A CONSTITUTIONAL COURT FOR South Africa?

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The emerging democracy in South Africa will look for apt examples of systems in other jurisdictions.

The Republic of South Africa is a former British colony. On establishing the Union in 1910 South Africa became independent of Britain, and adopted a Westminster pattern of government which included the principle of parliamentary or responsible government. The Head of State was the King of Britain, represented in South Africa by the Governor-General who acted, by convention, on the advice of the South African Prime Minister. This independence from Britain, however, excluded the majority of the indigenous population from governance, and the present constitutional crisis is the legacy of that colonial past.

South Africa became a republic in 1961. As a consequence, the British monarch and the office of the Governor-General were replaced by the new office of the State President, but there were no changes of substance.

In 1984 yet another new constitution, the *Republic of South Africa Act* 1983, introduced substantial changes. The State President replaced the office of Prime Minister, and acquired a pivotal executive and legislative role. The most significant factor of the 1983 constitution was that while it co-opted the participation of the Coloured and Asian national groups, it still excluded the African majority. The unitary cabinet structure that existed before was replaced by a more complex, racially-based system consisting of a 'Cabinet' dealing with 'common' or 'general' affairs relating to all race groups, and three Ministers' Councils, responsible for the separate 'own affairs' for 'whites', 'Indians', and 'Coloureds'.

Negotiations and current constitutional developments in South Africa

Since the'unbanning' of all political organisations in South Africa as from February 1990, a process of constitutional negotiation has been in progress.

Initially there were more than 23 political parties and organisations represented in the Multi-Party Negotiation Process (MPNP). This is a forum which was set up to agree on the structure and function of the transitional executive government, and also to draft an outline of a transitional constitution. In producing this constitutional draft, the Technical Committee on Constitutional Matters was instructed to make provision for:

- the election, according to a system of proportional representation, of a constitution-making body (CMB), and of a legislature and national government for the transitional phase;
- the election of regional legislatures and the establishment of regional governments in the transition;
- the powers, functions and structures of regions for the transitional period;
- fundamental human rights; and
- a constitutional court.

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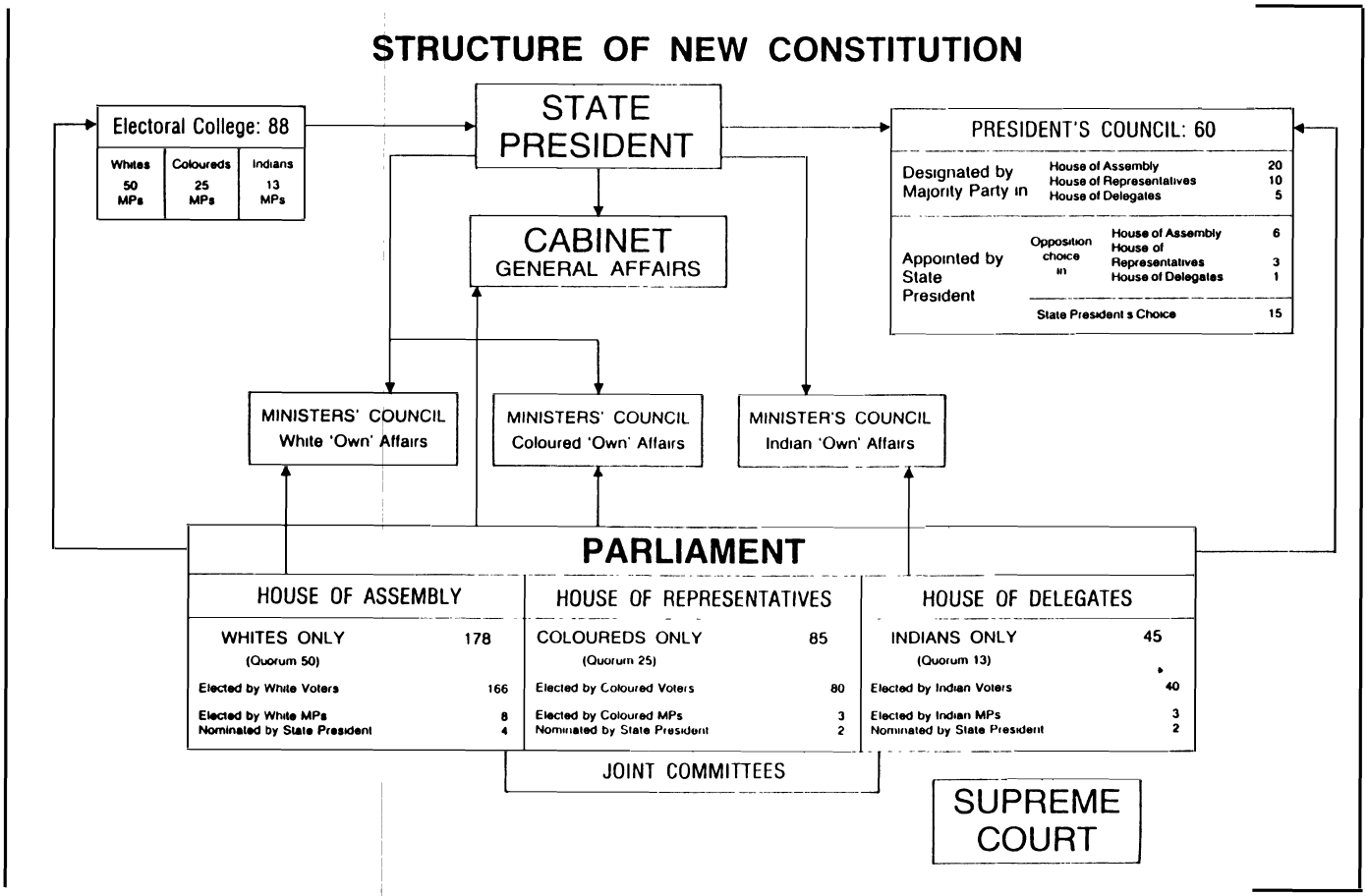
The Committee was appointed by the late President of the ANC, Dr Reginald Oliver Tambo, on the advice of his National Executive Committee. The Committee started its work on 8 January 1986, holding its sessions both in Lusaka and London before relocating permanently to South Africa. Other members who served on this committee were Professor Kader Asmal, Mr Penuell Mpapa Maduna, Dr T. Pekane, Professor Albie Sachs, Professor Jack Simons, Dr Z. Skweyiya, to be later joined by Ms Brigette Mabandla.



