

Courting justice

Intense speculation surrounds

Constitutional Court. Equal

Sky's the limit for powerful new body

ONE of the major items on the agenda as the euphoria of South Africa's first democratic election gives way to the challenge of reconstruction is the appointment of the 11 members of the country's first Constitutional Court. Able to overrule both legislation passed by the new parliament and executive acts of the new government, the court will be the most powerful body in the land – accountable only to the interim Constitution and the consciences of its members. The question is: Who can be trusted to wield this power?

Albie Sachs, director of the South African Constitutional Study Centre at the University of the Western Cape and former member of the ANC's Constitutional Committee, believes there are more than enough people of the necessary high character and expertise. "We've got lots of wonderful constitutional experts in this country and I think we could have two or three courts of the greatest calibre."

A possible appointee himself, Sachs has been the target of sharp criticism from some members of the legal community offended by what they construed as a public announcement of his candidacy for the court. He laughs when asked to respond.

"I wrote a piece for the *Weekly Mail & Guardian* in response to literally scores of people who have stopped me in the streets, in airplanes, expressing their disappointment at a statement I made that I was retiring from politics. People would intimate that they felt let down. The piece had nothing to do with the court. I wanted to convey that I wasn't cynical or disappointed with politics, but eager for a fresh start, wherever it might lead. We can so easily become hacks.

"One reason I opted out of the possibility of a parliamentary career was that I didn't enjoy the jockeying that seemed to go with it. Now it seems there is as much jockeying in the judicial sphere! I think it is most unfortunate. We need to have a fresh start and to encourage the new institutions to launch themselves in the spirit of dignity and respect. No one knows where he or she is going to end up these days. I certainly don't. What matters is that we have a new Constitution and that at last everyone has a chance to be considered on his or her merits."

But is it in fact an appointment he would like? "What lawyer wouldn't love to be on the Constitutional Court?" he replies.

The rest of the interview follows in a question and answer format.

What does it mean for the people of South Africa to have the interim Constitution as the supreme law of the land?

It's a huge achievement. It's our independence as a nation. It's the

guarantee of common citizenship, equal rights and freedom. It's also compact between all the major forces in South African society to accept certain basic common principles. Disagreement there will always be – it's part of the life of a nation, but the conflict will be in the framework of agreed rules that protect the fundamental rights of everybody.

What are the strengths of the interim Constitution?

It is based on universally accepted principles that have worked elsewhere in the world. It's also a negotiated document that corresponds to the realities of our own country and reflects the hopes and fears of the overwhelming majority of South Africans. It is technically strong, even if inelegant. Our country has too many soldiers and too many lawyers but sometimes it's good to have too many lawyers.

What are its weaknesses?

Well, its weaknesses come from its strengths in that it is interim. It has vast amount of detail on questions that hopefully will soon disappear and insufficient precision on important questions. It's really a constitution for getting a constitution. There's no clear inner logic and the language at times is inelegant but that's not inappropriate to an interim constitution. Time will show which are the loopholes and inconsistencies. It lacks the ringing preamble of a final constitution – but the constitution shouldn't peak too soon.

Does Chapter 3 of the interim Constitution dealing with fundamental rights apply only to relations between the state and citizens or also to relations between citizens?

In the first place it applies between the state and citizens and guarantees citizens protection against abusive behaviour by the state. But the courts have to take into account the spirit and the letter of the Constitution in developing the common law and interpreting statutes. So, for example, the question of public policy is sometimes relevant to the law of contract – that is between private individuals, and a contract that clearly violated fundamental rights, for example, by imposing racial discrimination, could be held to be unlawful.

If you had carte blanche in reshaping the final constitution, how would it differ from the interim version?

The interim Constitution starts on a flat note and ends on a ringing one. I think it should start and end with fine and appropriate language that

are processes of lobbying and jockeying for position behind the scenes.

Given the immense power the court will wield as guardian of the new democratic order, the call for a transparent appointment process involving public hearings is compelling.

SHAUNA WESTCOTT explored the issues with constitutional expert Albie Sachs.

honours the achievement of South Africans in getting this far and declares the basic principles that should guide us into the future.

I think the institutional side should be reviewed to see how all the elements integrate, but I wouldn't anticipate major structural changes. The elements dealing with the government of national unity (GNU) would have to be reviewed and probably we would end up with a single prime minister instead of two deputy presidents. In other words, the concept of forced coalition, which corresponds to the present transitional phase, will give way to voluntary coalitions.

The electoral system I would say should try to find some way of making at least a portion of the MPs more directly accountable to constituents. I think we should avoid small single-member constituencies because in South African conditions these would tie in with racial group areas and give rise to endless disputes about constituency boundaries. But we could have multi-member constituencies. For example, Cape Town could be divided into three electoral zones, each with five MPs.

A lot of detail will have to be filled in in relation to the powers and functions of the provinces and of local government. But I think the fundamental format in the interim Constitution, which in general terms corresponds to the Constitutional Principles, will be largely maintained.

How is the Interim Constitution likely to change to accommodate the volkstaters, on the one hand, and the Zulu/Inkatha agenda, on the other hand?

