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**SOUTH AFRICAN GOVERNMENT OFFICE  
- WORLD TRADE CENTRE -**

9 June 1993


Head of the Administration  
Multi-Party Negotiating Process  
World Trade Centre

Dear Dr Eloff

**SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT FOR THE  
ATTENTION OF THE TECHNICAL COMMITTEE: FUNDAMENTAL  
RIGHTS DURING THE TRANSITION**

1. Attached is a submission by the South African Government entitled ***DESIRABILITY OF THE ESTABLISHMENT OF CERTAIN MECANISMS DURING THE TRANSITIONAL PERIOD IN ORDER TO PROMOTE THE INDEPENDENCE OF THE JUDICIAL AUTHORITY.***
2. Kindly transmit the document for immediate attention to the Technical Committee.

Yours sincerely

  
GOVERNMENT OFFICE: WORLD TRADE CENTRE

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MINISTERIE  
VAN JUSTISIEMINISTRY  
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REPUBLIC VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

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Verwysing/Reference 8 June 1993

Dear Mr Van der Merwe

**DESIRABILITY OF THE ESTABLISHMENT OF CERTAIN MECANISMS DURING THE  
TRANSITIONAL PERIOD IN ORDER TO PROMOTE THE INDEPENDENCE OF THE  
JUDICIAL AUTHORITY**

I enclose herewith a document containing the Government's preliminary views on the desirability of the establishment of certain mechanisms during the transitional period in order to promote the independence of the judicial authority for submission to the Technical Committee on Fundamental Rights during the Transition.

With kind regards

HEAD: MINISTERIAL SERVICES

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OD116593

**PRELIMINARY VIEWS AND PROPOSALS OF THE GOVERNMENT REGARDING THE DESIRABILITY OF THE ESTABLISHMENT OF CERTAIN MECHANISMS DURING THE TRANSITIONAL PERIOD IN ORDER TO PROMOTE THE INDEPENDENCE OF THE JUDICIAL AUTHORITY**

**1. Introduction**

1.1 The Government's preliminary recommendations in respect of the independence of the judicial authority, which were recently submitted to the Technical Committee on Fundamental Rights ("Technical Committee"), suggest the establishment of bodies such as the Council of Justice, the Judges Commission and the Constitutional Court during the transitional period.

1.2 However, since the Technical Committee at this stage finds itself in a difficult position in respect of making specific recommendations for the transition, it requested all parties in the Negotiating Council to inform it of their views as to -

- (a) the appropriate adjudicative institution(s) to enforce fundamental rights during the transition;
- (b) reasons for adopting such a course and for the timing of its introduction;
- (c) methods of constituting any new bodies suggested, and of selecting their members;
- (d) supplementary mechanisms to make the functions of the adjudicative institution effective and accessible.

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**2. Ad paragraph (a): Appropriate adjudicative institutions to enforce fundamental rights during the transition**

2.1 In its preliminary proposals (Annexure "A"), the Government recommends the establishment of a Constitutional Court to decide authoritatively the constitutionality of legislative, executive and administrative acts (See paragraphs 4.2 and 4.3 of Annexure "A" for the constitution of such a Court). The question arises as to whether an ordinary court should be able to decide constitutional disputes. In view thereof that it could take several months before a matter is heard in the Supreme Court, that such a court might consist of a single judge and that an appeal lodged against such a court's decision might take considerable further time, the opinion is held that such a procedure would not only escalate legal costs, but could also result in a constitutional crisis and would consequently not be a desirable procedure.