The present legislature enacted in September 1993 set up a multi-party transitional governing body in South Africa. The new Transitional Executive Council (TEC) will administer South Africa in the run-up to the first multi-racial elections, scheduled for 27 April 1994. The TEC includes representatives of all parties in the current constitutional negotiations; other political organisations outside the negotiation forum are being invited and persuaded to join.

The elections on 27 April 1994 are for the establishment of the CMB which will draft a constitution for a future democratic South Africa. The CMB will be a sovereign body which will draft and adopt the new constitution subject only to the limitation of agreed constitutional principles. The parties in the MPNP have already agreed to 26 binding constitutional principles that will bind the CMB, which would otherwise be sovereign.

These constitutional principles include, among other things, constitutional provision for one sovereign state; common South African citizenship; a national democratic government which will not encroach on the integrity of regional administration; an exercise of power by the central government on foreign affairs, functional uniformity, national economic policy and minimum national standards; and a justiciable Bill of Rights.

The Constitutional Court will ensure that constitutional proposals conform to the agreed Constitutional Principles. The purpose of this paper is to argue that even after the constitution-making process, there are cogent reasons for the establishment of a Constitutional Court as a permanent feature of a future democratic constitution. This court would have as its mission the development of a constitutional jurisprudence that would guide future generations of this long fought for democracy.

Control over the constitutional validity of legislation and executive action is a basic theme of constitutional law. Such control is based on the assumption that a constitution forms part of the 'supreme' law or 'higher' law which ought to regulate or control the power of legislators.

Two ways of controlling bodies independent of parliament can be adopted. The first of these is the process of scrutinising the legislative proposals before they are passed by the legislature or before the laws are promulgated. The second is *a posteriori* examination of measures already promulgated into law. In some cases, the two are combined.

Constitutional courts today

The American and European models of constitutional review differ. Two broad types of judicial control over constitutionality of legislation may be distinguished. The first is the 'decentralised' type which gives the power of control to all judicial organs of a legal system; this originated in the United States of America. The second type is the 'centralised' control which confines the power of review to a single judicial organ. The 'centralised' type may by analogy be referred to as the Austrian system of control, Austria being the first country to have established a Constitutional Court, in 1929.

In the American system the constitutional review is part of the judicial system, and is not distinct from the administration of justice. The disputes as a whole are decided by the same courts, by the same procedures and in essentially similar circumstances.

It is in the nature of the American system that constitutional matters may be found in any case, and do not receive special

treatment. In the words of de Tocqueville 'An American court can only adjudicate when there is litigation; it deals only with a particular case, and it cannot act until its jurisdiction is invoked.[1] On the other hand, in countries where constitutional courts have been established, constitutional issues are decided by a court specially established for the purpose of constitutional litigation.

