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CURRENT DEVELOPMENTS

Judicial Independence and the Constitution Fourteenth Amendment Bill

I Introduction

The publication of the Constitution of the Republic of South Africa Fourteenth Amendment Bill on 14 December 2005,[1] part of a package of measures designed to rationalise the judiciary in terms of Schedule 6 of the Constitution,[2] elicited strong responses from civil society as the constitutionally required 30-day period for public comment[3] ran over the height of the long summer holidays in South Africa. A second month for public comment allowed by the parliamentary Justice Portfolio Committee did little to stem the growing public opposition to the content of the Bill. Eventually, criticism by the current and former Chief Justices and prominent human rights lawyers,[4] led the President to intervene and the Portfolio Committee to delay the deadline for public comment by two and half months to 15 May 2006.[5]

At the core of public and judicial criticism has been the concern that the Constitution Amendment Bill, together with the Superior Courts Bill,[6] prejudice and limit the independence of the judiciary and the constitutional doctrine of the separation of powers. Some of this has been

1 General Notice 2023 *Government Gazette* 28334 of 14 December 2005.

2 Section 16(6) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 ('the Constitution'). These Bills include the Constitution Fourteenth Amendment Bill; the Superior Courts Bill, the South Africa National Justice Training College Draft Bill; the Judicial Conduct Tribunals Bill and the Judicial Service Commission Act Amendment Bill. The Superior Courts Bill had previously been published for comment (Bill B52 of 2003) and the Constitution of the Republic of South Africa Amendment Act (Bill B60 of 2003) proposed changes to the structure of the High Courts and the Supreme Court of Appeal . The 2005 Bills substantially change aspects of the 2003 Bills. Only the first two bills (ie, the Fourteenth Amendment Bill and the Tribunals Bill) are currently in the public domain. The National Justice Training College Bill has been withdrawn, and the other two are pending. The text of the Bills and drafts is available at < http://www.pmg.org.za > .

3 Section 74(5) of the Constitution requires a Bill amending the Constitution to be published in the national Government Gazette at least 30 days before its introduction into Parliament.

4 At a Colloquium organized by the General Council of the Bar on 17 February 2006, the former Chief Justice, Arthur Chaskalson and the current Chief Justice, Pius Langa, both expressed their concerns with provisions that restricted the evolving model of judicial independence. On the same day, veteran human rights lawyer, George Bizos SC made a public speech condemning the Bills. 'Judiciary under threat, Bizos says' *Business Day* (20 February 2006).

5 Press Statement issued by Ms Fatima Chohan MP, Chairperson of the Portfolio Committee on Justice and Constitutional Development, 27 February 2006. 'Mbeki puzzled at judges' criticism' *Business Day* (23 February 2006).

6 B52 of 2003 (draft dated 19 October 2005).

overstated in the media.[7] Effective public comment was also made difficult by the fact that the discussions on the Bills, held over a period of several years between the judiciary and three successive Ministers of Justice, had largely been held behind closed doors. Little was known about either the justifications of government or the detail of the judiciary's opposition and its preferred alternatives. The revised versions of the Bills were not made public until late 2005 and early 2006.

This note considers the constitutional and legal issues surrounding the Constitution Amendment Bill. Although this is the fourteenth amendment of the Constitution, it is the first time a constitutional amendment has drawn such opposition from the legal and justice sector.[8] In this context, this note considers the extent to which constitutional amendments may be challenged in our democracy, as well as the principles that should guide public and legal debate. It then discusses the key concerns around judicial independence and the separation of powers in the Bill.[9] These are: the division of 'judicial' and 'administrative' functions in the Bill; the prohibition on adjudicating on laws before they commence and the appointment of judges-president and of acting judicial leadership. Overall the note identifies within the Bill a pattern of executive power encroaching upon the judiciary's role. It concludes with comments on the overall constitutionality of the amendment.

III The Significance of Constitutional Amendments

Constitutional amendments are not ordinary legislative amendments. In recognition of this, s 74 of the Constitution provides for special procedures and majorities. The procedure envisages special majorities and public participation through the publication of an amendment for comment, and the requirement that these comments are sent to the Speaker of Parliament and the chairperson of the National Council of Provinces for tabling in their respective Houses.[10] A period of thirty days must elapse before the amendment is put to the vote. This procedure was put in place after the Constitutional Court declined to certify the first draft of this part of the Constitution, and referred it back to the

7 For example, early press reports misinterpreted the provisions relating to the suspension on the commencement of Acts of Parliament as eradicating an individual's right to interim relief. See Part IV below.

8 The floor-crossing amendments (the Constitution of the Republic of South Africa Eighth and Ninth Amendment Acts of 2002, discussed in *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC)), created similar concerns amongst political commentators and political parties.

9 This note does not address a further area of contention in the Bills: the role of the Constitutional Court as the apex court and the rationalisation of the system of appeals. See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509.

