

Letters/Briewe

Appointments to Appellate Division

The editorial in the last edition of *Consultus* deals with the report of the SA Law Commission on Group and Human Rights. Commenting on the Commission's suggestion that the proposed Constitutional Court "would not necessarily consist of present Judges and . . . would not necessarily be composed of persons from among the ranks of senior practising counsel" (South African Law Commission, Project 58, Group and Human Rights, para 10.85, p 669), the editors state that it is "difficult to accept that a constitutional academic, whatever great heights he may have reached in his field of study, would indeed do better in the Constitutional Chamber than a Judge of a provincial division of the Supreme Court who, in the nature of things, had practised at the Bar for many years and had thereafter for a considerable time sat on the Bench". The editors state further that "judging from the law reports on constitutional issues in foreign countries, a practical lawyer with wide experience on the Bench would in fact be better equipped for the task of a Judge of Appeal in a constitutional matter than an academic constitutionalist, or say an attorney who has practised somewhere on the platteland and who, therefore, may be said to have gained a sound knowledge of the sense of justice of persons at grass roots level" ((1992) 5 *Consultus* 4).

While mindful of the fact that the editorial comments do not represent "firm standpoints" and that the views expressed are not those of the General Council of the Bar, the observations made are surprising and, in my view, ill-considered. They are surprising because the editors do not appear to have absorbed the lessons of several important contributions published in their own journal. In the very issue of *Consultus* in which this editorial appears, a distinguished legal academic, Madam Justice Louise Arbour of the Ontario Court of Appeal stresses the importance of a representative judiciary and observes that "pluralism on the

Bench can only increase the public's perception that the Courts are a fair and responsive forum" (at p 15). Also in the same issue, Professor Krattenmaker makes the point that "a judiciary completely unrepresentative of the citizenry at large is going to do a poor job of articulating their over-arching goals and enduring aspirations" (at p 48). Articles in previous issues of *Consultus* have made similar points. Reference may be made to the contribution by Jeremy Gauntlett SC "Appointing and Promoting Judges: Which Way Now?" ((1990) 3 *Consultus* 23) which was awarded the Butterworths prize for the article containing the most useful and best motivated law reform proposal. (See also: JR Midgley "The Legal Professions – Pointers Towards Structural Reforms" (1991) 4 *Consultus* 8 at 13-14.) The opening words of an editorial in an earlier edition of *Consultus* made the point that "the credibility of the country's legal system is of paramount importance and in a new South Africa its importance will grow". The editorial went on to state that "the lack of legitimacy of the administration of justice among black people . . . is therefore a problem that cannot be left unsolved" ((1991) 4 *Consultus* 3).

In the light of these and other contributions, the editors surely cannot believe that existing Judges in the provincial divisions who are all white (with the exception of Mahomed J) and all male, would lend any new Constitutional Court the type of legitimacy it requires. Nor can the editors believe that such Judges are representative of the community as a whole. The editors claim, however, to "fully agree with the idea that the Courts should be democratized as far as possible, inasmuch as all races should be represented on the various court benches". But, the editors warn, they cannot agree "that the administration of justice at the highest level of the judicial hierarchy should be allowed to deteriorate solely in order to achieve that object, no matter how commendable or justifiable such object may be". The best the editors can do in the light of their concern to maintain standards is to make the unhelpful suggestion

that "the idea of a Constitutional Chamber should be given further attention".

What actually requires "further attention" is the assumption that only members of the Bar are fit to serve on any Constitutional Court. The argument for appointing Judges from the ranks of the Bar is strongest in relation to trial courts where experience in procedure and assessing the credibility of witnesses are important attributes. But Judges of Appeal serve an altogether different function. They work from the record and are frequently concerned only with questions of law. Any distinguished lawyer, whether advocate, attorney or academic is capable of serving in an appellate capacity. That is the experience of other jurisdictions, particularly Canada and America. The editors state, that "judging from the law reports on constitutional issues in foreign countries, a practical lawyer with wide experience on the Bench would in fact be better equipped for the task of a Judge of Appeal in a constitutional matter than an academic constitutionalist, or say an attorney who has practised somewhere on the platteland and who, therefore, may be said to have gained the sound knowledge of the sense of justice of persons at grass roots level." Regrettably, the editors do not cite a single example from the "law reports on constitutional issues in foreign countries" to support their proposition. I suggest that the proposition is baseless.

What also requires "further attention" is the implication that the appointment of academics to a Constitutional Court would lead to a deterioration in standards. If the editors are truly committed to seeing all races adequately represented on the Bench, it is difficult to understand the real basis of their objection to the appointment of black academics to the Constitutional Court. The editors know full well that appointments to such a Court from the ranks of existing Judges will leave any Constitutional Court all white and all male. That would surely spell disaster for the future of our legal system.

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Note:

The gravamen of the editorial referred to is that, assuming a bill of fundamental rights would be enacted for South Africa, it would be neither desirable nor practicable to divide the Appellate Division into two Chambers: a Constitutional Chamber and a General Chamber (as recommended by the SA Law Commission). On the contrary, our view is that all appeals from provincial divisions – including those involving constitutional issues – should be dealt with by the Appellate Division as it exists at present; the Chief Justice, as heretofore, retaining the power to determine the composition of the Bench in every appeal. (See also “The courts in a new South Africa” by VG Hiemstra and “The proposed Bill on Human Rights: The practical implications” by HJ Fabricius SC elsewhere in this edition; and “A Bill of Rights for a new South Africa” by Thomas G Krattenmaker, (1992) 5 *Consultus* 45 at 49.)