Both models are means to the same end. Both protect fundamental rights against the infringement by governmental authority, particularly by the legislature; both try to maintain a balance of power between the state and its agencies; both protect the separation of powers.

To give a better understanding of the work of constitutional courts, this article discusses three recent anti-fascist constitutions: the pre-unification German constitution, and the Spanish and Portuguese constitutions.

The German model

The German Constitutional Court was prescribed by the 1949 constitution and established in 1951. It has the widest jurisdiction of all European Courts, and is the most powerful.

The court 'shall consist of federal judges and other members' (Art.94): the Lower House (the Bundestag) elects half the members and the other half is elected by the Upper House (the Bundesrat). Members of the court may not be members of parliament, the federal government nor of government agencies. The Upper House elects the judges directly, while the Lower House elects them indirectly through a 12-person judicial committee. In both cases, a two-thirds majority is required which in turn ensures that there is a 'democratic' legitimacy in the election of judges.

The Constitutional Court has two panels of 16 judges, and sits in two independent divisions. The court sits with two panels of eight judges, each being a panel 'Federal Constitutional Court'. A decision given by a panel in a constitutional law problem settles the relevant question, and if the other panel wishes to deviate from that decision, a plenum of 16 judges will be convened. A judge is elected to one panel only and a judge from the other panel may not deputise for her or him (Art. 15 and 16), thus maintaining the independence of each panel.

Observations that can be made on this selection mechanism are, first, the broad base from which judges are drawn enables academics and civil service jurists to be eligible; second, political parties have a leading role in the recruitment of judges, and the court will be widely representative of participating interests. This mechanism of selection is said to ensure a blend of judicial and legislative selection and seems among other things, designed to neutralise the possibility of manipulation of the Constitutional Court by politicians.[2]

In addition to the court's constitutional jurisdiction an individual is allowed immediate access to the court for a complaint about the infringement of individual human rights, or a claim that an individual right has been violated by judgment, administrative act or statute. The individual is allowed such direct access where there would be serious and unavoidable disadvantage and delay if she/he were to exhaust all other remedies first.

There are also provisions which give certain state agencies the right to bring proceedings to determine whether a law substantially conforms to the Basic Law and respects the basic rights of individuals.

The Spanish model

The 1978 Constitution, often referred to as the anti-fascist constitution, established the Spanish Constitutional Court. Spain is a unitary state with autonomous regions that have considerable governmental authority. Title IX of the Constitution, together with other provisions of the Constitution and the organic law, cover the composition and powers of the Spanish Constitutional Court.

The 12 judges on the bench are appointed by the King, four on nomination by Congress, four by Senate, two by government and two by the General Council of the Judicial Power. Article 159(2) of the Law on Federal Constitutional Court sets out qualifications for judges, saying that 'they shall be appointed from among the magistrates and prosecutors, university professors, public officials and lawyers, all of whom must be jurists of recognised standing with at least fifteen years of experience in the exercise of their profession'. They are appointed for a period of nine years, and a third are renewed every three years. Membership of the Constitutional Court is incompatible with any representative function, any political or administrative office and any professional or commercial activity.

The Constitutional Court has jurisdiction over conflicts between state authorities; the constitutionality of laws and treaties; and the petition of *amparo* against administrative acts and court decisions interfering with fundamental rights. The writ of '*amparo*', dating back to the Kingdom of Aragon, is an institution that has been used since the 19th century in Latin America and was adopted in the Spanish Constitution of 1931. In the present Constitution, an individual may invoke this writ to request the Constitutional Court to assure protection of individual rights against an administrative act or a judgment of a court, when the ordinary courts have not provided that protection.

In addition, an ordinary court may refer a case to determine the status of a law which may be unconstitutional.

The Portuguese model

Following the overthrow of the fascist regime and the establishment of the constituent assembly, Portugal adopted a constitution in 1976. There was later a large scale review of the Constitution in 1982 and, following that, a Constitutional Court was established with comprehensive jurisdiction.

The Constitutional Court comprises 13 judges, ten of whom are appointed by the legislature, the Assembly. The other three are co-opted by the appointed members. The ten members are supposed to be elected *en bloc* by the Assembly by a two-thirds majority. Since no political party has a two-thirds majority, there has to be a process of give-and-take before the list can be agreed on. In practice, half the judges come from members of the ordinary courts and half from outside – mainly the universities.[3] When the ten judges co-opt the other three judges, they choose three people of high standing who are not clearly associated with any political position.

The Constitutional Court has a number of functions. Article 213 gives the court jurisdiction to decide whether the President

is incapacitated or not, and article 213(1) provides that the Constitutional Court 'shall be competent to judge whether acts are unconstitutional and illegal in accordance with the constitutional provisions'.