10 Section 74(5) to (7).

Constitutional Assembly for amendment to ensure compliance with Constitutional Principle XV, namely that 'amendments . . . shall require special procedures involving special majorities'.[11] Section 74(4) to (7) was duly added and was approved by the Constitutional Court in the *Second Certification* decision.[12]

Public participation in amending the Constitution is particularly important in contemporary South Africa where the relatively recent process of drafting the Constitution was an inclusive and participatory process in which civil society was encouraged to make representations. In addition, South Africa's democracy is still in a process of establishment and consolidation. Many will argue that it is too early to make substantial changes to the text. This may be particularly true of the idea of judicial independence which the Constitutional Court has described as 'an evolving concept'.[13] There is a danger that constitutional amendments that are not sensitive to this may halt or reverse that evolution. As discussed later, this has been the argument of some critics of the Fourteenth Amendment Bill.

Some commentators have gone further to suggest that this means that some of the amendments are unconstitutional.[14] As discussed below, whether that is correct will depend upon how one interprets the Constitution and the amendments. However, beyond the technical intricacies of constitutional interpretation, there are sound democratic reasons why constitutional amendments should be avoided. These relate to the place of the Constitution, as the supreme law of the land, in setting rules, principles and standards of democracy that stand above day-to-day politics and transient ruling elites. Too often (in Africa and elsewhere) constitutional amendments have been used to serve the short-term interests of those in power, to the detriment of society and longer-term democratic goals. Even if the substance of an amendment is benign, amendments remain a risk to democracy as they instil bad political habits (regarding it as 'normal' to amend constitutions), tend to create perceptions of manipulating constitutions to suit political ends (even if this is not the intention or effect), and ultimately damage the legitimacy of the Constitution and the strength of democracy.

Section 74 seeks to protect South Africa 'against political agendas of ordinary majorities'.[15] It requires a period of publication and public comment, ensures these comments reach Parliament and puts in place

11 *Ex parte Chairperson of the National Assembly: In Re: Certification of the Constitution of the Republic of South Africa,1996* 1996 (4) SA 744 (CC) paras 151-156.

12 *Ex parte Chairperson of the National Assembly: In Re: Certification of the Constitution of the Republic of South Africa,1996* 1997 (2) SA 97 (CC) paras 49-52.

13 *Van Rooyen v S* 2002 (5) SA 246 (CC) para 75.

14 Bizos (note 4 above).

15 *First Certification* decision (note 11 above) para 153.

special majorities for amendments to key provisions, including the Bill of Rights and s 1 which sets out the Republic's founding values. The Constitutional Court has twice considered the extent to which the constitutional text is protected against amendment.[16] Although it has acknowledged that there is very limited scope for challenging amendments that have complied with the constitutionally prescribed procedure,[17] this does not give Parliament carte blanche to amend the text. In particular, the Court will look at whether the amendment affects the basic structure of the Constitution, in which case it might not qualify as a 'constitutional amendment' at all.[18] This is a stringent test, requiring the amendment to undermine democracy itself and 'effectively abrogate or destroy' the Constitution.[19] Secondly, the Court will assess whether the amendment affects the founding values of s 1, and thus requires a special 75 per cent majority in terms of s 74 (1). Here it does not interrogate political choices, merely tests whether the amendment complies in general terms with the values.[20]

The role of the Constitutional Principles has not been explicitly addressed by the Constitutional Court since the *First Certification* decision confirmed that certification meant that the question of compliance of the text with the Principles could 'never be raised again in any court of law'.[21] Whether they still have force as interpretative principles is an open question.[22] However, as principles, they contain little detail, requiring merely that the judiciary shall be independent[23] and '[t]here shall be separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'[24] They do not prescribe the form which this may take, and thus provide general protection to the principles of democracy and not specific protection to a particular way of

16 *Premier of KwaZulu-Natal v President of the Republic of South Africa* 1996 (1) SA 769 (CC) and the *United Democratic Movement* case (note 8 above).

17 In *Premier of KwaZulu-Natal* (ibid) the Court stated that an amendment is 'constitutionally unassailable' if it follows the correct procedure. In addition, once an amendment is passed, it cannot be challenged on the grounds of inconsistency with other provisions. The amended constitution must be read as a whole, and the provisions in harmony with one another: *United Democratic Movement* (note 8 above) para 12.

18 *Premier of KwaZulu- Natal* (note 16 above) para 47.

19 Ibid para 49.

20 *United Democratic Movement* (note 8 above).

21 *First Certification* decision (note 11 above) para 18. Whether the Constitutional Principles could be raised in relation to later amendments to that text is arguably still an open question, although, as argued in this note, it is likely that they have no independent role.

22 Goldstone J referred to their role as a 'primary source of interpretation' in argument in the certification case. P Andrews & S Ellman (eds) *The Post Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001). This was not addressed in the *United Democratic Movement* decision (note 8 above).