2.2 In paragraph 4.3 of Annexure "A" it is stated that since the Constitutional Chamber would be an integral part of the Appellate Division, it would not be possible to lodge an application with the Chamber directly, and each application, action or appeal would have to follow the normal course through the existing structure of the courts. This preliminary proposal is in line with the recommendations of the South African Law Commission. Notwithstanding the preliminary views in this regard, after further deliberation, the Government is of the opinion that provisions in terms of which certain disputes may also be referred to the Constitutional Chamber directly, might be a more desirable option. In our view, such provisions should include the following:

- (a) If the validity of any act of Parliament or provincial ordinance is questioned in any proceedings before the Supreme Court on the ground of alleged inconsistency with the transitional constitution and finality regarding the validity of the law in question is essential for the determination of the matter before such Court, the Court should be able to refer the question to the Constitutional Chamber, unless the Court concerned is satisfied that there is no reasonable prospect of a finding by the Constitutional Chamber that such law is inconsistent with the transitional constitution. Furthermore, the proceedings before such Court should be suspended, pending the decision of the Constitutional Chamber.
- (b) If a dispute referred to in paragraph (a) above arises in proceedings before a lower court, such court should determine the matter before it on the assumption that the law in question is not inconsistent with the transitional constitution, unless a request, to refer the question of validity to the Constitutional Chamber, and to suspend the proceedings before the lower court pending the decision of the Constitutional Chamber filed in the Supreme Court by a party to the proceedings, is granted.
- (c) A provision in terms of which a procedure is created whereby a dispute between constitutional authorities regarding the question whether the conduct of one of these authorities has been in accordance with the transitional constitution, may be referred to the Constitutional Chamber. An application to refer such a dispute to the Constitutional Chamber may be brought before a judge in chambers who, should he be of the opinion that mediation is not possible, refers the dispute to

the Constitutional Chamber. However, should a judge in chambers be of the opinion that a mediated settlement is possible, he should refer the dispute to a Commission for Constitutional Affairs to deal with it, provided that the authorities concerned consent thereto. If the efforts of the Commission for Constitutional Affairs to reach a mediated settlement are not successful, it would refer the dispute back to the judge in chambers who would, in turn, refer it to the Constitutional Chamber.

- (d) A provision in terms of which a procedure is created whereby affected private individuals may approach the Constitutional Chamber directly, by way of submitting a constitutional complaint, which should only concern the violation or alleged violation of a fundamental right. Such procedure should exclude the need for the submission of formal documents or the payment of any "filing" fee in order to prevent any legal costs being incurred.

However, the possibility exists that the Constitutional Chamber might be flooded with burdensome and time-consuming constitutional complaints. In our view, screening committees consisting of members of the Constitutional Chamber should be established, in order to filter out frivolous complaints that might be submitted in terms of the procedure referred to in paragraph (d) above. We are furthermore of the opinion that submissions in terms of paragraphs (a) and (b) should also be screened accordingly. (See Annexure "B" for a schematic representation of the above procedures.)

2.3 In paragraphs 2 and 3 of its preliminary proposals the Government also recommends the establishment of a Council of Judges and a Judges Commission in order to give visible and statutory embodiment to the process of judicial appointments.

3. Ad paragraph (b): Reasons for adopting such course and for the timing of its introduction

3.1 The main question that should be answered is whether fundamental rights and freedoms are going to be entrenched during the transition. Should this question be answered in the affirmative, the further question arises as to which would be desirable mechanisms for the adjudication of such fundamental rights during the transition. The opinion is held that the only logical authority to enforce these fundamental rights and freedoms would be an independent judicial authority which would have to include a Constitutional Court as the final arbiter on constitutional and rights issues. (See also paragraph 2.1 *supra*) This will no doubt place the judiciary far closer to the centre of political controversy and might have consequences for the appointment and selection of judges. In such circumstances it would be more important than ever that the appointment of judges be, and should be seen to be, impartial, strictly on merit and above any reasonable suspicion of bias or favouritism.

3.2 The Commission of Enquiry into the Structure and Functioning of the Courts ("Hoexter Commission") already recommended in 1983 that a Council of Justice be established, in order to advise the Minister of Justice on matters concerning the administration of

justice in South Africa. In addition to this the Hoexter Commission also recommended that the State President should appoint judges on the advice of an independent advisory committee consisting of representatives of the bench, legal professions and the Department of Justice.

