

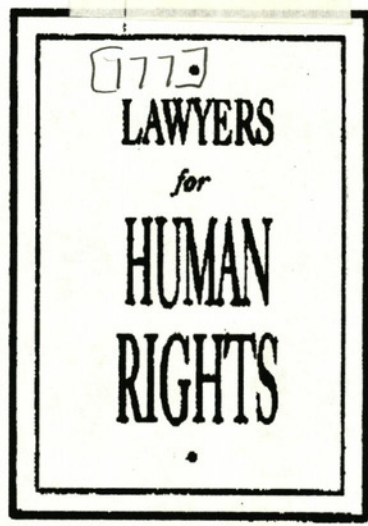
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THANK YOU

(1)

SUBMISSIONS ON THE ENFORCEMENT MECHANISMS**INTRODUCTION****THE CONSTITUTIONAL COURT**

South Africa is moving from a Westminster system of Parliamentary Sovereignty towards a system of Constitutional Sovereignty. This shift in government system should also be reflected in the Judicial System. It would however not be advisable to effect any major structural changes in the judicial system during the transitional phase. It is however, essential that there should be some indication that there is a break with the past. The establishment of a Constitutional Court separate from the existing court structure would therefore be of significant historical and symbolic value in this regard.

The constitutional court should be a separate court of first and final jurisdiction in constitutional issues. This court should be able to establish its own identity and legitimacy. The proceedings of the court should also be conducted in terms of its own rules and procedure.

The constitutional court would have final jurisdiction in constitutional matters and the appeal court would retain its appellate jurisdiction in all other matters.

PROPOSED MODEL

We support the proposal for a hybrid model based on the parallel system. The Constitutional Court would have jurisdiction to hear and determine:

- * As a court of final instance in any question concerning the validity of legislation referred to it by another court.
- * As a court of final instances, in any dispute between organs of the state concerning the validity of any action the constitutionality of which is disputed by them.
- * As a court of first and final instance in any matter referred to it on the grounds that such matter is of such constitutional importance that it should be determined by the Constitutional Court.
- * The constitutionality of any law including an act of parliament irrespective of whether such law came into operation or was adopted prior to or after the coming into operation of the constitution.

The Appeal court and the Regional Divisions of the Supreme Court would have jurisdiction to apply the Constitution and to adjudicate on matters relating to fundamental rights. It would however not have jurisdiction to pronounce on the validity of any Constitutional provisions as this would be in the exclusive jurisdiction of the Constitutional Court. It would however have jurisdiction to pronounce on the validity of legislation of SPR and local government. Subject to a right of appeal to the constitutional court which would have the final jurisdiction.

(2)

The magistrate should have jurisdiction to apply the constitution and to adjudicate on all matters relating to fundamental rights. It should also have jurisdiction to pronounce on the validity of legislation of any local government. Should the validity of a constitutional provision be in dispute at any stage in proceeding before a regional division of the Supreme court or a magistrate court, this dispute should be directly referred to the Constitutional court for a pronouncement.

SECTION 87 (d) disputes between organs of state at a regional or local government level should be subjected to the jurisdiction of the regional division of the Supreme court subject to a right of appeal to the Constitutional court as a court of final instance in the dispute.

APPOINTMENT PROCEDURE

There should be a more open and critical appointment of judges. In the past a number of judges have been appointed for improper motives or political reasons. At this point in our history it is imperative that persons of integrity and who have the confidence of the majority of South Africans be appointed. Basic principles of representative government suggest that the judiciary should cease to reflect the values and interest of one group of society. It is essential that the judiciary should consist of men and women from all sectors of society. An alternative procedures and criteria for the appointment of judges to the constitutional and Supreme court be adopted in the interim constitution.

APPOINTMENT TO THE CONSTITUTIONAL COURT:

SECTION 88

We agree to the appointment procedure as set out in section 88 subject to the following proposals.

SECTION 88 (2) The criteria as set out in this section is exclusive rather that inclusive.

SUB - SECTION C would have the effect that a number competent blacks and women be excluded. It is therefore proposed that the ten year period as proposed in this section be amended to five years. This would not in our view affect the standard of candidates but would broaden the base from which potential competent candidates could be drawn. Merit include technical skills but also include other attributes such as integrity, ability to listen and understand counsel and witnesses and to write well balanced judgements.

SECTION (d) This section should in addition refer to persons who have the potential in acquiring expertise in the field of constitutional law and human rights. The inclusion of potential as a criteria in this section would also facilitate the application of an affirmative action policy in the appointment procedure.

(3)

SECTION (3) It is vital that the method of appointment be as transparent as possible. We therefore propose that the candidates be interviewed in public hearings. The Constitutional court would be charged with the duty of dealing with contested social and political values which outcome would affect the lives of the citizens to a great extent. The general public therefore have a right to know the person they would have to entrust with such important decision making function.

The joint standing committee should consist of representatives of all houses of parliament on a proportional basis. No party should be allowed to dominate the proceedings.