23 Constitutional Principle VII. The Principles are listed in Annexure 2, Constitution of the Republic of South Africa Act, 200 of 1993.

24 Constitutional Principle VI, Annexure 2, Constitution of the Republic of South Africa Act, 200 of 1993.

'operationalising' this principle. The Constitutional Principles do not add greater protection than the 'basic structure' and 'founding values' tests, which seem to have superseded the Principles. All three secure the basic principles of democracy, including judicial independence and the separation of powers. Perhaps the best way of understanding this is to distinguish between amendments that affect that substance of a principle or value from those that provide for alternate ways of implementing a particular principle or value. The 'basic structure' and 'founding values' tests (read with or without the Constitutional Principles) provide substantive protection to the democratic principles and values of the Constitution — they cannot be eroded. However, the 75 per cent majority permitted in relation to s 1[25] means that the Constitution can provide alternate ways of implementing these principles, as long as they remain intact. Political choices are permitted and protected, but these must be within the parameters of the prescribed values and principles. Changes in the form may not erode the substance. The difficulty here is that the line between form and substance is not always clear.

In the following sections I will consider whether the Fourteenth Amendment might be unconstitutional. In this discussion, it is assumed that the independence of the judiciary and the separation of powers, although not specifically mentioned in s 1 of the Constitution, are 'founding values' (in addition to being Constitutional Principles). This is based on the Constitutional Court's finding that they are implicit in the rule of law and foundational values of our democracy in s 1.[26] In so far as some of these amendments may be found to affect the implementation of these principles, they will be at least subject to the 75 per cent majority requirement of s 74(1). If they erode them, then they must be unconstitutional.

At the time of writing, the issues are still in the realm of debate. Aside from questions of constitutionality, how should South Africa deliberate on constitutional amendment? What is the appropriate democratic response of government and civil society to amendments that are contested? I argue that the democratic principles of necessity and justification should govern this debate. The Constitution envisages an inclusive, participatory and accountable democracy. The democratic imperative for this is even stronger when it comes to constitutional amendment. The principle of necessity means that constitutional amendments should be the last resort and should not be done merely to provide clarification or detail. Such matters should be dealt with in legislation where detail is possible and where they can be tested against existing constitutional standards. Limiting amendments to what is necessary promotes good governance, constitutional legitimacy and

25 Required by s 74(1).
26 *Van Rooyen* (note 13 above) 17.

avoids perceptions of manipulation of the Constitution. Government should justify the amendments as enhancing and not limiting the democratic vision of the Constitution. In this case government should demonstrate that the amendments are based on sound constitutional justifications that promote the independence of the judiciary, maintain the separation of powers, and improve the efficacy of the justice system and the delivery of justice to all.

III The Independence of the Judiciary — An Evolving Concept

The independence of the judiciary is protected in s 165 of the Constitution. This provides that '[t]he courts are independent and subject only to the Constitution and to law', 'no person or organ of state may interfere with the functioning of the courts' and 'organs of state must assist and protect the courts to ensure their independence'.[27] In other words, it is the constitutional duty of the executive and legislature to ensure the courts' independence. The Constitution thus sets out clear and broad principles on judicial independence. Over the past decade, both judicial independence and the separation of powers have been given further meaning through legislation, judicial interpretation and the practice of the judiciary and the courts. For example, the Constitutional Court Complementary Act 13 of 1995 gives the Chief Justice significant, although not exclusive, authority over budget and staffing of the Constitutional Court. The Minister appoints the Registrar of the Constitutional Court and other officers on the Chief Justice's request.[28] The Chief Justice may appoint some staff (eg, research staff such as clerks) and determine their remuneration and conditions of service in consultation with the Department's appointed accounting officer.[29] The Chief Justice requests funds, after consultation with the Minister, who then approaches Parliament for such funds.[30] This model is qualitatively different from the apartheid model of ministerial authority that still pertains in other courts.

The Constitutional Court has given jurisprudential content to the principles of judicial independence and separation of powers in several cases.[31] These have confirmed that the principles have core meanings, but that their precise meaning within any constitutional context is dependent upon the history, circumstances and conventions.[32] One needs to be aware of the country's complex reality, the 'evolving patterns of its constitutional developments' and guided by the Constitution and its

27 Section 165(2)–(4).
28 Section 14(1).
29 Section 14(2).
30 Section 15.
31 *De Lange v Smuts NO* 1998 (3) SA 785 (CC); *SA Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC); *Van Rooyen* (note 13 above).
32 *De Lange v Smuts NO* (note 31 above) paras 60–61.

values.[33] Both the Chief Justice and the previous Chief Justice have referred to the evolving concept of judicial independence that is developing in our context.[34] An important question is whether this evolution is merely one of form, or whether it is also a matter of building the judiciary to meet the constitutional requirement of independence 'in substance'.