Among other functions is a provision enabling certain legal texts (treaties, decrees, etc.) to be sent to the court before they become law. This may be referred to as 'preventive' scrutiny.

The court is able to rule on the unconstitutionality of any provisions of the law of general application, the illegality of regional acts or the illegality of an act on the grounds that it violates the rights of the region. Here we have a case of 'abstract' scrutiny. Direct recourse to the court for an abstract opinion on constitutional questions can be had by, among others, the President of the Republic, the President of the Senate, the President of the Assembly, and the Prime Minister. Ordinary members of the public do not have direct access to the court but can generate sufficient public pressure to get one of the above-mentioned, particularly the Ombudsman, to bring a case.

Article 283 enables the Constitutional Court to perform the interesting function of calling on Parliament to adopt legislation where no law exists to give effect to constitutional rights. Article 280 provides for 'concrete' scrutiny for constitutionality and legality in the usual indirect way of testing constitutionality during a court case.

The South African judiciary

South Africa is at present negotiating to free itself from the oppression and repression that has characterised the apartheid regime since 1948. The agreed binding constitutional principles indicate that the final product of negotiations will be a constitution with programmatic features similar to those found in the anti-fascist constitutions of Germany, Portugal, Spain and others. These countries adopted a centralised system of judicial review after the reign of the fascist regimes. The main reason for opting for specialised Constitutional Courts was the lack of confidence in the judiciary that once served those regimes – in Germany, for instance, many of the judges were incriminated through their collaboration with the Nazis. In other instances there was lack of confidence in the suitability of the traditional and formalistic judiciary for the new task of protecting constitutional guarantees.

Article 4 of the South African Multi-Party Negotiating Process document, 'Binding Constitutional Principles' provides for the establishment of a judiciary that shall be 'competent, independent and impartial and shall have the power and jurisdiction to safeguard and endorse the constitution and all fundamental rights'.

The present South African Supreme Court (in particular the Appellate Division) lacks legitimacy in the eyes of the majority of the citizens. It is predominantly white, male dominated, drawn from the middle class (which is to a great extent the Afrikaner community) and for years it identified itself with the racist policies of the apartheid ideology. The judges are not schooled in human rights law, and are not products of a human rights culture.

In a democratic South Africa, the judiciary will be called on to adjudicate on issues involving women, children and workers' rights. The traditional judges who are now on the bench are products of a male chauvinistic society and could not be expected to be sensitive to women's issues. In South Africa, the case of black women is pathetic; they suffer triple oppression: as a nation, as workers and as women.

The youth organisations have been in the forefront of the country's political struggles: children have sacrificed their lives, careers and education. Children have been involved in the fight for fundamental human rights including the right to free and equal, non-racial, non-sexist and compulsory education. Again, the attitude of the judiciary to the plight and detention of children during the recently lifted states of emergency showed shocking judicial insensitivity to the vulnerable position of children in a society.

Commenting on the suitability of the traditional judiciary for the new task of protecting constitutional guarantees, Professor Cappelletti[4] characterised their mentality as follows:

> The bulk of Europe's judiciary seems psychologically incapable of the value oriented, quasi-political functions involved in judicial review ... Modern constitutions do not limit themselves to a fixed definition of what the law is, but contain broad programs for future action. Therefore the task of fulfilling the constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes ...

Cappelletti goes further, to stress that continental judges are usually 'career' judges who enter the judiciary 'at a very early age and are promoted to the higher courts largely on the basis of seniority'. This analysis concludes that the 'career judge', 'develops skills in the technical rather than the policy oriented application of statutes'.[5]

A close study of cases coming before the Appellate Division of the Supreme Court in South Africa demonstrates that most cases have been totally lacking in constitutional matters. Commercial disputes and criminal appeals constitute the bulk of the court's work. The Appellate Division has, therefore, had little opportunity or inclination to build up a constitutional jurisprudence.

In South Africa, clinging absolutely to legal positivism, the parliament, the executive and the judiciary have seen the judiciary's function as being to apply the law, and not to pronounce on matters of national policy. This approach will be at odds with the demands of a new constitution.

The 'Binding Constitutional Principles' provide for a strong central government, and at the same time make provision for strong regional entities with considerable governmental authority. Under Article 19 the 'powers and functions of the national and regional levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis'.

As in other jurisdictions where a Constitutional Court is in existence, the future South African judiciary shall be called on to resolve disputes between the centre and the regions, and also between various organs of state at different levels. The present judiciary has no experience of such conflicts, as South Africa has been ruled as if the other black national groups were outside the realm of the society.