It follows that the Appellate Division should be manned in exactly the same manner as at present, ie by drawing from the provincial divisions those judges who have proved themselves as the most suitable candidates to serve in the Appellate Division. In the proposed new dispensation the fact that issues arising from the bill of rights will also have to be adjudicated, will presumably be borne in mind by the appointing authorities when selecting judges for elevation to the Appellate Division.

As has frequently been stated in *Consultus*, we fully support the idea of democratisation of the courts but it goes without saying that such an exercise should be carried out in an orderly fashion. And by appointing lawyers having no judicial experience directly to the Appellate Division would, in our opinion, not amount to an “orderly fashion”. Naturally, to the extent that the provincial divisions of the Supreme Court will in the course of time become more and more representative of the population as a whole, so the Appellate Division will equally become representative.

It is undesirable to permit the executive to appoint lawyers directly to the Appellate Division. There is too much at stake. South Africa – particularly at this stage of its history – cannot afford the risk of having the highest court of the land packed with judges who might prove to be unable to meet the high standards traditionally maintained by the Appellate Division and whose presence in that Division might therefore jeopardise its legitimacy.

The best way of ensuring that the Appellate Division will have legitimacy (also among those people who will constitute the minorities in the new South Africa) will be to devise a system whereby only judges with proven ability are appointed to that Division. The estab-

lishment of an independent body for the selection of judges – as has often been proposed in *Consultus* – will go a long way towards achieving that goal.

□ It has become an established practice to appoint only judges from the ranks of provincial divisions to the Appellate Division. However, it may not be generally known that *stricto iure* lawyers may be appointed directly to the Appellate Division – see section 10(1) of the Supreme Court Act, 59 of 1959. Two judges of appeal – Tielman Roos and FW Beyers – were so appointed, in 1929 and 1932, respectively – both had been Cabinet Ministers prior to their appointment. (See Ellison Kahn, *Law, Life and Laughter*, 6 and 209.) Section 10 should therefore be amended so as to bring the law into line with practice. (Strangely enough, only a judge or former judge of the Supreme Court may be appointed as an *acting* judge of appeal – see section 10(5).)

□ Further views on this important matter will be appreciated.—*Editor*

Warped Latin

While extremely flattered to be quoted in your prestigious journal (see (1992) 5 *Consultus* 31) and by no less a Romanist than Paul van Warmelo SC, I humbly submit that not even I could have perpetrated the warped Latin ascribed to me. Or perhaps my Latin has improved since Professors van Warmelo and Gonin and I held our weekly “committee meetings” at one of which this weighty topic was discussed. It is true that some RAF squadron had a dog-Latin slogan which they believed meant “Don’t let the bastards grind you down”, and since this is such an inspiring sentiment the motto became more and more famous and its Latin more and more unintelligible. The version given by Mr Justice Munnik (*non illegitimi carborundi*) would have to be something like “the b. . .’s must not be ground down”, since *carborundi* is clearly a gerundive (which, as all good lawyers of course know, is a verbal adjective denoting susceptibility or passive obligation). On the other hand it could be a descriptive genitive of the (English) word “Carborundum” which (as few lawyers probably know) is a silicon carbide used as an abrasive. No, the best solution is probably to assume that those pilots – or more probably their grease-monkeys – wanted a Latin word for “decarbonize” (which I think involves “grinding down”): so they invented a Latin

verb *decarbonare*. A negative command introduced by *ne* would require the present (or perfect – depending on how Ciceronian you feel) subjunctive: “*Ne te decarbonent*” would then be “Let them not decarbonize you/grind you down”. On the other hand, *carborundum* is probably used to grind-in valves, so that the form “*carborundi*” is attractive: but would the verb be a first conjugation “*carborare*” or a third conj “*carborere*”? Probably the latter, so that one could imagine a present subjunctive in-*ant*: “*Illegitimi ne te carborant*”.

If more pedantry is required I can offer a host of further improbable possibilities.

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Once upon a time in Zimbabwe

At the request of the immediate past Chairman of the General Council of the Bar (GCB), I recently attended, as an observer, a meeting of the newly formed Southern African Progressive Legal Practitioners Association (SAPLEPA), and one of the speakers was Mr Sternford Moyo, a Zimbabwean lawyer, who gave an address about various aspects of the Zimbabwean legal system and the way it functions. Part of his speech was devoted to an interesting account of pre- and post-independence characteristics of the legal system with particular reference to fusion, the right of audience and related matters which, I felt, may be of interest to South African practitioners on the eve of what could be drastic change to our own system. What follows is a reproduction of the notes I made at the meeting recorded in the first person to recapture (as far as possible) the tenor of the speech made by Mr Moyo:

Historically we had a divided Bar like the English. Attorneys had no right of audience (in the Supreme Court) and couldn’t draw pleadings either. They had to do articles and could also become qualified as notaries and conveyancers.

The advocates had to obtain the LLB qualification and pass the Bar Council examinations. They had no direct link with the public.

The problem was that the University was admitting few Black students. Consequently few Blacks could become attorneys. They also couldn’t