The Fourteenth Amendment Bill seems to affect this evolving concept of independence of the judiciary in several ways. These include the proposed system of administering the courts and the role of the Minister in this respect,[35] the 'ouster clause' which removes the jurisdiction of all courts to hear a matter or make an order about the suspension of the commencement of an Act of Parliament,[36] the erosion of the authority of the Chief Justice in respect of selecting acting Constitutional Court Judges[37] and the diminution of the authority of the Judicial Services Commission in selecting judges president.[38] Read across all these provisions, the Bills suggest a reversal of the trends set in the past decade and a pattern of creeping executive power at the expense of the judiciary. While this is emphatically denied by the government[39] (which has professed a strong commitment to judicial independence and transformation) it is difficult to escape the conclusion of a 'nanny state' stepping in to 'fix up' actual and perceived problems in the delivery of justice.

IV The Separation of the 'Judicial' and the 'Administrative' Function in the Administration of Justice

The Bill seeks to amend s 165 of the Constitution by establishing the Chief Justice as the 'head of the judicial authority' who 'exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial function of all courts, other than the adjudication of any matter before a court of law'. It also states that the 'Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts'.[40] This seeks to clarify the leadership role of the Chief Justice; and to draw a line between the judicial function which falls within the jurisdiction of the judiciary and the administration of the courts which is the responsibility of the Department of Justice. The stated objective is to maintain and entrench the 'Commonwealth model of the separation of powers between

33 *Van Rooyen* (note 13 above) para 34.
34 Note 4 above.
35 Clause 1.
36 Clause 7(b).
37 Clause 10.
38 Clause 9(b).
39 Most recently by the President. See note 5 above.
40 Clause 1 of the Constitution Fourteenth Amendment Bill.

the executive and judiciary' in which the judicial function is the 'sole preserve' of the judiciary and 'responsibility for the administrative functions of courts' is the 'sole preserve of the relevant Minister'.[41]

In reality, it is difficult to identify a 'Commonwealth model' on the administration of justice and the appropriate role of the executive in this. Little detail is provided in formal Commonwealth documents and agreements beyond principled commitments to judicial independence, and the need for security of tenure for judges and sufficient resources for courts.[42] Indeed, the recent Commonwealth conference in Kenya called for more detail on the role of the executive, whose position as main decision-maker can hinder positive developments in accountability and the relationship between the three branches.[43] In practice, Commonwealth countries have different models of managing the courts that include the Courts Administration Service in Canadian federal courts that places the courts' administration 'at arm's length' from the executive.[44] This is also the situation in some Australian state courts.[45] In other instances in Australia, the Chief Justice or a group of judges are responsible for administration.[46] In general, some have argued that the contemporary trend is for less, rather than more, executive control over the administration of courts.

(a) Governance, accountability and the leadership role of the Chief Justice

The proposed s 165(6) reads:

> The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial function of all courts, other than the adjudication of any matter before a court of law.

The judiciary is accountable for the efficient exercise of the judicial function. Governance within, and accountability of, the judiciary are important components of judicial independence and separation of powers and may include practices such as publishing periodic reports of judicial activities, simplified rules and procedure, public hearings, well-reasoned judgments delivered within a reasonable time and a pro-active leadership role of heads of the judiciary.[47] The establishment of appropriate

41 Memorandum on the Objects of the Constitution Fourteenth Amendment Bill, para 1.

42 The Latimer House Principles set out the Commonwealth principles on the accountability of and the relationship between the three branches of government: *Commonwealth (Latimer House) Principles on the Three Branches of Government* (2002); available at <http://www.thecommonwealth.org>. The Latimer House Guidelines are part of these. See Para II under 'Preserving Judicial Independence'.

43 The Pan African Forum on the Commonwealth (Latimer House) Principles on the Accountability and relationship between the three branches of Government. *Communiqué* Nairobi, Kenya, 4-6 April 2005.

44 Courts Administration Act, 2002.

45 See the Courts Administration Act, 1993 (South Australia).

46 Federal Court of Australia Act 1976 (Cth), High Court of Australia Act 1979 (Cth).

47 Commonwealth Judicial Colloquium on Combating Corruption within the Judiciary *Limassol Conclusions* (2002) para 12.5.

leadership and of norms and standards for the exercise of the judicial function is a sound democratic idea. In practice, the Chief Justice of South Africa is already recognised as the head of the judiciary and the judiciary has an evolving, if informal, model of collective leadership where the heads of courts meet on important issues.

The constitutional recognition of the leadership role of the Chief Justice does not preclude collective leadership nor is it an issue that necessarily impedes upon the independence of the judiciary, although concerns have been expressed by the judiciary about centralising too much power in the Chief Justice.[48] Nevertheless, together with improved governance, clear leadership potentially enhances the functioning of the judiciary. But even if acceptable in principle, it is not necessary to amend a Constitution to achieve this. Nor is the current wording that places the Chief Justice at the 'head of the judicial authority' justifiable. Judicial authority of the Republic vests not in an individual but in the courts.[49] Judicial authority is thus held by each and every judge within his or her court and is secured by the independence of that judge in his or her court. An individual cannot be the head of the judicial authority. He or she can only be the head of the institution of judges, the judiciary.

