Constitutional amendment 2010

– a major shift in our separation of powers doctrine!

By Patric M Mtshaulana SC, chair of the General Council of the Bar of South Africa

The Constitutional Amendment Bill 2010 proposes to make the Chief Justice the Head of the Judiciary. In that capacity (s)he will be empowered to exercise responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions by all courts. If the constitutional amendment is passed, the judiciary shall consist of the Constitutional Court (the CC) as the highest court (Apex), the Supreme Court of Appeal, the High Courts of SA (or courts of similar status), the lower courts and other courts recognised or established by the legislature. The traditional courts fall into this latter category.

It is not entirely clear at this stage what the impact of the Bill will be. Up to now the CC has been the highest court in constitutional matters only. The Bill would make it the highest court in the Republic, with jurisdiction to hear appeals in all matters, including non-constitutional matters. It is arguable that this is not a dramatic change. Although the CC will have jurisdiction to hear appeals in non-constitutional matters a litigant would require leave of the CC before (s)he can go to the CC on a non-constitutional matter,. The CC itself will be constrained by law to grant leave only in those cases where it is in the interest of justice to do so.

Presently the CC is the highest court in constitutional matters. The court is the only court that decides finally what a constitutional matter is. Because of this, it can grant leave to appeal on any matter which it considers to be a constitutional matter. Under the amendment it will do the same, with the qualified added power to grant leave to appeal in non-constitutional matters only when the CC considers it to be in the interests of justice.

According to the summary of the department which accompanied the Bill to Cabinet, the aim of the Bill is to make the CC the Apex court. Thus the summary goes on to say that the Bill gives the CC jurisdiction as the highest court in all constitutional and other matters. According to this summary, the CC would be the highest court and the SCA an intermediate court. From this it is clear that what was sought to be achieved was to change the status of the SCA from the highest court in non-constitutional matters to an intermediate court. From this perspective, the change may be significant, having regard to the additional proceedings to which litigating parties may be subjected before a matter is finalised.

Under the amended Constitution, parties will have to appeal to the High Courts. If they are not satisfied they will be entitled to go to the SCA and if the matter is constitutional or the CC considers it to be in the interests of justice to grant leave to appeal to it the matter may still go to the CC. The question is: must the SCA still be the intermediate court in those circumstances or may the CC grant leave to appeal to it without a non-constitutional matter being heard by the SCA?

This Bill appears to be more about power than reforming the administration of justice. What seems to have been the drafters' concern was: if the courts are to be controlled by an institution other than the Minister, to which court should the control be given? Which court can the executive influence indirectly in the sense of, for example, appointing judges who the executive believes are committed to transformation? I have no problem with the executive seeking such influence. The country is in transition and transformation of the Bench is a necessary part of the process.

However, in 1994 the choice was for the executive to have that indirect influence only in relation to the CC but to have no such influence in relation to the rest of the judiciary. This was a response to the indirect influence the apartheid regime had on the then Appellate Division in particular. For this reason, while in terms of section 174(4) of the Constitution the President has a choice of selection from one or more names for appointment to the CC from the list prepared by the JSC, he is bound by the choice of the JSC when appointing other judges. Similarly, while he is free to decide who the next Chief Justice is, he is bound by the choice of the JSC for the head of the SCA. The distinction was made because the CC was seen as a special court whose task it was to take special decisions on policy matters. However, the incumbents were also to have short terms of office. The intention was clearly to move away from the pre-1994 influence of the executive on the judiciary in the broader sense.

The essence of the amendment is that the court whose mode of appointment is most in the hands of the executive is now going to be the court that is the head of the judiciary and the court to decide what the law is in non-constitutional matters too. What is the justification for the JSC? Internationally, judges are appointed either by the Head of State or Parliament or an independent body such as the JSC. The country must make a choice between having an independent body appoint judges or giving the Executive or Parliament the power to appoint after recommendations from the JSC. What this amendment is doing is giving the Executive power to appoint Judges for life and these judges will determine the jurisprudence of the country for the commensurate period. If that is not strengthening the hand of the Executive over the judiciary I do not know what does. The objections against the SCA are mainly that this court is not transformed. But the sub-text is that it is not appointed by the ruling party. In the United States of America the Supreme Court justices are appointed by the President but the process of nomination is very different. I have no problem in principle with that system. I however have a problem with such a shift made while everyone is asleep. This is a major change to our system of separation of powers.

