Proposed amendments of the Constitution

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Representatives of, amongst others, the General Council of the Bar of South Africa, have competently and comprehensively analysed and commented on the proposed amendments of the Constitution and the Superior Courts Act. Such analysis and their comments were, prudently and correctly, restricted to the desirability and constitutionality of the proposed amendments.

The conclusion reached by the GCB's representatives was that the majority of the proposed amendments were either not justified or unnecessary, or would serve no purpose, or would even be unconstitutional or, at least, undesirable.

What the report of these representatives also mentioned was that the proposed amendments would give the government, and effectively the ruling party, greater control over the judicial authority and, therefore, would undermine the independence of the judiciary.

The reigning political party already controls the legislative and the executive authorities. It has also, through its direct and indirect representation on the Judicial Services Commission and often, I believe, in ostensible compliance with the provisions of section 174(2) of the 1996 Constitution, gained some control over the judicial authority by means of appointments to the Benches of the various courts. Should the President or executive authority gain exclusive control over the appointment of Judges President, it would gain further control over the judicial authority, since Judges President allocate cases to judges and a 'horses for courses' situation may or can very well arise – reminiscent of the pre-1994 situation?

Since very little, if any, justification for the proposed amendments has been advanced, the question therefore arises whether the proposed amendments were not motivated by the political desire on the part of the governing party to gain further control over the judicial authority which, ideally, should of course be as independent as possible.

Those politicians who created and/or support the proposed amendments, to the effect that the President should appoint also the Judges President, can rest assured that, as far as the Free State is concerned, the person who has been earmarked to succeed the present Judge President will no doubt be recommended for appointment as such by the JSC.

An amendment to the Constitution that I believe should be considered is to introduce in the Bill of Rights chapter the right for litigants to choose or select which judge should preside in the trial to determine their dispute(s). I am convinced that many judges would support such an amendment, as it would ensure that they would then have more time to spend with their families. 🕮

Is the legal profession's 'New Clicks' nigh?

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During January 1995, the then Chief Justice, in terms of section 43(2)(a) of the Supreme Court Act 1959, issued the Uniform Rules of Court for the High Court. That he could only do after consultation with the Judges President and with the approval of the State President. Amongst those rules was a rule 43(7), which set counsel's fees at R25,00 for an appearance in an opposed matter under that rule (vide *Varkel v Varkel* 1967 (4) SA 129 CPD at 133H-134A).

Section 43(2)(a) of the Supreme Court Act was repealed by the Rules Board for Courts of Law Act 1985. That Act created a board, under the chairmanship of a judge (appointed by the Minister of Justice) consisting of 12 persons of whom eight are from the legal profession (four being practitioners). It provided that the board may make, amend or repeal (and also review), subject to the approval of the Minister of Justice, rules for the different tiers of courts regulating, amongst others, 'fees and costs,' and 'the tariff of fees chargeable by advocates ... ' In November 1991, the rule 43(7) fee was set at R170,00 by the Rules Board. Since then it has not been 'updated.' With only a modest 7% annual inflation since then, that fee should have been R500,00 today.

The infamous Superior Courts Bill (B52-2003, dated 19 October 2005) now envisages that the Minister of Justice must make, amend or repeal rules of court 'after consideration of the advice of' an Advisory Board for Rules of Court. It would also be a 12 member board, but with only two members from amongst practitioners (one of whom would be a senior practising advocate and the other a senior practising attorney). Those rules must also regulate 'fees and costs' and 'the tariff of fees chargeable by advocates ...'

This Bill follows a similar pattern as the Medicine and Related Substances Act 1965, which establishes a pricing committee, which makes recommendations to the Minister who may then make regulations on a pricing system for all medicines and scheduled substances sold in the Republic. The concern to ensure the provision of more affordable medicines in terms of that Act culminated in the *New Clicks* saga. In that case, the pharmacy profession demonstrated that the fees that were set were insufficient even to cover the cost of dispensing (vide *New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 SCA at 277F; *Pharmaceutical Society of South Africa v The Minister of Health; New Clicks SA (Pty) Ltd v Dr Manto Tshabalala-Msimang NO* (2005 (6) 576 (SCA. However, in the Superior Courts Bill the jurisdictional threshold is weak, and the Minister of Justice has to *consider* the advice of the Board only and may reject that advice, in the words of Traverso DJP 'to go on a frolic of her own' (vide *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang* 2005 (2) SA 530 CPD at 589H).

Not difficult then, to imagine a new rule 6(16) (or, for that matter, a rule 39(25)), reading:

> 'No advocate appearing in a case under this rule shall charge a fee of more than R80 if the claim is undefended or R170 if it is defended, unless the court in an exceptional case otherwise directs.' 🕮