The balance of the amendment relating to 'responsibility for . . . norms and standards' is unclear. It might be read merely to refer to the governance functions of the Chief Justice, without limiting other functions, or it may be seen to limit the administrative role of the Chief Justice (outside of the adjudicative function) to 'the establishment and monitoring of norms and standards for the exercise of the judicial function'.[50] This lack of clarity is, in itself, a problem. In addition, the clause is unnecessary for governance purposes and unjustifiable on the second interpretation. An independent judiciary, as guaranteed in the Constitution, will have the power to establish norms and standards for governance and accountability. It will do so in accordance with its own model of leadership, not necessarily limited to the Chief Justice.[51] The details of governance are best left to practice or to legislation where they may be subject to the constitutional test of judicial independence.[52] The problems with the second interpretation are addressed in the next section.

48 *Memorandum on behalf of the Judiciary on the Bill* (2005) part II para 6.

49 Section 165(1) of the Constitution.

50 This is the argument of the Legal Resources Centre (see Letter from the Legal Resources Centre to the Portfolio Committee on Justice, 1 February 2006). However, there are differing responses to this section by the LRC, the Human Rights Committee of the General Council of the Bar 'Update on Proposed Legislation concerning the Independence of the Judiciary' (2005) and Theunis Roux ' "Thinkpiece" for Seminar on the Constitution Fourteenth Amendment Bill, 2005' (2005).

51 The judiciary has argued against concentrating too much power in the person of the Chief Justice. 'Memorandum on Behalf of the Judiciary on the Bill' (2005) part II para 6.

52 See the proposed cl 11 of the Superior Courts Bill.

(b) The division of the judicial and administrative functions

The proposed amendment to s 165(6) and (7) of the Constitution seeks to draw a line between the roles of the Chief Justice in relation to the judicial function and the Minister who 'exercises authority over the administration and budget of all courts'. Thus it seeks to entrench a constitutional distinction between the role of the Chief Justice (judiciary) and the Minister (executive) in the administration of justice. This has been subject to strong criticism as affecting the independence of the judiciary and the separation of powers.[53] At the heart of the issue are three related questions: Is there a clear line of distinction between the adjudicative and administrative functions in the administration of justice? If so, is it properly drawn in this amendment? Is the independence of judiciary threatened if the executive 'exercise[s] authority' for finances and administration of courts?

According to the Constitutional Court, institutional independence of the judiciary means that the judiciary should have control over 'matters that related directly to the exercise of the judicial function, as well as judicial control over administrative functions "that bear directly and immediately on the exercise of judicial function".'[54] This seems to envisage the possibility of a division, but raises the question of how and where to draw this line between 'judicial' and 'executive' control. In principle, there are several ways of administering courts that are compatible with an idea of judicial independence, ranging from control within and by the judiciary, through administration by an 'independent service' to a degree of control by the executive. As discussed above, comparative systems show a variety of practices, but with a trend towards developing an 'arm's length' relationship with government. In South Africa, in the past the Department of Justice has been responsible for the administration of courts. This has begun to change in the democratic era and the Constitutional Court was able to obtain a greater degree of autonomy over its administration and budget.

There are increasing arguments that the line drawn during the apartheid era is now unconstitutional.[55] In so far as this line can be said to be entrenched by the amendment, it violates the concepts of judicial independence and separation of powers as found in the Constitution (stating that 'no person or organ of state may interfere with the functioning of the courts')[56] and as interpreted by the Constitutional Court (as including judicial control of administrative functions

53 See in particular the Legal Resources Centre, note 50 above.
54 See *Van Rooyen* (note 13 above) para 29.
55 This is the argument of the Legal Resources Centre (note 50 above).
56 Section 165(3) of the Constitution. For argument on this see Legal Resources Centre (note 50 above) paras 2.5–2.7.
57 Legal Resources Centre (ibid).

immediately related to the adjudicative function).[57] The Legal Resources Centre lists several instances in which the administration of the courts is bound up with the adjudicative function, meaning that the judiciary should exercise control over, eg, the office of the registrar, the libraries and other court officials, such as translators.[58] It has also been noted that the fact that government is a party in many cases militates against executive control of these administrative issues.[59] In addition, the amendment seems to claw back the partial autonomy that the Constitutional Court has gained in relation to administration and finances. This has led some to argue that the amendment seeks not only to entrench the status quo, but also to legalise it. [60]

The central problem is that the amendment does not take account of the fact that our evolving model of judicial independence, in line with the Constitution and international trends, is moving away from the system of close executive administration practiced under apartheid. This evolving model envisages at least partial judicial control, if not full autonomy, over finances and administration. In this context, a constitutional amendment that confers authority on the Minister alone for 'the administration and budget of all courts', without qualification, is a regressive move. It is also unconstitutional[61] if it can be shown to retard and erode the substance of the constitutionally approved concepts of judicial independence and separation of powers, rather than just to provide a constitutionally permissible political choice of the form of judicial independence.

