1.1 SHOULD THE PUBLIC SERVICE BE REGULATED BY WAY OF A CONSTITUTIONAL PROVISION? IF SO, WHAT SHOULD THE FORM AND CONTENT OF THE CONSTITUTIONAL PROVISION BE?

The present Constitution, in Chapter 13, contains provisions relating to the establishment of a Public Service Commission, the Public Service itself and to Provincial Service Commissions. The inclusion of these provisions in the Constitution conforms with the view expressed by the South African Law Commission in its 1991 Report on Constitutional Models, viz that there are certain aspects which will unquestionably have to be dealt with in the new Constitution, among which the organisation of the Public Service. It may be argued that the constitutional establishment of a Public Service Commission with wide powers will be sufficient and that the present reference to the requirements set for the Public Service (in section 212 of the present Constitution) is unnecessary. Since the Public Service and its composition as well as its operation will undoubtedly need to reflect the spirit and content of the final Constitution, the inclusion of constitutionally entrenched prescriptions in this regard - such as those enshrined in section 212 - may prove to facilitate and enhance clarity.

It is submitted that provisions along the lines of those in the present Constitution should be included in the final Constitution. To the extent that the present wording of section 210 may create doubt as to whether the Public Service Commission is specifically empowered to structure necessary adaptions in accordance with changing needs, it is suggested that a provision to this effect be included with the qualification that any restructuring should reflect the values underlying the Constitution.

2.1 How is the Public Service to be defined and which institutions of government should be incorporated in the definition? For example, should the army, police, health, education, local government and parastatals, as well as administrative personnel in the judiciary, be covered in this definition?

In a country such as South Africa with its own peculiar population make-up, its intricate political set-up and its history, it is not surprising that the transitional Constitution reflects these peculiarities and, as a document of political compromise, contains detailed provisions which are generally not to be found in other constitutions. Hence the detailed provisions relating, amongst others, to the Public Service, the National Defence Force and the South African Police Service.

The opinion is held that if nation-building and reconciliation are to be advanced, the arrangements contained in the present Constitution relating to the Public Service, upon which the success of the RDP will to a large extent be dependent, will have to be perpetuated in the final Constitution to a greater or lesser degree, so as to provide the legal certainty and peace-of-mind which the present provisions in this regard have brought about.

As far as the Department of Justice is concerned in this regard, the following:

A break has been made with the past in that the system of parliamentary sovereignty has been replaced by a constitutional state with the Constitution being the supreme law of the land, with a greater emphasis being placed on the doctrine of separation of powers. This being the case, it can be argued that the success of the new constitutional dispensation rests, at the end of the day, squarely on the shoulders of the judiciary, which in turn is dependent on a sound administration of justice.

It is expedient at this stage to refer to excerpts from the Report of the Commission Inquiry into the Structure and Functioning of the Courts (the so-called Hoexter Commission) which was published

in 1983, the sentiments of which are perhaps even more valid now than at that stage, since we now have a constitutional state an greater emphasis on the trias politicos doctrine.

In the sections of this Report dealing with "Executive Functions in Relation to th Administration of Justice" and the "Role of the Minister of Justice in Administrativ Functions Affecting the Administration of Justice in Practice", amongst others, the following excerpts are relevant:

> "in the course of its inquiry the Commission has noticed, in regard to executiv functions in relation to the Suoreme Court, definite indications of a lack of appreciation of the financial and other needs of that judiciary. The same lack of appreciation of the administrative needs of the courts is apparent in the lower courts. The provision of auxiliary services and staff for both the Supreme Court and the lower courts has become bogged down in the bureaucracy of the Public Service to such an extent that in the opinion of the Commission proper attention is not always devoted to the specialised needs of judiciary machinery. A bureaucratic feature particularly inimical to the judicial function is the diffuse administrative responsibility, spread over a number of Government departments, for the provision to the courts of services and staff and for related matters". (Paragraph 4,1)

