

One Apex court?

The text of a speech made in October 2008 by Mr Justice IG Farlam at a conference held to celebrate the 120th anniversary of the founding of the South African Law Journal.

The question I want to discuss today is the following: should there be an apex court to sit as the final court of appeal with power to hear all kinds of cases or should we continue with the present bifurcated system based on the model of some European countries, with one court as the final court for all constitutional matters, a Verfassungsgericht, and another as the final court for all others, a Bundesgericht? In other words I want to revisit two important decisions relating to the judicial structure of South Africa, the first made at Kempton Park when the Interim Constitution was drafted and it was decided to set up a separate Constitutional Court, with the Appellate Division being left as the final arbiter on all other matters and unable to consider constitutional questions, and the second made in the Constitutional Assembly to retain the Constitutional Court but to give the renamed Supreme Court of Appeal, the old Appellate Division, constitutional jurisdiction, subject to further appeal to Braamfontein: so that in our system we have, to use British terminology, the Supreme Court of Appeal as our House of Lords and the Constitutional Court to be seen in some ways as sort of local European Court of Human Rights.

Before considering this question, it is both necessary and appropriate to consider why the Kempton Park negotiators decided to depart from the judicial model found in the United States, Britain and the rest of the Commonwealth and to adopt a jurisdictional scheme first seen in Austria after the break up of the Austro-Hungarian Empire at the end of the First World War and later copied in West Germany after the Second World War.

One of the most eminent of those who argued for the adoption of the Austro-German model was Professor Tony Honoré in a speech he made in 1992 at the University of Cape Town when he received an honorary doctorate in law. The reasons he gave were similar to those which carried the day in West Germany after the Second World War. It was not practical to remove all the existing judges from office, but in view of their involvement in applying the laws of the old regime it would not be appropriate to give them the final say in the application of the new constitution, incorporating as it did the Bill of Rights.

This view found favour at Kempton Park and our Constitutional Court was set up. In the nine years since it started operating, it has produced a corpus of constitutional jurisprudential material of the highest calibre of which all South Africans can be proud. Its judgments are cited with approval and respect all over the world and the legal foundations of our new constitutional order have as a result of its labours been well and truly laid. While there can be no doubt that the decision of the Kempton Park negotiators was the correct one at the time, it must be borne in mind that the judges of the Constitutional Court were appointed for their constitutional law expertise, not for their general legal skills.

The situation which led to the adoption of Austro-German model has changed substantially since 1994. The Appellate Division, as I have said, regained constitutional jurisdiction under the new Constitution and its judges are appointed on basis of their expertise over the whole of the law, including constitutional law. Both its President and its Deputy President have been appointed by the Judicial Service Commission, as have the vast majority of its members. And all the judges who sat in the Court in the days of the state of emergency have retired.

As a result it is fair to say that the conditions based on the fear (whether justified or not it is unnecessary to say) that judges of the old regime should not be entrusted with the important task of laying the jurisprudential foundations of our new constitutional democracy no longer apply.

It is appropriate therefore to revisit the question and to ask whether the decisions made at Kempton Park and in the Constitutional Assembly should still apply and whether the constitutional structure then erected should continue into the new century.

Two main questions arise:

1. Should there be a single apex court?
2. If yes, what should happen to the twin peaks we have at present?

There are several problems with the present set up:

1) expense:

Can we and the litigants afford a system which provides for two or sometimes three appeals from a decision at first instance in the High Court?

2) The imprecision of the dividing line between cases which must end in the Supreme Court of Appeal and those which can go on to the Constitutional Court. This is a result of the constitutionalisation of our administrative law, our labour law and our law relating to criminal procedure and evidence in criminal cases, as well as the fact that the basic values, purport and objects of the Constitution must from their nature undergird the whole of the law. As an example, important interests protected by, for example, the law of delict are linked to rights entrenched in the Bill of Rights, such as life, bodily integrity, dignity, privacy, reputation, etc.

Indeed more and more are we reminded that, though the law is for purposes of exposition and convenience to be divided into separate segments, it is really a seamless web, each part of which is inextricably linked with each other part. I believe that at the top appellate level in any country the overall development of the law should be overseen by one generalist court. That is and always has been the approach in the legal systems of the United Kingdom, the Netherlands, the Commonwealth and the United States. Authorities to whom I have spoken in Germany have told me that in what one can call generalist legal circles there is concern at decisions of the *Verfassungsgericht* which deal with matters of private law, because the judges of that court lack the expertise and experience to deal adequately with problems on which they have to decide.

Furthermore experience shows that a court solely concerned with constitutional matters may well be more vulnerable to external attack from politicians dissatisfied with its decisions, who believe that they know as much about constitutional law as the constitutional judges. This is something which cannot happen so easily when the judges on the top court charged, *inter alia*, with constitutional adjudication have all been appointed on the grounds of their general juristic experience and competence. This was dramatically illustrated in the country from which the idea of a separate constitutional court derives its origin, *viz* Austria. It is not generally known that it was Hans Kelsen, the jurist and neo-Kantian legal philosopher, who was largely instrumented in the establishment of the first Constitutional Court in Austria after the break up of the Austro-Hungarian Empire. Kelsen was appointed by the legislature as one of the original members of the court, with life term. After about ten years the court gave a very unpopular judgment dealing with the power of administrative agencies to grant dispensation from the proscription of remarriage of Roman Catholic spouses who

had been separated from their former marriage partners. Popular agitation then became widespread throughout Austria for what was called the 'depoliticisation' of the Court, which was then reconstituted in 1928. Kelsen's dismissal followed in 1930. It is clear that the Constitutional Court which he had helped to establish proved very vulnerable to external attack. It is interesting to compare the fate of similar reconstitution efforts aimed at the US Supreme Court some six years later, which Hughes CJ was able to ward off very successfully. Fortunately nothing of that kind has happened here – yet – and our Constitutional Court still enjoys tremendous authority and prestige but one cannot be certain that that will always be the case.

To sum up so far, I suggest that the case for having **one apex court**, based on jurisprudential considerations and the desirability of reducing the number of appeals open to dissatisfied litigants together with the concomitant costs thereof, is becoming increasingly more persuasive the further we get away from the particular and essentially temporary circumstances which prevailed at the beginning of the 1990's

The next question to be considered is what form should the single apex court take.

I suggest that the fairest and most sensible approach is to combine the Constitutional Court and the Supreme Court of Appeal. The members of the Constitutional Court at the moment are expected to give final appellate answers to constitutional questions coming before them and the members of the Supreme Court of Appeal are expected to give final appellate answers on all other questions coming before them and, as I have said, they are also expected to exercise constitutional jurisdiction. Both the President and the Deputy President of the SCA have been appointed by the Judicial Service Commission, as have the vast majority of the members of the Court. As we have heard at this conference it appears to be generally accepted that judgments given by members of the present Supreme Court of Appeal are in accord with the basic values of the Constitution and give effect to the spirit, purport and objects of the Bill of Rights. The reasons for the erection of a separate Constitutional Court, valid and compelling as they were at the time, have now fallen away and do not need to be taken into account for the future.

Interesting questions of detail remain for discussion once the main point of principle has been decided but the decision on principle should not be dictated by them.

To sum up: we should only have **one apex court** and the two existing apex courts should merge.