# MEMORANDUM SUBMITTED ON BEHALF OF THE JUDICIARY OF SOUTH AFRICA ON THE CHAPTER ON THE ADMINISTRATION OF JUSTICE IN THE DRAFT INTERIM CONSTITUTION

1. We have been requested by the Technical Committee on Fundamental Rights to comment on two options dealing with the administration of justice in the proposed new Constitution of South Africa.

2. Before dealing with the two options in detail, we note with concern that the sections dealing with the Magistrates' Courts in both options have failed to establish compatibility with the new Magistrates Act, 90 of 1993, and the Magistrates' Courts Amendment Act, 120 of 1993. The above-mentioned Acts, although recently passed after thorough debate by both the Standing Committee on Justice and Parliament, have not yet been put into operation. We submit that, for the sake of continuity and legal certainty, the Technical Committee should closely study the principles of the said two Acts in order to ensure the maximum compatibility of its proposals with the new statutes.

3. In commenting on the two options, we propose firstly to make some general submissions in regard to

matters of fundamental importance to the administration of justice and secondly to comment on certain other matters of detail. The matters of fundamental importance are:

(a) Whether or not jurisdiction to adjudicate in matters in which a constitutional issue arises should be confined to either a separate Constitutional Court or a Constitutional Chamber of the Appellate Division; and generally the procedure in regard to constitutional cases.

(b) Whether there should be a separate Constitutional Court or a Constitutional Chamber of the Appellate Division.

(c) Our proposal in regard to constitutional adjudication and a constitutional chamber.

(d) The proposed Judicial Services Commission and the section dealing with the appointment, disciplining and dismissal of Judges.

4. Constitutional Jurisdiction

Both options one and two are based on the general principle that the Constitutional Court, or Constitutional Chamber as the case may be (for the sake of brevity I shall merely refer to a "CC" as representing

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either), shall have exclusive jurisdiction in constitutional cases. It is to be a "court of first and final instance".

We are not in favour of this general principle and would propose a system under which, generally speaking, all Divisions of the Supreme Court would have jurisdiction at first instance in constitutional matters and the CC would, in general, be the court of final instance. (The details of this system are given under par 6 below.)

Our reasons for this viewpoint are as follows.

(a) We believe that under our system of administering justice the general procedure proposed whereby the CC would exercise its constitutional jurisdiction would in most instances be cumbersome, impractical and unduly costly. The stated case procedure, as laid down in clauses 10 of the two options, means that in every case, criminal or civil, where it is alleged that a law is invalid on grounds of being in conflict with a provision of the Constitution (generally the bill of rights) and a decision on the validity of this law is decisive of the matter, proceedings must be suspended and a stated case submitted to the CC for decision. This means that a stated case must be formulated, presented to the CC and the

matter set down for hearing by the CC. The time lapse before the decision of the CC is given and the case can be resumed could be considerable, especially if in the beginning many cases come before the CC. It is not unreasonable to put this time lapse at about a year. This involves considerable delay in the disposal of the case and disruption of the hearing. If the attack upon the validity of the law fails and the case has to be resumed, the Judge or magistrate may have difficulty in recalling the evidence of witnesses who have given evidence and the parties (especially the prosecution in a criminal case) may have problems in regard to witnesses who may in the meanwhile have disappeared or died. Moreover, it may transpire at the end of the case that the facts as eventually found by the Court render the constitutional point irrelevant, in which event the reference to the CC would have been superfluous and futile. In our view, the Court should not decide a constitutional issue unless this is absolutely necessary for the determination of the case. In any event, the reference to the CC may constitute an expensive procedure which would not have been necessary had the court of first instance been seized of the constitutional issue. All these

difficulties would be avoided if the trial Court (at Supreme Court level at any rate: we deal with this point later) were vested with a constitutional jurisdiction. What would then happen is that the trial Court would decide the constitutional issue (normally at the end of the case) as one of the matters to be decided by it. If eventually the factual findings of the Court rendered the constitutional issue irrelevant, then it would fall away.

(b) Experience in ordinary litigation has shown that the stated case procedure often gives rise to difficulty. Parties fail to envisage all the facts necessary to enable the court to decide the matter. Often after hearing argument it becomes clear that the matter cannot be decided without hearing additional oral evidence. The CC would not seem to be an appropriate forum for deciding factual issues. Furthermore, the constitutional issue could be raised at any time, e g in a criminal case after the State's witnesses have already given evidence, and the constitutional question might be dependent upon findings of fact that still have to be made. A stated case presupposes that the facts are not in issue. How is a trial Court to prepare a stated case if it does not know what other evidence will be led and at

a stage when it has not made any findings of fact?