In the previous South African Constitutions there were provisions to be found, the effect of which was to place all administrative powers, duties and functions affecting the administration of justice under the control of the Minister of Justice. There is no such like provision in the present Constitution. The Hoexter Commission found that in practice effect was never given to the intention of those provisions and that "it would appear that the role of the Minister of Justice in the administrative aspects of the administration of justice is thereby reduced to the role of any other member of the Executive Council when advising the State President in his consideration of the recommendations of the Commission for Administration". (Paragraph 4.6.1.3)

In paragraphs 4.7.2, 4.7.3, 4.7.5, 4.7.6 and 4.7.7 of its Report, the Commission came to the following conclusions and I can do no better than quote from them:

"4.7.2 The Commission accepts that central control of the provision of services is necessary also in the administration of the Directorate of Justice. Such control should, however, be of such a nature that it cannot hamper the independent functioning of the courts of law. As has been pointed out, the Judiciary is one of the powers in the trias politica. Independent administration of justice cannot be achieved while the administrative functions connected with it are bound up with the bureaucracy of the broader Public Service. Efficiency in dispensing justice should in no way be influenced by administrative decisions in which the needs of the administration of justice are not the overriding factor. Furthermore, the administration of justice has its own distinctive and specialised administrative needs, which cannot readily be catered for within the framework of broader public administration".

"4.7.3 If the administrative functions connected with the administration of justice are to be carried out effectively and expertly, it is essential, in the opinion of the Commission, for the Minister of Justice to be given a freer hand in laying do policy in respect of salaries and conditions of service in the Directorate of Justice and the provision of accommodation and other auxiliary services for courts law."

"4.7.5 The provision of shabby or minimal facilities for the courts, and the staffing of the administrative component of the administration of justice with underpaid staff, with a rapid turnover of staff as a result, hamper the specialise function of the administration of justice in society."

"4.7.6 The problems outlined in paragraphs 4.1 to 4.6 above are a typical illustration of but one of the consequences of a deplorable lack of planned o even conscious co-operation or liaison between those concerned with the variou aspects of the administration of justice.

"4.7.7 The Commission is of the opinion that, in order to promote sound administration of justice in the Republic, the administrative functions in connection with the administration of justice, and more particularly in connection with the courts, should be carried out with due regard to the expert advice of those who are directly concerned with the functioning of the courts."

The final recommendations of the Commission in this regard were as follows:

(i) "that the control exercised by the Minister of Justice, more particularly with reference to the policy in respect of salaries and conditions of service in the Directorate of Justice and also in regard to the provision of accommodation and other auxiliary services for the courts, be effectually brought into line with the intent of "the constitutional provision existing then,in terms of which the Minister of Justice was responsible for the administration of justice;

(ii) "that the Minister of Justice exercise his control over the administrative functions, powers and duties affecting the administration of justice by taking counsel with those directly concerned with the administration of justice". (Paragraph 5.2 and 5.3)

The Commission subsequently recommended the establishment of an independent advisory "Council of Justice", consisting of various judicial experts, e.g. the Chief Justice, a judge-president and a judge of the Supreme Court, an attorney, an advocate, an attomey-general, a magistrate, etc. This body would then make recommendations on the various aspects relating to the administration of justice. The Commission compared a body of this nature to similar bodies elsewhere in the world with similar powers and functions e.g. in England to the advisory committees appointed by

the Lord Chancellor, in the USA to the Federal Judicial Center and the annual Judicial Conference and in Australia to the Australian Institute of Judicial Administration. .

It is significant to note that our present Constitution already provides for such a body of experts, namely the Judicial Service Commission, one of whose functions is "to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice.". (Section 105(2)(c) of the Constitution).

In conclusion, the question is raised whether the time is not ripe to give proper effect to the spirit of the present Constitution, to the concept of a constitutional state and to the principle of the separation of powers by making the Minister of Justice (in consultation with an advisory expert body) solely responsible for the administration of justice in deed and in word.

