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A REVIEW OF THE

ADMINISTRATIVE RECESS SYSTEM

IN THE HIGH COURT

BY

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FOREWORD

The Minister of Justice and Constitutional Development and the National Director of Public Prosecutions are to be commended for sanctioning a formal investigation and report on the thorny issue of the **recess system** in our country.

It is a matter of public record that, for years, I have been **opposed** to the recess system and, in the process, have elicited strong and emotive responses from all quarters - not least of whom the **judiciary**.

Unfortunately, other debates on this important issue have also generated more heat than light.

A proper study of the current recess system in the South African context of overcrowded prisons, accommodation shortages, court delays and criminal case backlogs which have assumed serious proportions, shows that recesses do not belong in our **overburdened criminal justice system**.

Elsewhere, foreign jurisdictions have tackled the problem in a structured fashion and developed alternate ways of balancing the interests of the judiciary with the interests of the community.

There are many facets to any proposed solutions and this report does not pretend to have found the Holy Grail.

If anything, I would like to think that this report shows that there is ample room for **common ground** and that it is possible to find solutions, which could be welcomed by everyone concerned.

Any alteration to working patterns in the High Court is likely to affect a wide spectrum of people, and arouse strong emotions.

Accordingly, I consider it **essential** that those who wish to **comment** on the proposals contained herein, be given the opportunity to do so. For that reason, the report will not be considered final until all **submissions**[1] have been considered and included, where appropriate or necessary.

Finally, I would like to **thank** the many people who gave me the benefit of their experience and wisdom in contributing to this report.

Others, who assisted in various ways, are too numerous to mention. Two, in particular, must be singled out for thanks: Amy Bell-Mulaudzi at the American Consulate, for her overwhelming helpfulness and efficiency, and my secretary, Dawn Greyvensteyn, for her long-standing loyal support and invaluable assistance.

F W KAHN SC
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[1] See p. 95 *infra*

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APPENDICES:

A REVIEW OF THE ADMINISTRATIVE RECESS SYSTEM IN THE HIGH COURT

INTRODUCTION

Productivity in the High Court is dependant on the **optimal utilisation** of the **hours** available, per calendar day, per court, on the one hand, and, on the other, the **number of** such **calendar days available**, per court, to dispose of the business of the courts.

The former problem is in the process of being carefully scrutinized and reviewed on an ongoing basis by all the relevant role players in the criminal justice system. My mandate[2], however, is to review the latter problem, with special reference to the **recess system** and the **criminal business** of the High Court.

Approximately **5%** of all serious criminal cases manage to be heard in the High Court, where cases are finalized approximately two years after the date of the commission of the offence, while witnesses struggle to remember and accused persons languish in jail.

The recess system dates back to **civil recesses** in colonial times and causes a loss in court time, countrywide, of some **4624 days** per year[3]. In modern times, this is a luxury which the country cannot afford, given that "*there is presently a crisis in our courts which should receive the*

[2] My mandate refers specifically to productivity in the High Courts; it **preceded**, and was **unrelated** to, the Management Meeting held subsequently on 26 May 2003. Any suggestion to the contrary, in a letter signed by the Chief Justice and the National Director of Public Prosecutions, is factually incorrect.
[3] See page 52 *infra*

urgent attention of the authorities".[4]

The **poor performance** of our criminal justice system is not simply an issue of governance.

In South Africa, it risks affecting the **stability** of the State and the well-being of the constitutional order; increasingly, communities are engaging in **vigilante** activity. This is largely a result of popular perceptions that the country's constitution and the criminal justice system are, at best, ineffectual when it comes to fighting crime or, at worst, afford greater protection to criminals than law-abiding citizens.[5]

Public trust and **confidence** are unlikely to be achieved if there is a **perception** that the **courts** are **inaccessible** or **wasting public resources**.

It is unarguable that a well nigh complete **shut-down** of **fourteen weeks** of the year, in each of the well-equipped and -staffed High Courts across the country, is not a waste of public resources which is almost **criminal** in itself.

It is the **duty** of the courts to engender **public trust** and **confidence** by justifying their performance[6].

Similarly, it is the **responsibility** of the political branches, and the prerogative of the public, as users of the courts, to voice concern about the **accountability** and **performance** of the courts and how the courts are performing against the **resources** at their disposal.

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[4] Colloquium, Commission 2: Court Management and Effective and Efficient Resource Utilization under the Chairperson The Honourable Justice J H M Traverso, October 2000.

[5] Institute for Security Studies, Paper 56, May 2002.

[6] Judicial accountability and court performance standards: managing court delay, Ziyad Motala, XXXIV CILSA 2001, p. 172.

In this regard, it is regrettable that there has been considerable **controversy** surrounding statements by the Minister of Justice and the Chairperson of the Justice Portfolio Committee, questioning the workload of certain high courts and the Constitutional Court.[7]

After all,

> *'[a]nyone who is not an anarchist wants the courts at all levels to be fair, efficient and so far as possible **cost-effective**; wants to see the acquittal of the innocent and the conviction of the guilty; and wants to see the guilty appropriately sentenced. There is room for legitimate differences of opinion as to how these ends are best achieved in practice, but it should be an argument about **means**, and not **ends**.*
>
> *It is very unfortunate if those who hold differing views seek to brand their opponents as lacking sincerity in their opposition to crime, or as indifferent to the evils which flow from it. Historically, issues of this kind have not occupied the foreground of political debate; it would be welcome if the future were to bring a return to a more measured and bi-partisan approach.'*[8]

A number of **foreign jurisdictions** have considered the time-worn system of fixed recesses, found it wanting, and developed alternative ways of accommodating judicial vacations and judgment-writing time. One such innovation has been the system of **staggered recesses**, whereby not all the judges take leave at the same time and the courts are able to operate **continuously**.

