

Tenure of the judges of the Constitutional Court

Memorandum submitted to parliament by Justice Arthur Chaskalson, president of the Constitutional Court

- 1 **T**he European constitutional courts find their place in a civil law system in which there is a career judiciary. Their judges are usually not part of the career judiciary and are appointed for fixed periods of time. Though there are differences between the various countries, the majority of constitutional judges are drawn from the academy and the political sector. For instance the past president of the French constitutional court was previously the Minister of Foreign Affairs. His predecessor was minister of justice and after completing his term on the constitutional court, became president of the senate. The president of the German constitutional court was formerly minister of justice of one of the states; her predecessor had been an academic, a minister in a state cabinet, and later became president of the Federal Republic of Germany. A former president of the Italian constitutional court, Mr La Pergola, was also an academic, a minister in the Italian government, a member of the European parliament and is now a judge of the European court at Luxembourg.
- 2 In SA the Constitutional Court [the CC] finds its place within a common law system which has a professional and not a career judiciary. The CC functions in the same way as other courts do and as part of an integrated court system. Its jurisdiction and place in the court structure is closer to the common law supreme courts such as the US supreme court and the Canadian supreme court than to the constitutional courts of Europe. From enquiries that I have made I understand that the great bulk of the work of the Canadian supreme court falls within the jurisdiction of the CC. The CC hears appeals from other courts including the SCA and has jurisdiction in respect of private law disputes as well as public law disputes. In the structure that is contemplated the CC and the SCA will in effect be at the apex of a single court system in which there will be a single judiciary. The chief justice and the deputy chief justice will sit in the Constitutional Court. It would be strange if the tenure of the head of the judiciary is weaker than the tenure of the judges of the SCA and the high court.
- 3 At present five of the judges of the Constitutional Court have full tenure and six of the judges do not. That is attributable to the transition and the appointment directly to the court of persons who had not held judicial office under apartheid. This should change over the years, as appointments are likely to be made to the court from within the judiciary. If this happens all judges will have tenure. In the meantime, however, this disparity exists.
- 4 The present arrangements concerning tenure is incongruous for various reasons.
 - (a) Tenure is an aspect of the independence of the judiciary. Judges of the CC who do not have full tenure may be perceived to have less independence than judges of other courts who have full tenure. Should they be concerned about their future when they give their judgments? Obviously not, but what might the perceptions be, particularly if on retirement they go into government service, or work for litigants who have had important cases before the CC? The need to seek employment after retirement is undesirable, and the distinction in this regard between them and other judges, is out of place in a single judiciary.
 - (b) Some of the judges of the CC have full tenure and others do not. Those who have full tenure have occupational and pension rights that are more favourable than those of their colleagues who do not have full tenure.
 - (c) Those who have tenure but whose terms on the CC come to an end after 12 years will in effect be demoted at that time and will have to return to a position in the high court. This is undesirable, puts them in an invidious position and at a disadvantage in comparison with the judges of the SCA, who retain their position in that court with the status, salary and other benefits attaching to it until they reach retiring age.
 - (d) Those who do not have tenure and full pension rights will have to seek employment after their term expires. It is undesirable that they should return to the legal profession or that they should enter government service or business, which leaves them with comparatively narrow options.
 - (e) It is undesirable that the best candidates should be deterred by the conditions of appointment from making themselves available for appointment to the CC.
- 5 There is a possibility that judges of the CC will hold office for long periods of time. That is also true also of judges of the SCA and the high court and is in part due to the transition to democracy taking place at a time when there is an imbalance of race and gender in the legal profession and the judiciary as a result of our history.
- 6 There are, however, many examples of long periods of service as a judge in common law countries at other times. For instance, Chief Justice Marshall, who famously declared the US constitution to be the supreme law, served as chief justice of the USA for 34 years; Lord Denning served as a judge in England for 38 years during which he was Master of the Rolls for 20 years; in South Africa Chief Justice Innes was a judge for 25 years of which 18 years were served on the appellate

division; Chief Justice Rumpff was a judge for 28 years of which 20 years were served on the Appellate Division; Chief Justice Corbett was a judge for 33 years of which 22 years were served on the appellate division.