My concern is that this Bill is driven more by power considerations than the desire to improve the quality of the administration of justice in SA. Let us be very clear: changing the name of the magistrate's court to 'Lower court' does not change the quality of justice these courts will deliver to our people. Having magistrates appointed by the JSC will merely replace the Magistrates Commission with the JSC, without doing anything to improve the quality of magistrates' perfor-

mance. What SA requires are changes that will be directed at ensuring that our people, the poorest of the poor, those that come into contact with the law at levels lower than the High Courts, are provided with better chances of having their matters decided finally without the need to appeal. Their matters in most cases involve less money than others but the desire to know who is right (*wie heeft gelijk?*) is central. They go to the courts to seek justice. The only solution is to ensure that your court of first instance has the best and most experienced people. That reduces appeals or opportunities for appeals.

This Bill not only fails to introduce a system which ensures a strengthening of the lower courts but in addition introduces a further possibility for appeal and thus extends the chain of the judiciary to the detriment of poor people.

The Dutch system, which has an intermediate court as envisaged in this Bill, has the *Rechtbank* as the court of first instance. This court always sits with three judges comprising two permanent judges and an acting judge. From this court the matter may be taken to the *Hof*. Each *Hof* is responsible for a few provinces. From the *Hof* the matter goes to the *Hoge Raad*. Merging the lower courts with the High Court and creating a strong court of first instance would go a long way in improving the quality of justice for poor people and reducing the opportunity for appeals. This would definitely reduce the load of higher courts and improve their judgments and the quality of justice for all our people.

The Dutch system aside, let us look at these changes from what we currently have.

Presently, lower courts may not hear constitutional matters. In non-constitutional matters, appeals from lower courts go to the High Courts. From there the matter will either go to the CC or the SCA. Notionally therefore we have three courts for both constitutional and non-constitutional matters. As it is, these courts are inaccessible to the majority of South Africans who do not have the financial means to litigate. Looked at from this angle the constitutional amendment is retrogression. Litigants in future may have to go through four different courts before the last word is spoken in any dispute (and what if the matter commences in a traditional court?). This is simply too much litigation, too heavy a burden on the fiscus and unaffordable to most South Africans.

STOP PRESS

Sydney and Felicia Kentridge Award

Abram ('Bram') Louis Fischer QC, political activist and fearless champion of apartheid victims, renowned for saving former President Nelson Mandela from the death penalty in the Rivonia trial, not only was the first advocate to be posthumously reinstated to the Bar but also on 23 July 2010 became the first posthumous recipient of the GCB's prestigious Sydney and Felicity Kentridge Award for Service to Law in Southern Africa for his exceptional contribution to the development of the law in South Africa. The award is presented annually to a person who has made an exceptional contribution to the development of the law in Southern Africa.

The award ceremony was appropriately held in Bloemfontein where Fischer was born and later died, debarred and serving a life sentence for his efforts to help change the 'law as it was' to the 'law as it ought to be.' To quote Justice Chaskalson, Fischer's junior with George Bizos SC, in the Rivonia trial: '[Bram] served the law as an advocate by defending those who were the victims of injustice and he served the law at the political level by participating in the struggle to promote and secure a society based on laws consistent with justice.' Patric Mtshaulana SC described Fischer as a visionary who gives us hope for the future of this country and Africa and referred to Fischer's famous statement that 'the sun will rise.' [From the dock, Fischer had quoted the famous words of President Paul Kruger: 'With confidence we place our case before the whole world. Whether we are victorious or whether we die, freedom will arise in Africa like the sun from the morning clouds.' (*Met vertrouwen leggen wij onze zaak open voor de geheele wereld. Hetzij wij overwinnen, hetzij wij sterven: de vryheid zal in Afrika rijzen als de zon uit de morgenwolken.)*]

Former Chief Justice Arthur Chaskalson (left) and Patric Mtshaulana SC, chairman of the GCB (right,) at the presentation of the award to Fischer's two daughters, Ruth Rice and Ilse Wilson.

GCB's annual general meeting in Bloemfontein on 23-24 July 2010

At the conclusion of the annual general meeting the Executive Committee was constituted as follows: Rashid Vahed SC (chairman), Ishmael Semenya SC (deputy chairman), Izak Smuts SC (vice chairman), Soraya Hassim (honorary secretary), Anthea Platt (assistant honorary secretary), Tayob Aboobaker SC, Jeremy Muller SC, Kgomotso Moroka SC, Gerrit Pretorius SC, McCaps Motimele SC, Archie Findlay SC (*ex officio* as convener of the National Bar Examination Board), Roland Sutherland SC (*ex officio* as convener of the GCB Finance Committee) and Mbuyiseli Madlanga SC (*ex officio* as the GCB's representative on the Judicial Service Commission (who serves there with Izak Smuts SC as the GCB's other representative)).

A historic resolution was adopted at the AGM in terms of which equal governance provisions in relation to the partnership with Advocates for Transformation were entrenched in the constitution of the GCB.