All 11 members as propose in **SUB SECTION 3 (a) and (b)** should be approved by 75% of the members of the joint standing committee. The recommendation at present requires an unanimous vote in subsections (a) and (b). This requirement could result in numerous deadlocks that could unnecessarily prolong the procedure as it allows for any dissenting vote to veto the appointment.

It is also proposed that the word person in **SUB SECTIONS 3 (a) and (b)** be replaced with the wording women and men in that it would expressly make the appointment of women to the constitutional Court a constitutional requirement. It would also ensure the appointment of a minimum of two women.

APPOINTMENT OF JUDGES IN OTHER COURTS

The application of the convention for the appointment of judges at present is wholly inadequate as it leads to the exclusion of black people and women. This criteria that persons appointed to the ordinary courts as judges should be changed in its entity in order to broaden the base of possible candidates and to allow for appointment of persons representative of the whole of society.

We propose the following guidelines as possible criteria that could be in the selection of judges.

- (a) Academic qualifications that would enable the person to be admitted as an advocate in terms of the current requirement for admission as an advocate.
- (b) Person of integrity.
- (d) Person with the ability to listen and understand witnesses and counsel.
- (e) A Person with the intellectual capacity to interpret the law and the facts relevant to a case and the capacity or the potential to develop the capacity to write well motivated judgements.
- (f) Practical and or academic legal experience of a minimum of at least 5 years.

SECTION 93

In terms of section 93 we propose the following amendments:

(4)

SECTION 93(a) The Commission should select its own chairperson.

SECTION 93 (d) and (e) to read as follows:

- 1 practising advocate; and
- 1 practising attorney.

Reference to the designating body should be deleted as these bodies are for a number of historic reasons not representative of members of its respective professions at present.

The procedure for the nomination of these candidates could be set out in the internal rules of the Commission.

SECTION 93 (g)

This section we propose should read as follows:

- 5 members of parliament designated by the National Assembly by a majority.

The judicial service commission as constituted in terms of this section is dominated by the legal profession. It is our view that the general public have a vested interest in the appointment of judges as it is a matter of public concern. We are however of the opinion the judicial selection committee should consist of representatives of the judiciary, the executive and the general public.

We therefore propose that the state president should appoint 6 men and women from civil society to redress the imbalance in the Commission as proposed in section 93.

The procedure for the nomination and the election of these candidates should also be developed.

SUB-SECTION 92 (A)

The terms of reference of the commission should be extended to enable the commission to conduct disciplinary hearing and recommend disciplinary action to the National Assembly in instance of alleged misconduct by any judge.

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PROPOSALS ON THE EIGHT REPORT OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS:

THE HUMAN RIGHTS COMMISSION

STRUCTURE OF THE COMMISSION

The enabling legislation of the Human Rights Commission should make provision for the establishment of a National and Regional structure .

The National and Regional Commissioners should be appointed by the Judicial Service Commission as proposed in the twelfth draft of the technical committee on Constitutional issues subject to the amendments as proposed.

The Regional Authorities should however appoint regional judicial service commissions for the election of additional employees to the regional commissions.

The enabling legislation should also empower the Commission to appoint sub- committees to deal with specific areas and categories of Human Rights violations and Human Rights Concern. For example womens rights, torture etc

FUNCTIONS OF THE COMMISSION

The broad functions of the commission can be as under.

It shall be the function of the commission to examine and all allegations of human rights violations by complainants including human rights organisations and individuals or suo moto.

To conduct wide ranging National inquiries on Human Rights concerns of importance to the general public.

To scrutinise government policies whether in the form of legislation or otherwise and report to parliament and the public its compliance with National and international Human rights standards.

To review the effectiveness of existing legislation and or the administrative provisions in the protection of human rights with the aim of making recommendations for the amendment of such legislation or the introduction of new legislation as necessary .

The commission should also examine bills and proposals for new legislation but forward by regional and national government to verify its compliance with International and National Human rights Standards

(6)

To undertake special studies and investigations into specific areas identified as sensitive and prone to human rights abuses and to report and make recommendations to the responsible authority.

To conduct and promote human rights education with a view to disseminate human rights literature and promote and understanding of the human rights situation in the country and enhance respect for human rights among all sections of society and all levels of the administrative system.

To lobby for the adoption of international and regional human rights documents and on the adoption thereof monitor and report on compliance thereof.

To establish communication with and between national and international human rights organisations.

The commission should also work towards the promotion of cooperation with regional and international human rights organisations

The Human Rights Commission should have as its broad aims the prevention and promotion of Human Rights.

ADDITIONAL FACTORS TO BE CONSIDERED

It should aim to achieve its objectives through mediation and arbitration or a combination of both. It should also be empowered to award compensation should the circumstances necessitate this. It is also important that the Human Rights Commission should have the power to institute action in the Constitutional Court if it is of the opinion that a matter warrants the attention of the Constitutional Court. It should be able to institute action in its own rights or on behalf of an individual.

It should have adequate funding, adequate staffing and adequate facilities.

