicking the popular consensus. The tension between independence and representativeness is not necessarily even unhealthy and Cappelletti remarks:

> "Since in this area the degree of judicial creativity is so high, an extraordinary degree of independence of judges and lawyers is an obvious requisite, if a system of judicial review of

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[30] M Cappelletti Judicial Review in the Contemporary World (1971) 54-66.

> political action is to be effective ... Let me note, however, that judicial independence is not incompatible with democratic accountability: it surely means independence vis-a-vis the political branches, but many ways can be designed to make the judges nevertheless responsive to societal needs and aspirations."[31]

In almost all constitutional court jurisdictions members of the court or a percentage of them are directly elected or appointed by parliament. This is certainly not radical. The same practice applies in almost all non-constitutional court jurisdictions, such as the United States. In Portugal parliament has to approve, by two-thirds majority, the ten members of the court. The two-thirds majority requires that political parties compromise in their selection in order to find broadly acceptable candidates. In Italy, although the magistracy appoints a percentage of the court's membership, so do members of parliament and legal academics. In Germany parliament appoints all the members to the court in accordance with proportional representation. It should be noted in these jurisdictions that court members are <u>not</u> appointed for life but only for say a seven-year, non-renewable term. There is no reward for ruling in favour of other directions. The

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[31] Cappelletti op cit note 12.

experience in Germany and Portugal is that notwithstanding direct political involvement in the appointment of these judges, the courts quickly develop a psychology of independence, even displaying a perverse desire to rule against the parties that nominated them.[32] The advantages of direct political appointment for non-renewable terms is that such a system ensures a turnover of members of the court who are, in however mediated a fashion, in tune with changing popular aspirations. Furthermore direct political appointment is a recognition of the central constitutional/political function of the court, in these countries this has not diminished respect for the court. On the contrary it has ensured a degree of representivity and has limited the criticism that the court is a self-appointed oligarchy insulated from societal norms. The democratic legitimacy of constitutional review rests upon the appointment of these judges by elected authorities. It could be argued that a political nexus to the court would more likely enhance the court's credibility in South Africa as jeopardise it. And indeed, recognising the truly political nature of appointments, says Dugard, compels careful attention to the appointment of judges.[33] One mode of appointment which enjoys little support in either constitutional court or non-constitutional court jurisdictions is one that allows

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[32] Van der Westhuizen op cit note 6 at 32.

[33] Dugard op cit note 5 at 5.

lawyers alone to be the sole arbiter in regard to the appointment of constitutional court judges. Equally unacceptable is the conferral of the sole power to appoint all the members to one political party.

At the constitutional court conference held earlier this year the consensus appeared to be that a hybrid mechanism of appointment is the most preferable. Members of parliament, in proportion to their electoral strength, together with representatives of the various branches of the legal profession and the judiciary would recommend candidates for appointment. Kader Asmal in his comparative survey of the operation of constitutional courts cites certain general characteristics of constitutional court judges:[34]

> "The members tend to be younger than the members of the appellate division of the ordinary court ... there is not an adequate number of women representatives; they are more representative of political tendencies in each country ... [they] are judges or highly qualified lawyers ... and they generally enjoy greater support across the political spectrum."

Should the members be lawyers at all? In most

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[34] K Asmal op cit note 9 at 29.

countries a requirement exists for at least the majority of members to be legally trained. This facilitates legally reasoned decisions, and a developing jurisprudence which is internally consistent. It is possible, however, to argue that non-lawyers may also be able to make a contribution to an understanding of certain issues. The South African legal system acknowledges this possibility in our criminal courts by allowing for the appointment of assessors.

CONCLUSION

By way of conclusion I would like to make two remarks. A South African judge recently remarked that he had no objection to a constitutional court as long as no-one asked him to sit on a constitutional court and adjudicate constitutional issues. Albie Sachs replied that though he might not wish to go to constitutional jurisprudence, but constitutional jurisprudence, like Mohammed and the Mountain, would surely visit him.

Finally, there is a need to consider Johan van der Westhuizen's sober warning that even if we were to accept that a specialised constitutional court can play a positive role in a country's legal and political life, it cannot hold a seriously divided society together nor

rescue a country from civil war. The successful German model was copied in Cyprus, where it and the constitution failed after a short time. "A constitutional court cannot save a nation without the will to be democratic".[35]

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[35] Van der Westhuizen op cit note 6 at 32.