DEMOCRATIC GOVERNANCE AND RIGHTS UNIT

UNIVERSITY OF CAPE TOWN

Submission to Parliament:

Constitution Seventeenth Amendment Bill [B6-2011]

Introduction

1. The Democratic Governance and Rights Unit ("DGRU") is an applied research unit based in the Department of Public Law at the University of Cape Town. The mission of the DGRU is to advance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. The DGRU's primary focus is on the relationship between governance and human rights, and it has established itself as one of South Africa's leading research centres in the area of judicial governance, conducting research on the judicial appointments process and on the future institutional modality of the judicial branch of government.

2. DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. DGRU's focus on judicial governance has led to it

making available to the Judicial Service Commission research reports on candidates for judicial appointment, and to DGRU researchers attending, monitoring and commenting on the interviews of candidates for judicial appointment.[1]

3. In light of the DGRU's interest in matters of judicial governance, the Bill is of interest and relevance to the core work of the DGRU. In July 2010, the DGRU made a submission in relation to an earlier draft of the Bill. In that submission, we dealt with the tenure of judges of the Constitutional Court, and the establishment of the Constitutional Court as an "apex court." The provisions relating to tenure do not appear in the latest version of the Bill. We would like to take the opportunity, however, to further develop our submissions in relation to the issue of the apex court.

The current position and the proposed amendment

4. Section 167(3) of the Constitution provides that:

> *"The Constitutional Court-*
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> *(a) is the highest court in all constitutional matters;*
>
> *(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and*
>
> *(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."*

5. Section 168 (3) of the Constitution provides that:

> *"The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only –*
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> *(a) appeals;*
>
> *(b) issues connected with appeals; and*

[1] These reports are available at http://www.dgru.uct.ac.za/research/researchreports/

(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament "

6. These sections therefore establish the dispensation whereby the Constitutional Court is the highest court in constitutional matters, and the Supreme Court of Appeal is the highest court in non-constitutional matters.

7. Section 3 of the Bill would changing this situation by substituting the following provisions into Section 167 of the constitution:

"(3) The Constitutional Court –

(a) is the highest court of the Republic; and

(b) may decide –

(i) constitutional matters;

...

(ii) any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court..."

Summary of DGRU's July 2010 submission

8. In our previous submission, we discussed the different approaches of specialist constitutional review, as practised in many European countries, and of "decentralised" constitutional review, as practised in countries such as the United States. We argued that the South African system from 1994 to date is best considered as a hybrid of those two models, since all courts (from High Courts upwards) are able to pronounce on constitutional issues, but the final say lies with the Constitutional Court on constitutional issues, and the Supreme Court of Appeal ("SCA") on non-constitutional matters.

9. We further noted some of the advantages and disadvantages of the "European" and "American" systems of constitutional review. We observed that the European system is said to have the advantage of isolating the constitutional issues to be decided by a specialist court which is not burdened by other cases, and can dedicate appropriate time

to consider the constitutional issues fully. On the other hand, we noted arguments that the American system was better at ensuring that constitutional rules are spread throughout different areas of the law. We suggested that this consideration was less pressing in the South African context, since our High Courts are permitted and mandated to pronounce on constitutional matters.

10. We noted that concerns had been raised that the interpretation of a "constitutional issue" for the purposes of determining the CC's jurisdiction has been strained, and that the proposed amendment would remove this uncertainty. However, in concluding that the amendment ought not to be passed, we noted several difficulties that could result from the amendment being passed, namely:

- The fact that current members of the Constitutional Court and SCA have been appointed on the basis of the current split in jurisdiction, with the result that members of the Constitutional Court may not have the same expertise as their SCA counterparts in non-constitutional matters which could come before the court.
- The fact that the Constitutional Court is vested with a discretion to decide which cases it will hear could place the court, if its composition remains the same, in an invidious position whereby its own expertise to deal with cases might (consciously or subconsciously) become a factor in deciding whether to grant leave to appeal.
- Similar considerations apply in respect of the likely increase in workload of the Constitutional Court. We noted that no provision appeared to be made for increasing the number of judges on the Constitutional Court.
- The loss of a dedicated constitutional court to develop the jurisprudence of a young constitutional democracy.

11. In the remainder of this submission, we will attempt to elaborate on some of these concerns.

Appointments and the composition of the court

12. From having observed the Judicial Service Commission ("JSC") interviews of candidates for vacancies on the Constitutional Court in September 2009, and subsequent interviews of candidates for vacancies on the Supreme Court of Appeal, it is apparent to the DGRU that appointments to both the Constitutional Court and the SCA have been made on the basis of the present split in jurisdiction being preserved. Indeed, whilst some

commissioners during the 2009 interviews raised the possibility that the Constitutional Court might eventually become an apex court, it seemed clear to us that the JSC was not conducting the interviews with an "apex court system" in mind.

13. This has implications for the expertise and aptitude of judges currently serving on the court, as well as for judicial tenure of judges on any future apex constitutional court.