The Constitution should therefore place a duty on the National Government to ensure that all arrangement are made and staff and facilities provided to enable and facilitate the proper and effective performance of all the functions of the commission.

CONCLUSION

To ensure that the commission functions effectively strong support of the Government would be essential. The Central and Regional Governments will have to commit themselves to undertake the follow up action on the recommendations of the Commission. Without the National Consensus and support the Commission would start with a disadvantage.

THE OMBUD

1) THE CURRENT OFFICE

The advocate General Amendment Act of 1991 created the office of the ombud. In terms of this Act the Ombud is appointed by the State President who also has the power to suspend him / her although this has to be done in consultation with Parliament. The State President also determines the salary and conditions of employment of the Ombud.

The scope of the office's jurisdiction extends only to matters involving dishonest dealing with public moneys, prejudice caused by State maladministration, and unlawful and improper enrichment (in connection with State affairs).

The office does not investigate complaints until other available remedies have been exhausted. Complaints are made by means of an affidavit or affirmed declaration specifying the nature of the allegations and the grounds on which such allegations are based and any other relevant information. The function of the Ombud is then to investigate the matter and to make recommendations as to the possible ways in which the dispute could be settled, if any. The Ombud, however, has no power to enforce his/her recommendations. The office can not on its own initiate investigations. The office can not ordinarily investigate matters arising "outside" the traditional white South Africa, i.e Self-Governing States.

The Ombud's annual report is submitted to the Speaker of Parliament who hands it over to the Minister of Justice to table in Parliament. If part of the report's content is, in the Ombud's opinion, not in the interest of the state security to publish, the Ombud could recommend that publication of such part be prohibited. The office can not institute legal proceedings nor prosecute.

2) RECOMMENDATIONS

It is clear from the above that for the office to be independent, credible and therefore effective, substantial changes have to be effected. These changes should largely be in respect of the incumbent's appointment, the office's jurisdiction and its powers. We therefore recommend the following with regard to these issues:

APPOINTMENT

The prevailing situation wherein the incumbent is appointed by the State President is not without drawbacks. In effect it renders the appointment a political one. The possibility of the office being more sympathetic to the executive can not be entirely ruled out.

(8)

It would be ideal if the incumbent was appointed by the judicial service commission. The appointment of a national and regional ombuds are proposed. The national ombud could be appointed by the Judicial Service Commission. The National ombud could that appoint the regional ombuds on the recommendation of the regional service commission. The Composition of the regional service commission could be constituted as follows:

- a The judge president of the regional Division.
- b 1 practising advocate in the region.
- c 1 practising attorney of the region.
- d 1 professor of law designated by the law schools in the region
- e 5 Representatives of the regional government.
- f 5 persons representing civil society.

JURISDICTION

We are of the opinion that the office's jurisdiction as it exists presently should be extended to cover a wide range of areas that are universally regarded as falling within the ambit of its traditional area of jurisdiction. There are three areas in this regard, namely matters to be investigated, persons or bodies to be investigated and the geographical area.

On matters to be investigated we recommend the following:

- a) Allegations of unlawful, unreasonable, unjust, improper, oppressive or discriminatory practices.
- b) Allegations of misconduct by those charged with State administration in its departments and institutions.
- c) Allegations of corruption
- d) Allegations of inaction or neglect of duties by State agencies in the performance of their duties.

On persons or bodies against whom complaints should be investigated we recommend the following:

- a) All public officials. No public official or body should be exempted from investigations.
- b) The entire executive, including the State President, Cabinet Ministers and Director General should also be investigated.
- c) All State departments, institutions and agencies
- d) All institutions, organisations and agencies receiving public funds for their operations.

(9)

On the geographical area, there is no doubt that the demarcation of areas into the so called Self-Governing States, Independent States and the Republic of South Africa is an artificial one aimed at conformity with the apartheid ideology.

It is as a result of this demarcation that the office has been inaccessible to the majority of the people of this country. In fact the majority of these people do not even know that the office does exist.

POWERS

There is no doubt that some of the causes of the present office's ineffectiveness and inefficiency can be attributed to its lack of strong powers. We therefore recommend that the institution should be given the following powers to enable it to discharge its duties effectively and efficiently:

- 1) To negotiate with the parties in order to reach a compromise or settlement.
 - 2) To make appropriate recommendations or call for steps to remedy, correct or reverse decision(s) taken by persons who or bodies which have been the subject of investigations.
 - 3) To report its findings to superior(s) of any offending person(s) with recommendations as to how the matter could be dealt with including recommendations to invoke the disciplinary procedures applicable in a given situation.
 - 4) To recommend payment of compensation to the victim if justice so requires.
 - 5) To refer matters to the Attorney General in appropriate circumstances with recommendations for prosecution.
 - 6) To institute proceedings in a court of competent jurisdiction for an interdict to secure the termination of an offending action or conduct or the abandonment or alteration of an offending practice.
 - 7) To refer matters or institute action as a complainant in the Human Rights Commission if it is of the opinion that human rights have been violated by a person or bodies investigated.
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