dgru Democratic Governance and Rights Unit

TO:

The Department of Justice and Constitutional Development
Attention: Mr J A de Lange

Per electronic mail: jdelange@justice.gov.za

Dear Mr de Lange,

Submissions: Constitution Amendment Bill, 2010

1. The Democratic Governance and Rights Unit ("DGRU") is an applied research unit based in the Department of Public Law at the University of Cape Town. The DGRU's work is focused on the relationship between governance and human rights, and we are involved in several projects dealing with the judiciary, and particularly concerning issues of judicial appointments and judicial ethics. As the Bill concerns issues of fundamental importance to the structure and functioning of the judiciary, it is of considerable relevance to one of the core areas of our work.
2. We therefore welcome the opportunity to comment on the Bill, and would like to thank you for granting us an extension in order for us to do so. Whilst the proposed amendments deal with many issues of importance to the judiciary, we will be confining our comments to two aspects: the issue of the tenure of Constitutional Court judges; and the issue of the Constitutional Court becoming the highest (or "apex") court in all matters (not just constitutional matters).

Tenure

3. Clause 10 of the Bill provides that a judge of the Constitutional Court, as well as judges of the Supreme Court of Appeal ("SCA") and the High Court, hold office until the age of 70, or until they are discharged from active service in terms of an Act of Parliament. The explanatory memorandum to the Bill states that the amendment has the effect of aligning the term of office of Constitutional Court judges with that of other Superior Court judges.
4. The Constitution calls for an independent judiciary insulated from interference by other spheres of government. An independent and impartial judiciary is a central part of every legitimate democracy. Universal to all the forms of judicial function is independent, impartial and neutral adjudication[1]. The Constitution states that judicial officers must 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.[2] Judicial independence is not an unqualified good.

[1] Anthony Mason, 'The appointment and Removal of Judges', www.judcon.nsw.gov.au/publications/education-monographs-1/monograph1/fb... accessed on 09/03/2010
[2] Schedule 2 of the Constitution Act 2006, - oaths/affirmation of judicial officers

Department of Public Law, Faculty of Law, University of Cape Town,
Private Bag X3, Rondebosch, 7701, Cape Town, South Africa
Tel +27 21 650 2011 • Fax: +27 21 650 5607

What is needed is a substantial measure of judicial independence combined with some degree of a democratic check on the court. "Absent an independent judiciary free from basic political pressures and influences, individual rights intended to be insulated from majoritarian interference would be threatened, as would the supremacy of the countermajoritarian constitution as a whole".[3]

5. One of the most important aspects in ensuring judicial independence is ensuring security of tenure for judges. However, tenure should be limited in order to avoid numerous problems associated with an unlimited tenure. We firmly believe that lifetime tenure should be avoided, and it is pleasing that the Bill has not proposed such an approach. On the one hand, in every democracy there should be wariness of having as judges unaccountable autocrats who may be out of touch with the typical citizen's concerns. On the other hand, having limited tenure makes courts more democratically accountable and legitimate by providing for regular updating of the court's membership through the appointment process.
6. The system of life tenure for constitutional court justices has been rejected by most major democratic nations in setting up their constitutional courts or other highest courts. In this respect, the United States is an anomaly: judges are appointed to the Supreme Court for life subject only to possible impeachment for violating the constitutional requirement of "good behaviour", although no Supreme Court judge has ever been successfully impeached. "Life tenure" means that the judges serve until they retire, or pass away. England has recently eliminated the guarantee of life tenure for judges of the newly-formed Supreme Court.
7. As far as our research has established, most other major democratic nations provide some sort of limited tenure of office for the Judges of its highest courts. Two possible ways of limiting tenure are discernable. The one involves fixed, limited terms for judges to serve on their constitutional or highest courts.[4] The concept is attributed to European constitutional courts, as a counter to the significant power vested in a court capable of overriding legislature and executive.
8. This approach is followed in respect of judges of the Constitutional Courts in France[5], Italy[6], Spain[7], Portugal, Germany and Russia, who serve fixed, limited terms of between six and twelve years. Judges of the German Constitutional Court additionally face a mandatory retirement age of sixty-eight[8], in addition to the twelve-year non-renewable

[3] Martin Redish, *Judicial Discipline, Judicial Independence and the Constitution: A textual and Structural Analysis,* 72 S. Cal L. Rev, 673, 683 (1999)
[4] See Dorsen et al, page 132.
[5] Members of the Constitutional Council serve a single nine year term. These terms are staggered, so that every three years there are three new appointees, and each of the three persons empowered to appoint judges is able to make one appointment every three years.
[6] Tenure of nine years.
[7] Tenure of nine years.
[8] A further factor is that judges of the German Constitutional court must be at least 40 years old when they are appointed.

term. Members of the Russian Constitutional Court face a mandatory retirement age of seventy in addition to the fixed term of twelve years.