3.3 The recommendations of the Hoexter Commission in the above-mentioned context are supported in principle by the South African Law Commission in its Report on Constitutional Models (Volume 3 on p1101 *et seq*).

3.4 The South African Constitutional developments is resulting in a process which is taking us further and further from the British system which had form the basis of South African Constitutional Law. The method of appointing the judiciary was also derived from the British system and in view of the above developments the time has come to introduce a new system commensurate with the other developments. The legal system should be divorced from politics and should be a sovereign entity. Political interference with the appointment of judges, whether through the Executive or through public participation should be avoided. The Government therefore proposes an independent body such as the Judges Commission to be responsible for the appointment of judges.

3.5 Traditionally, in accordance with the doctrine of separation of powers, the administration of justice is conducted by separate and independent courts. This viewpoint is subscribed to by the Government (*Hansard* 12 April 1984 Column 4886). In order to remove any doubt and criticism as to the independence of the



Bench, the Government has been involved, for some time now, in an investigation, in conjunction with parties involved in the administration of justice such as members of the Bench and the various legal professions, into the desirability of the establishment of bodies such as the Council of Justice, the Judges Commission and a Constitutional Court. In principle the senior members of the Bench as well as the various legal professions are *ad idem* that these institutions should be established as soon as possible but that the detail in respect of their constitution and functions should be negotiated. Furthermore the opinion is held that the establishment of such bodies would ensure the separation of the powers of the executive and judicial authorities, as it will totally eliminate the suggestion of "political" appointments. It is furthermore accepted that the introduction of a system that would place judicial appointments above suspicion would facilitate the acceptance of judicial office by the most able from every quarter. It is clear that the only way in which confidence in the judiciary can be maintained and enhanced, is by establishing such bodies, which will function independently of the executive authority.

3.6 In formulating practical criteria to help determine which fundamental rights and freedoms will have to be entrenched during the transition, the Technical Committee on Fundamental Rights recognizes, that the transitional process will have to be as democratic as possible and must be aimed at achieving full democracy. The Government is in agreement with this view and is of the opinion that the methods of constituting any adjudicative institutions to enforce such fundamental rights during the transition and

the methods of selecting the members of those institutions should also be executed in the most democratic manner possible.

3.7 In view of the above the opinion is held that it is of the utmost importance that the said mechanisms be instituted at the earliest opportunity to promote the enforceability of fundamental rights and freedoms which are going to be entrenched during the transition.

3.8 In conclusion it must be stressed that the proposed institution of the said mechanisms should not be regarded as a negotiating ploy. On the contrary, it is an absolute necessity that the proposed mechanisms already be in place during the transitional period, in order to ensure that such, or similar, bodies be part of a final dispensation. It should be kept in mind that, since doubts have been expressed regarding the credibility of the existing judicial authority, it is vital that the judicial authority which would be responsible for the interpretation and enforcement of fundamental rights and freedoms be accepted by all parties as being independent. Furthermore, the transitional period offers an ideal opportunity in which the practical operation of such bodies may be observed and streamlined if necessary.

**4. Ad paragraph (c): Methods of constituting any new bodies suggested, and of selecting their members**

4.1 In addition to what was said with regard to a Constitutional Chamber in paragraph 4 of Annexure "A" it is suggested that the Chief Justice should *ex officio* be a member of both Chambers,

that a Deputy Chief Justice be appointed for each chamber and that the other judges of appeal be appointed to the one or the other, or to both Chambers.

4.2 A Council of Justice should be instituted in order to establish and further the needs of the administration of justice (see paragraph 2 of Annexure "A"). In order to prevent the Council from being a cumbersome body, it is suggested that the Council consist of the following members:

- (a) The Chief Justice of South Africa or, if he is not available or his office is vacant, the most senior judge of appeal as a substitute;
- (b) six members of the Judges Commission, excluding the Chief Justice, who should be appointed by the State President for a period of three years;
- (c) five members of the Magistrates Commission, who should be appointed by the State President for a period of three years;  
and
- (d) the Director-general: Justice or an official of the Department of Justice who he appoints for this purpose.