- 7 The concern expressed about the possibility of long periods of service on the CC must be weighed against the need for the new court to establish itself and gain the confidence and respect of the community and the profession. Stability and continuity is important. Also important is the preservation of skills that are still comparatively scarce particularly during the transitional period through which we are passing. The older judges of the CC are presently the white male judges. Three of them are likely to retire within three years even if the tenure provisions are changed. Those most affected by the term provisions will be the four black male judges and the two judges who are women. All of them will be lost to the court prematurely if they have to leave the court after 12 years service. And what is more, all will go at the same time.
- 8 If it is considered undesirable that a judge should sit on the CC for more than 15-20 years this can be taken into account when appointments are made. Although this would not necessarily be desirable, there could even be a provision fixing a minimum age for appointment to the CC, or a provision that CC judges who have not yet reached retiring age be released from active service after 15 or 20 years on the CC. This could be dealt with in the Judges Remuneration and Conditions of Employment Act and need not impede the constitutional amendment required to extend the period of service of CC judges. The fairest and the most defensible provision is, however, to treat all judges equally. If the CC judges have the same conditions of tenure and pension rights as the other judges do, equality will be achieved, and no suggestion can be made that CC judges are being

preferred or discriminated against. That would best serve the standing of the court and its integrity as an institution.

- 9 The Bill of Rights lies at the heart of our new legal order. It is and must continue to be central to all aspects of our law. And all law has to be shaped consistently with its provisions. The Constitutional Court has a crucial role to play in this. It should be, and be seen to be, an integral part of the court system and not apart or on its periphery. Its judges should be, and be seen to be, part of a single judiciary, and not a breed apart, subject to weaker conditions of tenure and less favourable terms of employment than other judges are.
- 10 This is the position occupied by judges who exercise constitutional jurisdiction or enforce bills of rights in the highest courts of "common law" countries such as the United Kingdom, the other countries of the Commonwealth and the United States of America, whose legal systems are similar to ours. In those "common law" countries whose judges have power equivalent to that of the judges of our Constitutional Court, I am not aware of any distinction made between the tenure of judges of the highest courts that shape the law and judges of the lower courts who are bound by their decisions.
- 11 At one time there was a proposal that the CC and the SCA should be merged. Serious consideration was given to that possibility but ultimately it was rejected. If merger had taken place it would have been unthinkable for some of the judges of the merged court to have full tenure and others not. It is not clear why, in a single judiciary, that distinction should be maintained simply because the courts were not merged.
- 12 Stability, continuity and coherence are of signal importance to the development of the law. They are of particular importance now as the

new legal order is being established. In common law countries, law, once established, changes incrementally. Precedent is important and given greater weight than is the case in the civil law continental countries, where there are career judiciaries. There, most constitutional courts function apart from the ordinary courts. In Austria, which is the oldest constitutional court in Europe, judges have full tenure serving until the end of the year in which they turn 70. In most of the constitutional countries, however, constitutional judges are appointed for fixed terms. They are not part of career judiciaries but are drawn from the academic and political sectors to which they return after completing their terms. I have given examples of career paths of continental constitutional judges whom I have met and spoken to. This is not the career path of South African judges.

- 13 The jurisdiction of the CC and its place in the court structure, though different in some respects, is close to the position of the supreme courts in common law countries in which the constitution is the supreme law, or there is a bill of rights. It is an apex court of a single judiciary. In the United States supreme court judges are appointed for life. This is undesirable for there is no retiring age and it is left to the judges themselves to decide when to retire. In the Commonwealth the retirement age of judges varies from country to country – from 65 in India to 75 in Canada.
- 14 In SA the retiring age of judges is 70. In the case of judges who have had less than 15 years service when they reach 70, there is an entitlement to continue in office until the completion of 15 years service, but not beyond the age of 75. In the rhetoric about "life tenure" this should be made clear, for the public think that "life" means "life". What is in issue is not the age at which judges in South Africa should retire; it is, whether CC judges should be treated differently to other judges, or whether all judges should have the same tenure and conditions of service. 