9. The second approach is followed in many other countries which do not impose fixed term limits, but set a mandatory retirement age. Judges in the highest courts in Canada, Australia and England enjoy tenures limited by a mandatory retirement age of sixty-five, seventy and seventy-five, respectively. India and Japan have instituted a mandatory retirement age of sixty-five and seventy, respectively. The Supreme Court of Ireland carries a mandatory retirement age of 70, and judges of the Supreme Court of Mauritius hold office until they reach the mandatory retirement age of 62.[9] It should further be pointed out that the practice in many of these countries is to appoint only very senior and experienced judges to their highest courts. Thus, although an exact term limit is not legislated, the mandatory retirement age coupled with the seniority of the appointees provides in effect for a limited (though variable) tenure.
10. We acknowledge that there are persuasive arguments both for and against the changes to Constitutional Court judges' tenure.
11. In favour of the changes, the following arguments might be advanced:

    a. Currently the judges of the High Court and the Supreme Court of Appeal do not have to serve for a fixed period, whereas the judges of the Constitutional court have to serve for a fixed period of 12 years, even when they have not reached the mandatory retirement age. The proposed amendments would bring about uniformity in the judiciary as they suggest that all judges should have the same tenure, including those of the Constitutional Court.
    b. A longer term of appointment of judges might lead to greater consistency in the development of the jurisprudence of the Constitutional Court. Longer tenure may give judges more time to develop carefully jurisprudence without fear of time limits on their time on the court, and without feeling pressure to build a legacy. This is important as the constitution gives a mandate to the court to develop areas of law such as the common law and customary law. If the turnover of judges is quick, it could lead to inconsistent jurisprudence.
    c. By having a limited tenure in the Constitutional Court, the country loses talent as some judges, who could serve for much longer, have to retire at a relatively young age (an example is the recently retired Constitutional Court judge Kate O'Regan). Therefore having longer tenure would mean that the judiciary would retain talented judges who would contribute to the development of our jurisprudence, and the judiciary would not lose the benefit of the experience gained by these judges. Moreover, this eases judicial and professional anxiety about the quality of the judiciary in the years that lie ahead.

[9] http://www.afdevinfo.com/htmlreports/org/org_49220.html

d. Longer tenure arguably increases the independence of judges. Common to all the forms of the judicial function is independent, impartial and neutral adjudication. Having limited tenure has a potential danger of making judges give pro-executive judgements in order to secure employment when their term is over. For example, a constitutional court judge with ambitions to sit in an international tribunal at the end of their tenure may not want to rule against government, as they may need government backing to secure appointment to that international court.

12. However, the following arguments may be made against the amendments:

a. Having unlimited tenure may cause judges to stagnate on the court. Commentators in the United States have suggested that judges who remain on the Supreme Court for several decades may become insular and out of touch with new traditions, technological developments, and the attitudes of younger generations. It has also been argued that these judges can become less productive.[10] Although the Bill does not provide for an identical system to the United States, these concerns remain pertinent, and more so than under the current system.
b. These considerations are also important in the South African context in that, because of the legacy of apartheid, South Africa needs urgent development of its jurisprudence, and the Constitutional Court is the main interpreter of the Constitution, a document that drives social transformation in the country. More limited tenures will allow for regular injections of "new blood" and fresh ideas, and allow for the systematic replacement of judges who may have become "out of touch" following a long time on the court.
c. A related concern is that longer tenure may stifle the Constitutional Court by not having adequate bench with diverse legal backgrounds and philosophies. It is desirable for a country's judiciary to regularly bring in new judges who will bring new ideas and perspectives to the court. Having longer tenure may mean that judges who have been on the court for a long time may become narrow-minded and conservative over time.
d. The latter consideration is particularly pertinent in light of the potential power and influence of the Constitutional Court. It is arguably desirable that this function not be performed by the same individuals over a long period of time. Bringing in new judges would lessen the chances of having a court staffed by judges who are "stuck in their ways". This is especially important as the constitution is a living document, which will need to be interpreted in light of changing social and economic conditions in the future.