(c) Evidence might well be relevant to the application of the bill of rights (see for example clause 28, the limitation clause in the draft bill) and therefore to the constitutional issue in a particular case. If there were disputes of fact arising from such evidence, how would this be resolved?

(d) It is important for the creation of a proper human rights culture in our country that all Judges and superior courts should be involved in the legal debate surrounding the interpretation and application of the bill of rights. It will help educate the judiciary (and the legal profession generally) in such matters; and it must be remembered that it is from the judiciary that some (at least) members of the CC will in the future be drawn. Moreover, the views of the trial Judge on the constitutional issue could be of great value to the CC if and when it is called upon to decide the matter on appeal.

(e) If the entire responsibility for constitutional adjudication is vested in the CC there is a great danger of its becoming unduly politicized, becoming the sole target of attack for

decisions on human rights issues and thus having its credibility impaired. This is less likely if the responsibility for constitutional adjudication is diffused throughout the superior court system.

5. Constitutional Court or Constitutional Chamber

This question is approached specifically on the basis that the CC is a final court of appeal in constitutional matters and that all Divisions of the Supreme Court have a constitutional jurisdiction. Nevertheless, some of what we say here also has relevance to the type of CC proposed in options one and two.

For the reasons which follow we favour the CC being a chamber of the Appellate Division.

(a) If the whole superior court system is to be endowed with a constitutional jurisdiction, then it seems logical and sensible that the CC should be part of that system.

(b) It appears to be envisaged by both options that the Chief Justice should be a member of the CC and the Appellate Division. This would be difficult in practice if the CC were not a chamber of the Appellate Division, and especially if it were decided to locate the CC

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at a place other than the seat of the Appellate Division.

(c) A court needs buildings and an infrastructure, consisting of a registrar and staff, ushers, etc. In the short term it would be difficult to provide all this for a new and totally independent court.

6. Our proposal for a Constitutional Chamber

We propose the following:-

(a) A Constitutional Chamber of the Appellate Division should be created to act as the final court of appeal in all matters involving a constitutional issue and to enjoy a jurisdiction at first instance in certain cases (see par 6(e) below). The existing Appellate Division would then become the General Chamber of the Appellate Division.

(b) A system in terms of which all Divisions of the Supreme Court would enjoy a constitutional jurisdiction.

(c) When an appeal is lodged to the Appellate Division and it appears to the Chief Justice that it raises a constitutional issue which may be decisive of the appeal he shall arrange for

it to be heard in the Constitutional Chamber. All other appeals would be heard by the General Chamber.

(d) All appeals, whether raising a constitutional issue or not, can be lodged and pursued only if leave be granted in the manner presently required under the Supreme Court Act.

(e) In any case coming before a provincial or local division, either at first instance or on appeal from a magistrate's court, where it appears to the Court that the facts are not in dispute and that the only issue is a constitutional one, the Court may (in its discretion) at any time before judgment and on the application of one of the parties or both of them or **mero motu**, refer the case direct to the Constitutional Chamber for final decision by that Court. This procedure would be available particularly where there is urgency or the matter is one of great public importance. In such cases the case could take the form of an application for a declaration of rights.

(f) The Constitutional Chamber should consist of the Chief Justice, five members of the Appellate Division (who may also sit in the General Chamber) and five Judges who are not

existing members of the Appellate Division but are qualified to be appointed as Judges. (As to this see further par 7(e) below.) The quorum of the Chamber should be seven in all cases involving the validity of an Act of Parliament or any law made by a SPR legislature; otherwise five.

(g) The Magistrate's Court should not have a constitutional jurisdiction relating to the validity of legislation. Should such a constitutional issue arise in a case coming before it the law in question must be presumed to be constitutional; but the constitutional point may be taken on appeal to the Supreme Court. On the other hand, the Magistrate's Court should be permitted to pronounce on the constitutionality of executive or administrative actions, subject to the usual appellate procedures.

(h) **N.B.** It is a defect of options one and two that neither appears to make provision for how cases involving the constitutionality of executive or administrative actions are to be dealt with. Under our proposal they would be dealt with (in the Supreme Court) in the same way as other constitutional issues; and in the Magistrate's Court as indicated above.

7. Judicial Services Commission and Appointment, etc of Judges

(a) The two options compose this Commission very differently. We prefer the model contained in option two, but would amend it to include three representatives of the executive authority (see sec 18(1)(d) of option two). We think also that it should be made clear that the four Judges referred to in sec 18(1)(c) can comprise or include Judges President. We are opposed to the Commission including as members persons from the National Assembly as proposed under option one.