Language and cultural rights will have to be handled with sensitivity at all levels. The constitution will protect minority rights, not minority privileges. The cultural and language rights will also have a bearing on regional disputes. Their protection and promotion will need judicial decisions that will allay the

fears of the minority, while not protecting minority privileges at the expense of the black majority who have been deprived of rights and opportunities for centuries.

The minority groups have been vociferous in demanding that their language and cultural rights be entrenched comprehensively in the constitution, and not be scattered in pieces of legislation and statutes which can be amended or repealed by successive conservative governments. The development of legal jurisprudence devoted to protection of such rights will be strange to judges who sentimentally fought for the protection and preservation of Afrikaans as the dominant official language in South Africa.

Composition of the Constitutional Court

People who criticise the centralised system of judicial review and the establishment of a constitutional court in South Africa argue that, since the South African judiciary as a whole has not been exposed to a human rights culture, it would benefit from a process that requires it to adjudicate and give legal opinion on constitutional and human rights issues. To exclude the judiciary from such educative process would be a mistake, it is said, so let every layer of the judiciary be given the opportunity to deal with such issues.

The practical view is that ordinary courts could get submerged by litigation based on the constitutionality of legislation or executive acts. Such cases would receive neither the time nor the consideration they require. Ordinary courts often lack experience in constitutional matters. The European system seems to have the advantage of isolating important constitutional issues for decision by a specialised court which is free from other duties and can devote time required for this delicate task. The constitutionality of a national law is taken immediately to the Constitutional Court and does not have to go through the various steps of the jurisdictional ladder.

It is further said that it will be difficult to get suitable personnel for judicial appointments. There are few blacks who are qualified as lawyers or practising as lawyers. Even those who are in the senior ranks of practising advocates are products of the same system, with minor differences as to their social and racial background. For those few black lawyers, academic training might even be of a lower standard because of the system of Bantu Education which provided blacks with poor educational facilities.

Certainly the problem is there. The country will still depend on the judicial personnel coming from the white community because they have had a monopoly of better educational facilities and an exclusive racial educational system that has, to date, not been affected by the political upheavals raging in the country. But massive political educational processes are taking place within the white communities, and attitudes are beginning to change. The process of psychological reconditioning of racial prejudices is likely to be slow, but progress is positive. Apart from that, a South African democratic state can import skills from other jurisdictions, especially from countries where the institution of a Constitutional Court has been a resounding success, for example, Austria, Germany, Italy, Portugal and Spain.

Access to the court

The majority of future litigants who will make use of the Constitutional Court will be the black population which has not enjoyed fundamental human rights since the days of colonialism. Unfortunately they constitute that section of the community which is without property and has high rates of unemployment and illiteracy.

The black communities were also rendered poor by the exorbitant fees charged by the legal profession when defending political activists. This was made worse by the existence of the system of a divided bar which results in duplication of effort and charges. It is a system which has to be seriously reviewed. There will have to be revision of the existing prohibitive legal fees.

Some of these problems will be ameliorated by the establishment of institutions and offices of Human Rights Commissions, the Ombudsman and public interest rights organisations.

Conclusion

South Africa is poised to adopt a progressive constitution that will have strong regional governments and a justiciable Bill of Rights. The constitutional model presupposes a system of judicial review by a constitutional court. The performance of the present judiciary suggests that the country should adopt a 'new slate' principle, and establish a Constitutional Court that will be representative of the people as a whole and will enjoy acceptance and legitimacy in the eyes of the citizens. Further, there are experiences elsewhere in the world from which the people of South Africa can learn.

References

1. de Tocqueville, Alexis, *De la Democratie en Amerique,* 1835, collection 10/18 (Paris: 1963, p.78 (translation).
2. Brinkman, G., *The West German Federal Constitutional Court: Political Control Through Judges,* p.102, quoted by Langa, Pius 'A Constitutional Court for South Africa: Mechanism for Appointment of Judges' (1991), Conference on a Constitutional Court for South Africa. See also, McWhinney, E., 'Judicial Restraint and the West German Constitutional Court', (1961) 162 Vol. 75 *Harvard Law Review*, p.9.
3. These observations were made from notes in an interview by Professor Albie Sachs in Coimbra on 27 December 1990, with Vital Moreira of the University of Coimbra. The latter is joint author of the most widely used annotated version of the Constitution of the Republic of Portugal. Moreira is also a former member of the Constitutional Court of Portugal from 1983-89.
4. Cappelletti, Mauro, *Judicial Review in the Contemporary World,* 1971, Bobbs-Merril, Indianapolis, p.45.
5. Cappelletti, above.