As far as the volkstaat is concerned, the last Constitutional Principle lays down a procedure that has to be followed. What's important here is honest endeavour and realism, and then an appropriate solution can be found. In the case of the Inkatha Freedom Party, the IFP, together with other parties, has committed itself to functioning within the framework of the interim Constitution while seeking to argue for changes in the final constitution. It might well be that the whole question of federalism will be looked at in a less partisan way now that the election is over.



ALBIE SACHS: 'Not cynical or disappointed with politics.'

Picture: JANET LEVY

Is it correct that the Constitutional Court will be able to overturn Acts passed by the National Assembly?

Yes. In fact one-third of the MPs can petition the court to declare an Act invalid before it's finally promulgated. And after it's been adopted the lower courts can suspend proceedings where the validity of an Act is in question and refer the matter to the Constitutional Court. As they say in Germany, above the Constitutional Court there is only the blue sky. It is a very powerful body with a very heavy responsibility.

How will the Constitutional Court be accountable?

Well, it's accountable to the Constitution and the consciences of its members. It has to be independent. Clearly, as in other countries, the press, the public and parliament will comment on its decisions and I can think of at least one professor who will find most of its decisions appalling! If he's not on the court! That's as it should be.

Given the possible flood of applications to the Constitutional Court, how will a Bench of 11 persons cope?

The question of sorting out petitions and applications, grouping them and prioritising them, occupies constitutional courts throughout the world. A group of us who visited the German Constitutional Court were shocked to find that of the 4 000 cases submitted to that court each year, 98 percent are rejected. But the reason for this is that over 90 percent have already been heard by the ordinary courts and there's no specific constitutional question that needs specific determination.

If this approach is adopted in South Africa, then all the ordinary questions of whether or not officials have behaved in a constitutional manner will be heard by the ordinary courts and the Constitutional Court will focus on questions of principle. The constitutional courts in Europe tend to give what they call norm control to the constitutional court and control of conduct to the ordinary courts. Clearly, the new South African Constitutional Court will have to study the provisions of the interim Constitution and, in liaison with the other courts, work out procedures that would enable it to carry out its responsibilities.

What is your opinion of the recent ruling by Justice Lewis Goldblatt that only the Constitutional Court can rule on the validity of Acts of parliament?

I would need to see the full judgment before making any comment. There are going to be many applications brought and various issues raised and they must be looked at in a calm and systematic way. Other countries have solved them. I don't see why we shouldn't.

Should there be public hearings in the selection process for the Constitutional Court?

Definitely, because our society has been too divided and there's too much secret decision making. The Judicial Services Commission should have a chance to see and to question candidates in public view.

Do you think potential judges should be asked if they've ever smoked dagga?

Some people would say that you shouldn't be on the Bench if you haven't smoked dagga, whether you've inhaled or not. I would rather not comment save to say that these trivial questions are not the ones that should really be asked.

How seriously can we take the constitutional commitment to non-sexism in view of the derisory number of women appointed to the cabinet?

I think we have to build on what has been achieved. The women appointed to the cabinet are both strong personalities who should

make a good contribution to government. There are over 70 women on the ANC benches alone in the National Assembly. Many of them are brilliant and should make a major impact on parliamentary debates and be the core of many future cabinet ministers.

What is your view on the enormous salaries being paid to MPs, ministers and transitional bureaucrats of all kinds?

The transitional bureaucrats had to be guaranteed their salaries otherwise they could have resisted and sabotaged elections and the whole democratic process. MPs need a good salary so they can work full time and to reduce the temptations of corruption. It is particularly those from poor backgrounds who need these salaries.

As far as the top salaries are concerned, they are only a proposal from Judge Melamet and it remains to be seen if the president and cabinet ministers accept less. I personally hope they do, since this would be a wonderful signal to the country.

Can we afford to pay these salaries and build a better life for all, particularly in view of the R60-billion national debt?

If you add up the salaries themselves the amounts are not enormous in relation to total public expenditure. The problem is that they set standards for hundreds of thousands of officials at various levels of government. One has to balance out the symbolic importance of cutting down, as against the real needs of parliamentarians, as against salary scales in the private sector. We want the best people to make themselves available for public service.

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If you were appointed to the Constitutional Court, what would your vision of your role be? What would be your hopes and goals?

They would be the same as they will be if I'm not appointed to the court. I think we have the chance of a brilliant court, embodying the best of multiple legal and philosophical traditions in this country and, by conducting itself in a wise, fair, articulate, balanced, realistic and principled way, it can serve as a model of reconciliation.

The key adjective is principled. Its function will be to defend the core values of the new society and to develop a continuity of principled positions which are not affected by the hurly-burly of daily political conflict. I've often said that I long for the day when some drunk being pushed into the police station says "I demand my constitutional rights!" We want a country where everybody demands their constitutional rights, with the assurance they will get them.

What are your feelings in the wake of the election and the inauguration of Nelson Mandela?

It has been a wonderful vindication of our belief in democracy and in the capacity of South African people to work together to solve our common problems. At a personal level, it justifies everything, everything. I said that if we got peace and democracy, then roses and lilies would grow out of my arm. I had a look after the inauguration and my arm was the same - but the roses and lilies are in the smiles of people everywhere. ■