[10] Wendy Phillips, *Term Limits for Supreme court Justices*?

e. Longer terms of appointment may encourage political interference in the appointment of judges. If politicians know that they are appointing people who would be judges for a long time, they may be tempted to appoint candidates who would give judgements sympathetic to their ideologies. Longer tenures may lead to significantly less frequent vacancies on a court, which may reduce the efficacy of the democratic check that the appointment process provides on the court's membership. The combination of less frequent vacancies and longer tenures of office means that when the vacancies arise, there is potentially more room for political interference in the appointment process.

f. In saying this, we do not accuse government of attempting to undermine the judiciary. Rather, we seek to emphasise the importance of the Constitution enshrining the best possible principles of governance of the judiciary, which can endure to the benefit of all South Africans despite any changes in government in the future.

g. Any perception of political interference may lead to negative public perception of the judiciary. The preservation of public confidence in the judiciary is a vital component of the judicial function. Loss of confidence due to perceptions of lack of independence or impartiality on the part of the judiciary is extremely damaging to the effective working of the judicial system.

h. By contrast, it has been argued that the current system of tenure has not produced problematic jurisprudence due to considerations of a judge's future career ambitions – indeed, Constitutional Court judges are said to have displayed strong independence.[11]

i. In the United States, life tenure has been criticised for giving judges unrestrained power with a lack of accountability – unless a judge is impeached, there is no means of sanctioning or disciplining a judge. It may be said that these concerns are not as pressing in the South African context, particularly if judges must retire at the age of 70 in any event. Nonetheless, it is important not to overlook the "countermajoritarian dilemma" posed by a justiciable constitution. Limiting the tenure of judges on the highest court can provide an important balance for these concerns.

13. Having carefully considered the competing arguments, we submit that the amendments in respect of the tenure of Constitutional Court judges ought not to be passed. The constitution is not just any piece of legislation – it is the foundational document of our legal order, and ought not to be amended lightly. We respectfully submit that an examination of the arguments for and against the amendments do not reveal a strong need for change. There does not appear to be a compelling need for uniformity of tenure, in light of the exceptional nature and position of the Constitutional Court within

[11] Serjeant at the Bar, "Do Con Court judges need lifetime tenure?" available at http://www.mg.co.za/article/2010-06-25-do-con-court-judges-need-lifetime-tenure

our legal system. Concerns about independence under the current system do not appear justified in light of the record of Constitutional Court judges, and there are reasons to fear that independence would be in more danger of being compromised under a system of longer tenure. But perhaps most pertinently, we submit that the unique position of the Constitutional Court, in interpreting a constitution which guides the changes which characterise our rapidly developing society, makes it desirable that there is sufficient turnover of new judges with fresh ideas on the bench. Respect for the doctrine of precedent ought to ensure that this does not undermine the consistency of the court's jurisprudence.

Apex court

14. The Memorandum on the objects of the Constitution Amendment Bill states that it is intended to "provide that the Constitutional Court is the highest (apex) Court in all matters", and seeks to "regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal accordingly". Clause 3 of the Bill provides for the amendment of Section 167 of the Constitution, such that the Constitutional Court would become the highest court of South Africa, and would have jurisdiction over any non-constitutional matters where it has granted leave to appeal.
15. The practice of having a separate, specialised constitutional court may be traced to Europe, where judicial power was historically lacking in independence from other branches of government. Ordinary judges were thus not entrusted with constitutional adjudication, and specialist constitutional courts were established, consisting of independent judges who normally did not come from the ranks of the judiciary.
16. In the United States, the highest court (the U.S. Supreme Court) operates within a system of "decentralised" constitutional review, where constitutional review is not distinct from the administration of justice in general, and all disputes are decided by the same courts, without any special treatment for constitutional cases.
17. In many European systems, different categories of litigation are identified, and decided by separate courts. Constitutional litigation is decided by a specialist court which enjoys exclusive jurisdiction over such cases. Ordinary courts in these systems cannot decide constitutional matters.
18. South Africa's legal system post-1994 is perhaps best understood as a hybrid of these two approaches, in that all superior courts retained constitutional jurisdiction, but the constitutional court operated as a final court of appeal in respect of constitutional matters only.
19. Are there good reasons to change this state of affairs?
20. It has been said that the European system of constitutional review has an advantage over its American counterpart in that it isolates constitutional issues to be decided on by a specialised court, which is not burdened with other duties and is able to devote

appropriate time to consider carefully issues which will inevitably be of great significance.[12]