2.2 What should be the guiding values and principles for the Public Service?

The proposed code of conduct for members of the Public Service and the submission of the Department on the proposed code should cover the guiding values and principles for the Public Service. Copies thereof are attached.

2.3 What would be appropriate, speedy and effective mechanisms for ensuring accountability of public servants for their actions or inactions?

A prescribed procedure to deal with conduct of public servants to ensure accountability, based on substantial and procedural fairness is of importance. Appropriate, speedy and effective mechanisms should include amendments of the applicable acts to facilitate the extension of delegations in

respect of matters which can at present not be delegated. (For example: section 21 of the Public Service Act, 1994, with regard to the institution of misconduct proceedings in respect of officers in the A-division), amendment of the Public Service Act, 1994 to provide for a shorter process in cases where officers have been found guilty in a court of law on criminal charges brought against them (in that they will be deemed guilty of misconduct in terms of section 20(p) of the Public Service Act, 1994 without the necessity to be subjected to a misconduct hearing) and an experienced team of investigating and presiding officers to attend to matters relating to misconduct of staff and relating matters.

2.4 How should the concept of a representative Public Service be defined an what affirmative mechanisms and procedures will assist in achieving such respresentativity?

Representivity refers to representivity in general in respect of the Public Service as whole. General indications are that women, disabled persons and certain population groups, are not well represented in many occupational classes. The measures to effect representivity which was issued by the Public Service Commission in its Circular 712/B/1 dated 27 December 1994 for the filling of the 11 000 vacancies in the Public Servic seems to be appropriate to ensure a more representative Public Service. The merit principles in section 212(4) of the Constitution, 1993 which provides as follows, should however be borne in mind:

> "212 (4) In the making of any appointment or the filling of any post in the public service, the qualifications, level of trainin merit, efficiency and suitability of the persons who qualify for the appointment, promotion or

transfer concerned, and such conditions as may be determined or prescribed by under any law, shall be taken into account."

The Public Service Act, 1994 contains a similar provision,

2.5 DOES REPRESENTIVITY ENTAIL BOTH DERACIALISATION, AS WELL AS TRANSFORMATION OF STATE INSTITUTIONS?

It is trite that the mass of the people expects, and is entitled to expect, that steps be taken to transform all institutions in South Africa so that they reflect the country's composition. In this sense there appears to be a direct link between transformation and deracialisation. The very term "deracialisation" denotes and implies transformation given South Africa's history. The question posed above can be answered in the affirmative, yet not without qualification. In order to achieve the objective of representivity, a certain measure of deracialisation - and therefore transformation - will be inevitable. However, representivity cannot be achieved by deracialisation alone. Representivity has a much broader base; it would also implicate gender. Deracialisation for the sake of representivity can very easily result in tokenism, which would neglect quality in favour quantity. Tokenism may have the effect that people are advanced beyond their capabilities. If this does occur it can have the effect of renting legitimate achievements. Such persons have to bear the damaging psychological effects of peer group stigmata. Although compromises will have to be made, it would appear that the principle of merit cannot and should not be sacrificed in satisfying the requirement of representivity in the Public Service.

2.6 Should the public and public employees be entitled to participate in formulating policy on public services and should public service managers be responsible for creating the mechanisms for such participation?

Put differently, should there be a duty on public service managers to consult employees and the public in relation to the provision of public services?

Public participation is supported in appropriate circumstances as long as it does not effect the proper and effective functioning of the Department.

2.8 What forms of review and redress should the public / public employees have in relation to dissatisfaction with service delivery?

The present Constitution provides for numerous mechanisms which offer various forms of review and redress for unsatisfactory service delivery.