However, it can also be argued that the language of the amendment is vague. Perhaps it can be read in harmony with a constitutional model that vests ultimate authority in the Minister, but allows partial control over certain functions to lie with the judiciary and the Chief Justice. Certainly, one is bound to attempt to do this before declaring that it is not constitutionally permissible.[62] For example, the new s 165(7) would have to be read in a way that preserves the spirit and intention of s 165 (3), ie, that no person or organ of state may interfere with the functioning of the courts. Perhaps the amendment could be read down to permit the establishment of an independent courts service that affords sufficient

58 These include the role of the registrar in granting default judgements, taxing bills of costs; being an office for public correspondence; and general issuing of process and executing of orders (note 50 above, paras 2.7.1; 2.7.2; 2.7.6; 2.7.7).

59 For example, by former Chief Justice Arthur Chaskalson in an address to the General Council of the Bar Meeting on the Judicial Bills, 17 February 2006.

60 In discussion with judges at the General Council of the Bar meeting, it was clear to me that some felt that the amendment not only sought to prevent further claims for judicial autonomy, but also that it was necessary to 'constitutionalise' the current system, which might be unconstitutional under the current provisions and their judicial interpretation.

61 The Legal Resources Centre makes this argument on the basis of an interpretation of s 165(3). See note 50 above, para 4.6.

62 The Constitutional Court has stated that amendments must be read in harmony with the Constitution. *United Democratic Movement* (note 8 above) para 12.

judicial control and operates at 'arms length' from the executive, even if under its overall authority. But if this wording is capable of a benign interpretation, that is no guarantee against future moves for greater executive control. In this respect, the amendment continues to threaten the independence of the judiciary and the separation of powers.

In the end, it is the impasse between the executive and the judiciary over this constitutional amendment that is the democratic problem. Democratic dialogue rather than a stand-off is required. It has been argued by government that the Minister should have responsibility in terms of the Public Service Act and the Public Finance Act for the courts and their personnel. Judges should not be employers or accounting officers. It is not evident that judges are not asking for such control, merely for a greater distance from the executive and for a greater say in staffing, court management and budgets. It is also not inevitable that the Minister or her director-general are the only possible responsible officers. One could appoint an executive officer in a more independent courts administration. While even that executive officer may be accountable to the executive in terms of administration and finance — it will be much more of an 'arm's length' relationship.

The amendment is neither necessary nor justifiable. It is not necessary for the development of an appropriate model of court administration that can be set out in detail in legislation. The debate should thus be focussed on the Superior Courts Bill. It is also not justified, either for the stated reasons of commonwealth practice, or for wider constitutional or political reasons. All it currently achieves is to add fuel to the argument that these bills demonstrate a trend of executive curtailment of judicial authority.

V Clause 7 — Challenges to Acts of Parliament Before They Commence

Clause 7 of the Amendment Bill adds a new provision to s 172 of the Constitution to place an absolute prohibition on any court adjudicating a matter dealing with the suspension of an Act of Parliament before it has commenced:

> Despite any other provision of this Constitution, no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act.

This amendment was initially reported in the media to be a substantial erosion of the court's power to grant interim relief.[63] It is not necessarily so. It is rare that a litigant would wish to challenge legislation before it is in force, as the matter might not be 'ripe' for hearing under such

63 This appeared to be the initial view of IDASA and the General Council of the Bar according to press reports.

circumstances, and the commencement of an Act seldom immediately interferes with rights.[64] In addition, the amendment does not prevent a court from offering interim relief in the form of suspending the operation, rather than the commencement of, an Act. If there was a matter of invasion of rights, it would be possible to approach the court on an urgent basis on the day that the Act, or part of it, comes into force.[65]

The problem with this amendment is that it constitutes an ouster clause, against the spirit of the Constitution that removes the jurisdiction of the courts in an area where they have arguably shown appropriate deference to the role of the legislature in enacting laws and to government in determining policy. It also removes an important counter-majoritarian measure set out in ss 80 and 122 of the Constitution which allows one-third of the members of Parliament or a provincial legislature to refer an Act directly to the Constitutional Court for review. These are the only sections that explicitly deal with challenges to Acts that have not commenced and where an interim order may effectively suspend the commencement of an Act.[66]

The powers of courts to deal with Acts that have not yet commenced was partly addressed by the Constitutional Court in the third of its *United Democratic Movement* decisions.[67] In this case the Court assumed that the High Court had jurisdiction to suspend an Act of Parliament, either before or after it was published.[68] It then set out a test for the provision of interim relief in relation to official action in terms of an Act that was subject to constitutional challenge. This test is likely to form a minimum test for the more drastic remedy of suspending the commencement of an Act. This relief was narrowly construed and appreciative of the legislature's role. The elements of this are (i) that action pursuant to the Act is imminent; (ii) it is in the interests of justice; (iii) the relief is absolutely necessary to avoid irreparable harm; and (iv) it must be construed in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation.[69]

The proposed amendment means that interim relief, even under the above conditions, is ousted. Final relief is not possible, allowing the President to bring into being unconstitutional legislation before it is struck down. Counter-majoritarian measures are rendered meaningless.