(b) Sec 18(3)(c) - and Sec 19(2) - of option two deal with the disciplining of Judges. They appear to presuppose other legisltion dealing with this. There is no such other legislation; nor do we know of any basis for disciplining Judges or indeed what disciplining means in this context. Under existing legislation (see sec 10(7) of the Supreme Court Act) the only action that can be taken against a Judge is what is popularly called "impeachment", i e he can be removed from office by the State President upon an address from each of the houses of Parliament in the

same session praying for such removal on the ground of misbehaviour or incapacity. The references to "disciplining" should accordingly be deleted.

(c) Similarly the references in secs 18(3)(c) and 19(2) to "dismissal" appear also to be inappropriate: the references should be to "removal from office".

(d) With regard to the appointment of Judges, we are strongly opposed to the provision in sec 19(1)(a) of both options to the effect that the candidate must be "found by a joint committee of the National Assembly and the Senate to be a fit and proper person". We find this type of inquisitorial procedure unacceptable. In any event, the Judicial Services Commission will already have made such a finding.

(e) With reference to the provision in sec 19(1)(c), in both options, to the effect that the qualifications for appointment to the Bench are possession of the academic qualifications regulating the admission of advocates and, after having become so qualified, having been involved in the administration or teaching of law for a period of at least 10 years, we make the following points. Firstly, we firmly believe that as a rule judicial appointments

should be made from the ranks of senior advocates in private practice, as is the present position. As regards the position of attorneys who may in the future acquire the right of audience in the Supreme Court, consideration of this must be deferred until after the Milne Commission has reported and official action, if any, in pursuance thereof has been taken. Secondly, we do not accept the argument that is sometimes advanced that existing South African Judges (and future ones drawn from the Bar) will not be competent to interpret and apply the new Constitution and the Bill of Rights. Thirdly, we acknowledge that as far as the appointment to the Constitutional Chamber proposed by us are concerned, a case may be made out for including among the five Judges who will be members of that chamber (but not members of the General Chamber) persons qualified to be admitted as advocates and having the 10-year experience referred to above, even though they are not in private practice at the Bar.

(f) We assume that the appointments procedure in sec 19 applies only to future appointments and does not affect persons presently holding a

particular judicial office. This should be made clear.

(g) In view of the temporary nature of the proposed Constitution, it might be advisable, as far as the Constitutional Chamber is concerned, for the Chief Justice to be empowered to make **ad hoc** appointments to the CC from a list of names submitted to him by the Judicial Services Council.

8. Matters of Detail

We draw attention to certain matters of detail which deserve comment:

(a) Ad sec 10(5) and (6):

In the memorandum dealing with the proposed chapter on Fundamental Rights doubts are expressed as to the practicality and feasibility of an order postponing the coming into effect of a declaration of invalidity. We refer to the arguments raised in that memorandum but for convenience we repeat the gist thereof. Legislation is either constitutional or unconstitutional. If a particular piece of legislation is found to be unconstitutional, the practical effect of the application of sec 10(6) is that, pending the

passing of new legislation to replace that which is invalid, the executive, the administration and individuals will be entitled, even obliged, to obey the invalid legislation and act in terms thereof and to acquire or lose rights in terms thereof. This seems wrong in principle. The answer to the problem of a hiatus created by a declaration of nullity of legislation is not for the Court to postpone the declaration but for Parliament to convene as a matter of urgency and to pass a new law.

(b) Ad sec 10(7):

In our view, this subsection is unacceptable.

(i) Suppose that during a trial the issue is raised that a decision affecting the plaintiff was made in terms of invalid legislation and passed prior to the coming into effect of the interim Constitution. Suppose further that the plaintiff asks for that decision to be set aside. As the subclause reads at present, a setting aside will not affect the validity of the decision as such, because it is something that was "done" in terms of that Act. It is true that the Constitutional Chamber can exclude the operation of the

subsection, but there might be other prospective litigants who wish to oppose similar decisions and of whom the Constitutional Chamber is unaware.

(ii) The problem with which the Technical Committee was faced was that of the retrospective effect of a new constitution. We suggest that the only practical solution is the following:

The new Constitution and the Bill of Rights must be made applicable retrospectively, that is to say, it will also be applicable to legislation existing at the date of the commencement of the new Constitution. It will, obviously, also affect all new legislation. As far as executive and administrative actions are concerned, the only reasonable and equitable test is whether such actions have been finally and fully completed before the commencement of the new Constitution. This solution enables the court not only to declare "old" legislation invalid, but also to avoid the chaos of declaring invalid hundreds of completed administrative actions in terms of the old legislation.

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(c) Ad sec 10(8):

If the court is a chamber of the Appellate Division the clause is unnecessary. In any event we do not think that the Court should have the power to order the State to pay costs when it has not been a party to the action.

(d) Ad sec 19(1)(a):

It should be made clear that these provisions apply only to future appointments.

M M CORBETT
CHIEF JUSTICE

3 September 1993

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