14. The issue regarding expertise is clear. Current appointments to the Constitutional Court were not appointed on the basis of their expertise or experience in non-constitutional matters, or matters normally dealt with by the SCA. They were appointed on the basis of their expertise and experience in matters relating to human rights and other constitutional issues.[2]

15. We recognise that Constitutional Court judges are likely to have had experience of adjudication in non-constitutional matters, and could be perfectly capable of adjudicating such matters. However, they were not appointed to the highest court on this basis, but on the basis of their constitutional aptitude and value system.

16. Furthermore, an apex court would be likely to have an impact on the diversity of the bench. If the Constitutional Court were to be dealing with non-constitutional matters, this would almost certainly close the door to candidates for appointment to the Constitutional Court who had not sat as judges in lower courts. This would be unfortunate, as it would create a barrier to greater intellectual diversity on the court.

17. The issue of tenure is that, at present, the tenure of Constitutional Court judges is limited to 12 years or the age of 70, or 15 years or the age of 75, depending on the extent of their previous experience prior to their elevation to the court. This leads to a relatively frequent infusion of fresh judicial blood on the court, which is eminently suitable for a court deciding constitutional matters. However, it is cogently argued that, in non-constitutional matters, this is less desirable, and disrupts the technical expertise built up over time on a court such as the SCA.[3]

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[2] Justice Ian Farlam, *Why fix something that ain't broke?*, Cape Argus, 12 April 2011, available at http://www.iol.co.za/capeargus/why-fix-something-that-ain-t-broke-1.1055652

[3] See *ibid*.

18. If this concern is persuasive, then either further constitutional amendments would be needed to increase tenure, or the "regular turnover" principle would still apply.[4] Neither is ideal for an apex court with general jurisdiction. If amendments are made to increase tenure, the benefits of fresh judicial insight in constitutional matters would be lost.[5] But in the latter instance, skills and experience in non-constitutional matters would arguably be lost too quickly.[6]

19. Furthermore, as will be discussed in more detail below, the size of an apex Constitutional Court would almost certainly have to be extended beyond its current size, in order to cope with the inevitable increase in the court's workload.

The test for jurisdiction

20. Defining when "the interests of justice require" that the Constitutional Court hear an appeal in a non-constitutional matter remains, in our submission, an issue that needs further consideration. Questions need to be asked about how the interests of justice are to be defined in this context, and what standards are to be applied in determining it.[7] We acknowledge that the constitution uses the "interests of justice" standard in determining direct access to the Constitutional Court under Section 167(6), and the test is certainly one that could be regulated by the court and developed through case law.

21. But we suggest there is a fundamental difference between the direct access scenario and the apex court situation: if direct access is refused, litigants will usually still have the possibility of reaching the Constitutional Court once the case has been heard in the lower courts. In the apex court scenario, the test provides a final hurdle in the appellate chain – if the Constitutional Court decides it is not in the interests of justice to hear the appeal, there is no further recourse to the courts. This, we suggest, is an issue that the governing legislation ought to define, or at least provide greater guidance to the court on the exercise of its discretion.

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[4] *Ibid*.

[5] See our July 2010 submission for discussion of this issue.

[6] See Farlam.

[7] For an analysis of similar issues in relation to the jurisdiction of a proposed National Court of Appeals in the United States, see Luther M. Swygert, "A proposed National Court of Appeals: A Threat to Judicial Symmetry", 51 *Indiana Law Journal* 327 1975 – 1976, at p. 340.

22. Questions may also be asked about how the court will decide whether or not to hear an appeal. Will the full court be expected to make this decision – perhaps along the lines of the approach taken by the U.S. Supreme Court?[8] But given the significant number of applications for leave to appeal which are likely to come the way of the Constitutional Court as an Apex court, is such an approach feasible? Or will a panel of judges have to be assigned to make the decision? Would the panel decide by majority or unanimously?[9]

23. It is apparent that there are considerable practical details which the Apex Court proposal needs to address, but which are not covered by the Amendment Bill or the Superior Courts Bill. It may be said that these details may (and perhaps should) be left to the courts to regulate and develop. However, this approach may be compared with the jurisdiction of the United Kingdom Supreme Court, which is extensively regulated by statute.[10] We submit that these difficulties are illustrative of a broader point, namely that the creation of an apex court is, at least at the present time, unnecessary and undesirable.

The likely increase in the workload of an apex constitutional court

24. According to the Department of Justice and Constitutional Development's 2009/2010 Annual Report, during the reporting period the Constitutional Court received 122 new cases, with 134 cases on the register awaiting directions. The court dismissed 84 cases, and gave judgement in 35.[11]

25. During the same period, the Supreme Court of Appeal finalised a total of 42 criminal appeals, 196 criminal petitions, 180 civil appeals, and 295 civil petitions. If one ignores the petitions, the SCA still then finalised a total of 222 appeals, in a period in which the Constitutional Court handed down judgement in 35 cases. This comparison is not intended to embarrass or criticise either court. The different workflows are part of their

[8] In the U.S. Supreme Court, *certiorari* requests (requests for the court to hear an appeal) are circulated among the judges, and the Chief Justice leads the development of a discussion list of potential cases. A decision to grant *certiorari* requires the consent of at least four judges. Britannica Online Encyclopaedia, *Supreme Court of the United States*, available at http://www.britannica.com/EBchecked/topic/574815/Supreme-Court-of-the-United-States. See also Swygert at p. 340, suggesting that the entire court should make decisions on such matters.