64 *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC) para 28. The issue of suspension was considered in this case and in *National Gambling Board v Premier, Kwazulu-Natal* 2002 (2) SA 715 (CC) para 54. In neither case was it found necessary to make a finding on the courts' powers in relation to suspension of the commencement of an Act.

65 See Roux (note 50 above).

66 *United Democratic Movement* (note 64 above) para 27.

67 Ibid.

68 Ibid para 27.

69 Ibid paras 28-31.

In the constitutional and jurisprudential context of strictly tailored relief, this amendment seems neither necessary nor justifiable. If government is worried about unnecessary delays to the implementation of progressive legislation, this is not expressed nor is it a major concern under the current jurisprudence which provides for tightly constructed relief. If the clause reflects a concern about the appropriate boundary lines between the judiciary and the executive or between the judiciary and the legislature, the Constitutional Court is the chosen referee in our constitutional democracy

The fundamental problem with this amendment is that it evinces a kind of mistrust of the judiciary. Despite the careful and 'responsible' jurisprudence of the Constitutional Court, the government sees fit to oust jurisdiction. It is a worrying trend throughout the amendment bill. In any choice between giving power to, or leaving power with, the judiciary — the government chooses to take the power itself. In small strokes the line separating the powers is redrawn. It is in this subtle, but quite fundamental, way that judicial independence is threatened.

VI Clause 9 — The Appointment of Judges President and Deputy Judges President

Section 9 of the amendment Bill proposes the introduction of a new provision to s 174 of the Constitution providing for the President to appoint the judges-president and deputy judges-president from a list provided by the Judicial Services Commission (JSC), after consulting the Chief Justice and the Minister (in a similar manner to the appointment of Constitutional Court judges).[70] Currently this is not required by the Constitution, and the practice (which was in place before the 1996 Constitution) has been for judges-president to be chosen by the JSC, probably under an extended reading of s 174(6), where the President appoints judges on the advice of the JSC. To what extent does this proposed amendment interfere with the doctrine of separation of powers and the independence of the judiciary?

When faced with question of executive involvement in the appointment of judges during the certification of the Constitution, the Constitutional Court said the following:

> The mere fact . . . that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of the separation of powers or with judicial independence required by CP VII. In many countries in which there is an independent judiciary and separation of powers, judicial appointments are made either by the executive or Parliament or by both. What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.[71]

70 In addition, it is not necessarily possible to find four candidates for the position of judge-president, as required by this procedure.

71 *First Certification* decision (note 11 above) para 123.

If, as a general principle, executive involvement in appointment does not violate the separation of powers and the independence of the judiciary, what are the considerations in assessing whether this amendment is necessary or justifiable? Again it is important to turn to the evolving nature of our democracy, and the fact that South Africa has began to consolidate a particular view of the judiciary, the nature of its appointments and the role of the executive, JSC and Chief Justice. Constitutional practice has evolved over the past eleven years to give the JSC this role, and to allow the Chief Justice, as chair of this body, to shape the judicial leadership. The proposal can be seen to diminish the role of the JSC which was created to provide for an independent and depoliticised selection of judges in an open, transparent and accountable process. It also weakens the influence of the Chief Justice in selecting the leadership of the institution that he represents and for whose efficiency he is accountable.

Of course, it may be argued that while JSC has successfully transformed the judicial leadership from a race perspective, it has failed to appoint women as judges and to positions of leadership.[72] By contrast, President Mbeki has an impressive record of appointing women to positions of leadership. Would the President not do a better job of transformation? He might. But this fact is irrelevant. As a matter of principle, one cannot amend the Constitution because the current President makes more representative appointments. The issue is what should be the balance of power in appointments over the long term. In this respect, the current position is better for democracy. It 'trusts' the institutions that currently have a significant role in appointments. It recognises the important role of the judges president in relation to the court roll, and avoids any suspicion that the President's appointees may manipulate the assigning of judges to specific cases, an issue about which there have been particular sensitivities in the past twelve months.[73] In sum, the practices of selection of judicial leadership that have evolved in our democracy have been effective (if not comprehensive) in transformation, achieve a good balance between the roles of the President (who also nominates several JSC members), the Chief Justice and JSC, and prevent the abuse of power of any one institution or person. Where there have been shortcomings, as in the appointment of women, it is democratically better to retain an open process. Transparency and advocacy by civil society and human rights organisations on this issue must be seen as the necessary check and balance to inadequate selection procedures.