21. On the other hand, it has been suggested that the American system is more effective at ensuring that constitutional rules are spread throughout different areas of the law. However, we would suggest that the South African system does not suffer this defect, since our High Courts are able (and indeed required) to pronounce on constitutional matters. The difference to the American system lies only in the presence of a specialist constitutional court as a court of final appeal on constitutional matters.
22. In the South African context, a specific concern has been raised that the definition of what constitutes a "constitutional issue" is sometimes strained in order to give the constitutional court jurisdiction to hear a case. The amendment would remove any confusion as to what constitutes a constitutional issue, and as to whether the SCA or the Constitutional Court is the final court of appeal.
23. However, in our view the amendment also raises numerous difficulties, and ought not to be passed.
24. Non-constitutional cases would be capable of being decided by the Constitutional Court as a final court of appeal. Judges of both the Constitutional Court and the SCA have been appointed on the basis of the current split in jurisdiction. Current Constitutional Court judges may lack the knowledge and experience of their SCA counterparts for general jurisdiction work, because they have been appointed as constitutional law specialists.
25. It might be argued that, since the Constitutional Court would hear non-constitutional cases at its discretion (if "the interests of justice require that the matter be decided by the Constitutional Court", as is posited in the proposed amended section 167(3)(b)(ii)), the court would be able to decline to hear cases that it did not feel best place to decide.
26. We submit that it would be highly undesirable for jurisdictional decisions to be taken in such an ad-hoc manner at the stage of deciding on leave to appeal. Equally, we submit that it would be highly undesirable to place the Constitutional Court in a position where it felt obliged to hear cases in order to assert its position as an apex court, even though it might lack the expertise it needed to hear the case. We do not suggest that Constitutional Court judges would act improperly. But the Bill would seem to carry the potential to place them in an invidious position.
27. South Africa is a young democracy and there is still merit in having a dedicated constitutional court to develop our constitutional jurisprudence. Compared to countries such as Germany, Canada, and in particular the United States, our constitutional jurisprudence remains at an extremely early stage of its development – sixteen years is not a long time compared to the time in which these systems have developed their jurisprudence. We submit that there is much to be said for allowing a specialist, dedicated court to continue this development, without having to contend with what is

[12] See Louis Favoreu, *Constitutional Review in Europe*, quoted in Dorsen et al, *Comparative Constitutionalism,* pp. 120-121.

likely to be a very heavy load of non-constitutional case law (we note that no provision has been made to increase the number of judges on the Constitutional Court).

28. We also submit that there are difficulties in how the relationship between the SCA and the Constitutional Court is structured under the Bill. The Bill does not contemplated that the SCA would merge with the Constitutional Court. The eleven judges of the Constitutional Court thus face a potentially daunting increase in their workload. And we submit that it would be highly undesirable for a situation to develop where the court's workload was controlled by an application of what was in the "interests of justice" in determining whether leave to appeal ought to be granted to the Constitutional Court. Limiting the number of appeals allowed to the Constitutional Court may have the undesirable side effect of limiting the rights of many parties to prosecute an appeal to finality. If the Constitutional Court is to exercise a 'gate keeping' function, and limit the number of cases which it hears, there would seem to be a real possibility that the court will effectively end up hearing the same number and type of cases as it does already, leaving the SCA to deal with the balance. If this is the case, one may well ask why the amendments are really necessary.
29. As we have discussed, there is international precedent for specialist constitutional courts, for example in Germany (a legal system which was particularly influential in structuring South Africa's post-1994 legal order) and many other emerging democracies. The fact that a significant number of countries follow this approach suggests that there is much merit in, in particular for emerging democracies, and South Africa ought to proceed cautiously before discarding the system.
30. If this position is adopted and a specialist constitutional court is retained, then it further strengthens the argument for not changing the tenure of Constitutional Court judges. As was submitted above, a specialist constitutional court would be best served by a bench that is "refreshed" by new judges at fairly regular intervals.
31. In conclusion, we therefore respectfully submit that there are compelling reasons why the aspects of the Bill discussed above ought not to be passed.

Richard Calland
Associate Professor: Public Law Department
Director: Democratic Governance & Rights Unit, UCT

Abongile Sipondo
Researcher & Advocacy Manager: DGRU

Chris Oxtoby
Research Associate: DGRU

23 July 2010