[9] Swygert, p. 340.

[10] See *A guide to bringing a case to the Supreme Court*, available at http://www.supremecourt.gov.uk/docs/bringing-case-to-UKSC.pdf

[11] Report, p. 119.

different structures and composition,[12] and different mandates. But this illustrates a looming problem if the Bill is adopted. It must be assumed that, given the possibility of a further stage of appeal, a great many litigants will attempt to appeal to the Constitutional Court. This will present a significant challenge to the court. In addition with having to manage an increased number of cases, it will also, in all probability, receive a tremendous number of applications for leave to appeal.

26. Comparative experience gives some indication of the potential increase in the court's workload were the Bill to be adopted. In Canada, the Supreme Court receives over 500 applications for leave to appeal every year – over and above the cases where appeals or government references go to the court automatically.[13] In the United States, where the Supreme Court exercises an almost exclusive discretion as to which cases it will hear, it hears around 100 cases in a term (from October to June each year), but receives around 7 000 requests to hear cases.[14]

27. A decision on whether to grant leave to appeal can thus be expected to be time consuming and burdensome for the Constitutional Court judges.[15] This may have other consequences. It may be that pressure of an increasing case load would lead to the court's clerks and administrative staff playing an increasing role in assisting the judges, which raises concerns about the delegation of judicial authority.[16] In the United States, concerns have been raised that extensive reliance on clerks and other support staff could adversely impact on the deliberative process, by increasing the possibility that judges may not be fully immersed in the record, arguments and authorities that make up a case, and by decreasing the extent to which judges independently reason their way to a decision.

28. To deal with the likelihood of an increased workload, it is logical to suggest that an apex constitutional court should be staffed by more judges. As the court has, to date, always sat *en banc*, many practical details would have to be sorted out: how large should the

[12] During the reporting period, the SCA consisted of 21 judges, hearing in cases in panels. This contrasts with the Constitutional Court bench of 11 judges, who will usually hear cases together.

[13] *The Constitutional Framework*, Supreme Court of Canada website, available at http://www.scc-csc.gc.ca/court-cour/sys/index-eng.asp

[14] Britannica Online Encyclopaedia. Whilst the number of requests to hear cases has increased, the number of cases actually decided by the court has declined since the 1950s and 1960s.

[15] Swygert, pp. 330; 342.

[16] Daniel J. Meador, "An Appellate Court Dilemma and a Solution through Subject Matter Organization", 16 *University of Michigan Journal of Law Reform* 471 1982 – 1983, p. 472.

panels be? On what basis will they be assigned? Would the court continue to sit with all 11 judges on constitutional matters, and smaller panels on non-constitutional matters? If so, would this infringe the rights of litigants in non-constitutional matters to equal treatment? If the court no longer sat *en banc* in constitutional matters, surely our constitutional jurisprudence would run the risk of being weakened? (There is also a very practical issue: if the court is to sit in panels, it is likely that different panels may often need to hear cases at the same time. This could require renovations of the existing court building to provide additional courtrooms).

29. Expanding the size of the court may lead to other problems. In the United States, it is suggested that increasing the number of judges on an appellate court threatens the predictability and consistency of the court's jurisprudence.[17] It is suggested that increasing the size of a court beyond 15 judges is particularly problematic, as the court becomes too big to sit *en banc*, the use of rotating panels of three judges may undermine the court's ability speak with one voice.[18]

30. If this concern is correct, it would strengthen our argument that turning the Constitutional Court into an apex court is likely to be harmful to our constitutional jurisprudence. We maintain that, at this comparatively early stage in our country's constitutional development, the benefits of preserving a specialist constitutional court, insulated from general appellate jurisdiction, outweigh any benefits from making the court the highest court in all matters. We are concerned that, were the Constitutional Court to become an apex court, the overall centrality of the constitution in public affairs would be diminished, at a time when the constitution is still taking root.

Conclusion

31. In conclusion, we submit that the provision of the Bill which would establish the Constitutional Court as the highest court in all matters, ought not to be passed. We reiterate that constitutional amendments ought not to be made lightly, and without sound, pressing reasons to justify them. The apex court amendment does not seem to present such a case.

[17] Meador, pp. 473 - 474

[18] Meador, p. 474.

32. In addition to creating uncertain jurisdictional boundaries and the likelihood of a dramatic increase in workload for the Constitutional Court, the Bill also casts doubt on the future of the Supreme Court of Appeal. The SCA has built a significant expertise within its field of jurisdiction, and has made significant contributions to the development of South African jurisprudence. The status and expertise of the court could be undermined by the amendment.

Richard Calland

Associate Professor: Public Law, UCT; and Director: DGRU

Hugh Corder

Professor: Public Law, UCT

Chris Oxtoby

Researcher: DGRU

<u>With the assistance of:</u>

Sarai Chisala

Research Associate: DGRU

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