It seems evident that courts are becoming increasingly mindful that judicial independence does not remove the need to **manage public resources appropriately** and to account for their performance.

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[7] Speech made by the Minister of Justice in September 1999 and remarks by the Chairperson made in June 2003.

[8] Speech by the Lord Chief Justice, the Right Honourable Lord Bingham of Cornhill to Gloucester magistrates in 1997.

A proper study of the current recess system, set against the South African context of overcrowded prisons, accommodation shortages, court delays and criminal case backlogs, which have assumed serious proportions, creates the impression that our High Courts are presently **failing** the people they are meant to serve.

While courts elsewhere have examined and adapted their court systems to suit modern times and exigencies, there has never been a proper **assessment** of our own, archaic recess system.

In 1982, it was very briefly touched upon and endorsed by the Hoexter Commission[9] and again, in 1989, when the recess system became a negotiation point for a new salary package[10]. At that stage, the judges elected to '**sacrifice**' **two weeks** of their **sixteen week recess** and one month of their **4½ month extended leave** in order to secure their new salary benefits[11]. One such benefit, the full current salary, payable for life (under certain circumstances), is an extraordinarily generous benefit.

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[9] The Hoexter Commission on the Courts, 1983, Volume 1 of the Final Report, part III, page 225.

[10] An Attractive Deal for Judges, by Ellison Kahn, SALJ 1989, page 701. The 'new deal' for judges includes the basic principle that 'once a judge, always a judge'. A judge has a period of active service and then normally joins the 'reserves' from which he might be called on to do judicial service until he turns 75 years of age. While he is in the 'reserves', if he meets certain conditions, he will have the salary and benefits of those on active service, and if he actually does service he gets an additional salary.
After he has left the 'reserves', he is still on the normal roll and is allowed, if called on, to do judicial service at an additional salary. The basic salary on the nominal roll is calculated to a scale with complex rules: basically, however, **15 years of active service** will yield a **full current salary**. A judge is automatically discharged from active service when he turns 70 years of age if he has completed 10 years of service or, if he has not, once he has done so (section 3(2)(a) of Act 47 of 2001). If, on attaining 70 years, a judge has not yet completed 15 years' active service, he/she may continue to perform active service to the date on which he/she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first. (Section 4(4) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001). There are also gratuities payable to judges, as well as to their surviving spouses.

[11] See regulation 3(1) in footnote 143 *infra*. This reduction in extended leave was controversial, as some judges were upset at the reduction. Ellison Kahn, *op. cit.* states: *"one wonders whether the loss of a month is really a hardship. In the UK, leave is not known. As far as I am aware, it does not exist in the federal courts of the United States. Very likely, it was introduced in this country to enable judges to travel abroad from time to time, a commendable aim. But the days of the mailboat and obligatory train travel are over; and surely three and a half months every four years are enough*."

Section 16(6)(a) of Schedule 6 of our Constitution[12] provides that:

> *"[a]s soon as is practical after the new Constitution takes effect, all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalized with a view to establishing a judicial system suited to the requirements of the new Constitution*."

As a result of this provision, in October 2000, the Minister of Justice and Constitutional Development held a **Colloquium** with all the role players to discuss the strengths and weaknesses of the **judicial system**, *inter alia*,

> *"the **long recess periods** in the High courts which **create case backlogs** and **prevent optimal utilization** of the courts and prosecuting services".*

Although no final conclusions were drawn, a number of points emerged from the discussions[13], including the possibility of **staggering** the recesses:

> *"(i) Recesses are **essential** to prepare judgments and read appeals.*
> *(ii) Where possible, 2 or 3 judges should be **on duty** during recesses to deal with **criminal cases, especially** (there was sympathy for the position of the prosecuting authority).*
> *(iii) This issue can only be addressed properly on the strength of **facts** which need to be analysed (there is no easy answer and a balanced approach will have to be found).*
> *(iv) The question was raised whether **staggered recesses** could not be introduced.*
> *(v) Where long **criminal cases** run into recess time, they should be **finalized during the recess**.*
> *(vi) The possibility of using **acting judges** during recesses should be explored.*
> *(vii) The debate about recesses is aimed at ensuring that **resources are used optimally** and not at pointing fingers at the judiciary.*

[12] Constitution of the Republic of South Africa, Act 108 of 1996.
[13] These discussions were held by Commission 1, under the chairmanship of Mr Justice Bernard Ngoepe, Judge President of the High Court, Pretoria. As a result of discussions at Commission 2, under the chairmanship of the Honourable Justice JHM Traverso, it was likewise agreed that for efficient Court management, resources had to be used effectively and efficiently. Included in the areas which may improve efficient Court administration issues, was the question of Court recesses.

*(viii) The question of recesses is, in essence, a **management** issue.*

(ix) If there is a move towards intermediate appeal courts, there will not be a need for long recesses.

*(x) A change in the recess position will not address present problems unless **extra judges** are appointed."*

Despite these promising discussion points, it appears that, to date, this has been the end of the debate.

The aim of this report is, firstly, to consider whether the recesses are suited to the requirements of the new Constitution and secondly, to consider in what ways it may be improved upon.

In the latter regard, three ideas, in particular, will be considered, namely:

- the introduction of a system of both **fixed and staggered recesses**,
- the reduction of the High Court recesses by the creation, and gradual introduction, of a **new rank** of (**criminal**) **High Court judge**, and
- a **separate criminal bench** within the present High Court system.