

NATIONAL PARTY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEM MATTERS PERTAINING TO THE RELATIONSHIP BETWEEN DIFFERENT LEVELS OF THE COURT, AND A SINGLE OR SPLIT JUDICIARY

Issues pertaining the judicial system and the court structure, ought to be viewed against the background of:

- ways and means which will secure and enhance the independence of the judiciary in general, and its legitimacy in particular;
- the enhancement of a human rights culture;
- a properly qualified and broadly representative Bench;
- procedures which will lead to easier and fuller access for the public to the Courts, Particularly as far as the protection of fundamental rights is concerned.

The "traditional" court structure, consisting of Lower (Magistrates and other) Courts, and a Supreme Court (consisting of Provincial and some Local Divisions) with a single Appellate Division, has been retained in the Constitution of 1993. The hierarchy of the current court structure should in Principle, be retained, as should the Special Courts, e.g. the Industrial Court

All these courts have a well-system, the Water Court, etc. developed set of rules, procedures and traditions which should be adhered to. However, aspects such as access to the Courts, the use of assessors and, in general, the enhancement of legitimacy., should continuously receive attention.

The introduction of a Constitutional State-model with the Constitution being the Supreme Law, of necessity resulted in a re-appraisal of the court structures. The Constitutional Court, as the Court of final (and in some instances, exclusive) jurisdiction in Constitutional matters, was established. This system should be retained.

The principle of a separate Constitutional Court should be retained, as should the basic elements of that Court's jurisdiction as it is set out in Section 98. Some of the procedural elements set out in Section 102 will probably require re-visiting with a view to "streamlining the road" to the Constitutional Court and provide easier access. Also, and in a similar vein, the possibility of "direct access" to the Constitutional Court provided for in Section 102 (2) should be placed on a firm footing.

The provision which is made in Section 35 (3) for "seepage" of the spirit, purport and objects of chapter 3 to 1 areas of the law (and thus to the "private sphere," and private law), will result in the "ordinary courts" being placed in a favourable position to enrich and improve those areas of the law by way of applying relevant aspects of Chapter 3. A similar method is followed in German Constitutional Law.

In this way, the suspected negative consequences brought about by a "split" judiciary will be softened.

One of the consequences and, indeed, realities to be faced up to, resulting from the introduction of a

Constitutional State and the founding of a separate Constitutional Court, is that the judges of the Constitutional Court will have to fulfil a role alien to our legal tradition. In the words of Prof Lourens du Plessis:

It is matter of concern that South African jurists are generally speaking, schooled in a literalist,

technalist approach to the interpretation of written law. This approach is, as was pointed out earlier, conspicuously inappropriate in giving meaningful effect to a justiciable constitution containing a bill of rights. Constitutional interpretation does not only require creativity, tact, imagination and sensitivity, but also a resolute willingness to be independent from and impartial towards vested and competing interests and value-systems. At the same time, however, the judiciary, in particular, cannot shrug off the responsibility of making hard political choices which the legislature and the executive are sometimes loath (or may have neglected) to make. (Du Plessis, L M "The Genesis of the Chapter on Fundamental Rights in South Africa's Transitional Constitution" (1994) SA Public Law pp 20-21.

Our contention is that the sui generis role to be played by the Constitutional Court, firstly, calls for acceptance of the fact that the' judges of that Court will, more often than not, be called u-pon to decide "political" issues, and secondly, of necessity results in re-considering the way in which those judges are to be appointed. With regard to the appointment of all judicial officers other than those of the Constitutional Court, the present method (i.e. the Judicial Service Commission and the Magistrates Commission) should be retained.