It is difficult to find a constitutional justification for this change. The current process affirms democracy and transparent and accountable

72 See C Rickard 'Judging Women Harshly' *Sunday Times* (23 October 2005).

73 In this respect, the fact that this method is the same as the appointment of Constitutional Court judges means little. Judges President play a different role in the judiciary, one that calls for an arm's length appointment process.

selections. Presidential decisions are, by their nature, far less transparent. Shifting power to the executive, however small in practice, is not justified.

VII Clause 10 — Acting Appointments of Certain Judges

The Bill seeks to amend s 175 of the Constitution in relation to the appointment of judges in acting positions of leadership. The President will have sole discretion to appoint acting judges of the Constitutional Court, as well as acting judges in the position of deputy Chief Justice, deputy president of the SCA and the deputy judges-president, after consulting with various parties. In both instances, there is a shift in power towards the executive.

(a) Acting judges in the Constitutional Court

Currently, acting Constitutional Court judges must be appointed with the concurrence of the Chief Justice. There is no necessary and justifiable reason for the President now to have sole discretion in appointing these judges. On the contrary, there are sound arguments against it. The role of the Constitutional Court in holding government to account means that Government is often a party in the Constitutional Court. Given that acting appointments are for a defined and known period, when the court roll may also be known, it is undesirable that the President has the final say, and may lead to perceptions that the executive, in theory or in practice, is able to interfere with the Court. This is exacerbated by the increasing tendency of the Court to give split decisions, meaning that it is possible that the appointment of a single judge can have a material impact on the nature of its decisions.

In the *First Certification* judgement, when the method of the appointing acting Constitutional Court judges was challenged, the Constitutional Court said the following:

> [S]uch appointments (are) made by the President on the recommendation of the Minister acting with the concurrence of the President of the Constitutional Court and the Chief Justice. All three are members of the JSC and the requirement that there be agreement between them as to the person to be appointed meets any reasonable concern that the power of an acting Constitutional Court judge might be abused.[74]

The proposed amendment shifts this balance to the executive and thus interferes with the balance of powers as endorsed by the Constitutional Court. On this basis it must be seen to contravene the original Constitutional Principles on which the Court's decision was made, interfering with both judicial independence and the separation of powers.

74 Note 11 above, para 130.

Arguably, this is interference in substance rather than form, affecting the basic structure of the separation of powers and, as such, is impermissible.

(b) Acting judicial leadership

The amendment also provides that the President should appoint those who act as the Deputy Chief Justice, the deputy president of the SCA and the deputy judge president of a Division of the High Court. This is not specifically dealt with in the Constitution which only refers to the power of the Minister to appoint acting judges. The Constitution Court Complementary Act refers to the President appointing the deputy Chief Justice at the request of the Chief Justice.

Acting positions of leadership are important as they impact of the efficacy and direction of the court, as well as succession issues. For this reason, the decision should not be in the hands of one person. A balance should be struck between the executive, the Chief Justice and Deputy Chief Justice and the head of the court concerned. In other words, for similar reasons to those set out above, a wider consultation and selection process seem necessary, and the change in appointment seems neither necessary nor justifiable.

VII Conclusion

I have argued that several of the provisions in the Constitution Fourteenth Amendment Bill demonstrate a worrying trend of the executive redrawing the lines of judicial independence and the separation of powers. In each case, that line is shifted in favour of the executive. This gives rise to concerns that the government does not sufficiently 'trust' the judiciary to continue develop into a legitimate, accountable and efficient institution. It also feeds into perceptions that government will step in to 'fix' things by extending its sphere of control or failing to relinquish it where appropriate. The resultant creeping centralisation of power, however slight, narrows the democratic vision of the Constitution and ends up shifting the separation of powers and tampering with judicial independence.

Many in civil society can point to problems in the judiciary and the administration of justice. Some of that lies at the door of government and some is the responsibility of the judiciary. For example, many in the profession will agree that the Rules Board has not been efficient in its rule-making task. The solution is not to transfer rule-making power to the executive as the Superior Courts Bill seeks to do,[75] but rather to ensure that the judiciary has the capacity and the resources to ensure that its rule making power functions efficiently. The solution is to build democratic institutions and not to limit them.

75 Superior Courts Bill, cl 41.

In some instances, especially in relation to the separation of the judicial and administrative functions in clause 1 and the appointment of acting Constitutional Court judges, the amendments may affect the substance and not merely the form of judicial independence and the separation of powers. This raises the spectre of a constitutional challenge to a constitutional amendment. This is also not good for democracy, especially when it entails two of its fundamental institutions.

The constitutional imperative to restructure the courts in line with the new Constitution needs to be carried out in a manner that engages the institutions of the state in a democratic dialogue that has the establishment of an independent, accountable and efficient judiciary as its goal. This entails breaking away from the current impasse and the executive instinct of constraining judicial institutional development. The executive, the judiciary and civil society need to engage publicly to agree on a vision of an independent and accountable judiciary and work, collectively, towards its achievement.

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