Without going into detail in this regard, reference can, for example, be made to the Constitutional Court, the Public Protector, the Human Rights Commission, and perhaps to a lesser extent, the proposed Commission on Gender Equality and the Auditor-General, all of which were created to fulfill a "watch-dog" role in society. Other existing mechanisms or institutions where complaints of the nature in question can be dealt with include the departments of State themselves, the existing courts and perhaps even the Public Service Commission itself.

Cognisance is also taken of the fact that moves are afoot to enact an Open Democracy Act, one of the aims of which is to give citizens access to information held by government bodies. A further Bill which to a certain extent, overlaps with the Open Democracy Act is the proposed Judicial

Review Bill which emanates from the South African Law Commission's Report on its Investigation into the Courts' Powers of Review of Administrative Acts.

It is almost accepted as a fact in addition to the existing courts that the Constitutional Court, the Public Protector and the Human rights Commission will be perpetuated in principle in the final Constitution. The opinion is held that these institutions, and especially the Public Protector, are the appropriate mechanisms to review and redress problems relating to unsatisfactory service delivery. What must, however, be guarded against is the unnecessary duplication of such mechanisms or institutions.

Ad Paragraphs 3.1 and 3.2: The Role between Politicians and Civil Servants

If the outcome of the negotiations at the Muiti-Party Negotiation Process at Kempton Park which resulted in the present provisions of the Constitution relating to the Public Service are interpreted correctly, it would seem to be generally accepted that the Public Service is based on that of the English model where civil servants carry out the policies of the government of the day - a model which has been applied here in the past.

This assumption would appear to be confirmed by the provisions of section 212(2) the Constitution which provides amongst others that the public service must b "non-partisan, career-orientated and function according to fair and equitable principles", promote an efficient public administration broadly representative of the South Africa community; serve all members of the public in an unbiased and impartial manner; loyally execute the policies of the government of the day in the performance of it administration and functions.". Section 212(3) states that employment in the public service must be accessible to all South African citizens who comply with the requirements determined or prescribed by or under any law for employment in such servic Section 212(4) requires qualifications, level of

training, merit, efficiency and suitability of persons to be taken into account when an appointment in the Public Service is made or when a post is filled.

If all the above is taken into account the question is raised as to the desirability introducing a new public service model in South Africa in terms of which political appointments, as is known in France, for example, are to be made. In South Africa, with its history and bearing in mind the delicate stage at which it is at the moment and will most probably be for many years to come, the opinion is held that there is little or no room for open political appointments in the Public Service. Such a model can, in our opinion, only give rise to politicising of the Public Service, which in turn will lead to dissatisfaction in many quarters, bearing in mind South Africa's multi-political set-up, and eventually to a public service which cannot be non-partisan and career orientated.

4.1 Should an institution such as the Public Protector be embodied in the final text of the constitution? Is there a need for another body, such as the Public Service Commission, that deals exclusively with ombuds aspects relating to the Public Service? If so, what should be its role, particularly in relation to appointments, promotions, human recourse development and performance evaluation of departments and employees? How should it be composed? By whom should it be appointed and what are the appropriate mechanisms for public accountability? Should any provisions for the above be made in the Constitution?

Both the Public Protector and the Public Service Commission (PSC) can be accommodated in this regard. If the PSC formulates policy and is also the final arbitrator with regard to ombuds aspects relating to the Public Service, then the PSC will be "judge of its own case". It is therefore necessary that there should be a Public Protector. The courts are also a safe-guard as a last resort.

4.4 Should the Public Service Commission (PSC) act as a body of appeal for public servants or should this role be entrusted to an independent agency?

The PSC can act as a body of appeal for Public Servants in cases where it did not take the final decision. Where a person is not satisfied with a decision of the PSC he should have the right to approach the Public Protector or the courts.

From the start he should have the choice of which forum he wants to turn to.

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[GOVERNMENT GAZETTE, 30 SEPTEMBER 1994, VOL. 351, NO. 15987 IS UNSCANNABLE]