4.3 With reference to the above-mentioned, it should be noted that since the members of the Judges Commission and the Magistrates Commission referred to in sub-paragraphs (b) and (c), would represent the bench, advocates, attorneys-general, attorneys and the executive authority, the Council would consist of members representing the whole of the legal profession. Furthermore, it is suggested that the members appoint a vice-chairman from their ranks, who would perform the functions of the Chairman, should he

not be available. The Chief Justice and the Director-general: Justice should be members of the Council by virtue of their office.

4.4 As mentioned in paragraph 3 of Annexure "A" the primary function of the Judges Commission would be the appointment, discharge and transfer of judges. In order to establish a Judges Commission which would function independently, while taking into consideration what was mentioned in paragraph 3.3 of Annexure "A", it is suggested that such a Commission should consist of the following members:

- (a) The Chief Justice of South Africa as chairman of the Commission;
- (b) two judges of appeal, designated by the judges of appeal, as representatives of the appellate division;
- (c) the Judges-president as representatives of the provincial and local divisions;
- (d) a representative of the executive authority designated by the State President;
- (e) a representative of the advocacy designated by a professional association of practicing advocates, recognized by the Council of Justice for this purpose;
- (f) a representative of the attorney's profession, designated by a professional association of attorneys, recognized by the Council of Justice for this purpose; and
- (g) an attorney-general designated by the attorneys-general.

4.5 In respect of the above Council the Chief Justice and Judges-president should be members of the Commission by virtue of their

offices and the members of the Commission would appoint a vice-chairman from the ranks of the members referred to in sub-paragraphs (b) - (g).

5. Ad paragraph (d): Supplementary mechanisms to make the functions of the adjudicative institution effective and accessible

5.1 Human Rights Commission

5.1.1 As is pointed out by the South African Law Commission most modern constitutions provide for a network of mechanisms in addition to the testing right of the courts in order to enforce human rights provisions. There seems to be general consensus that a new constitution should include a permanent Human Rights Commission. The Government is in favour of the institution of a Human Rights Commission, but agrees with the South African Law Commission that such a Human Rights Commission should not take over the testing rights of the Courts but should, amongst others -

- (a) fulfil an advisory function in respect of questions regarding the consistency with entrenched rights and freedoms of any proposed and existing legislation;
- (b) fulfil an advisory function in respect of any question as to the extension of the protection of human rights, and to make recommendations regarding additional measures; and
- (c) inquire into alleged violations of human rights.

Such a Commission shall function under the chairmanship of a Judge of Appeal or Judge of Appeal that has been removed from active service or a retired Judge of Appeal. The Government is of the

opinion that such a Commission is also necessary during the transition because it is clear that its main functions relate to -

- (a) making the public aware of their fundamental rights;
- (b) taking preventative action regarding the infringement of fundamental rights; and
- (c) fulfilling an advisory role to the transitional Government regarding the infringement of fundamental rights and the entrenchment of further rights.

#### 5.1.2 The Ombudsman

During 1991 the Ombudsman Act, 1979 (Act 118 of 1979), has been amended in order to extend the powers of the Ombudsman. Amongst others section 4 of the Act was amended to provide that the Ombudsman may investigate complaints where it is alleged that the State or the public in general is being prejudiced by maladministration in connection with the affairs of the State. The Government is therefore of the opinion that the powers of the Ombudsman are wide enough to investigate complaints of maladministration by executive and administrative bodies and persons, including complaints regarding the violation of human rights. Should however a specific need be identified, the said Act can be amended in order to extend the powers of the Ombudsman.

H J COETSEE, MP  
MINISTER OF JUSTICE

## ANNEXURE "A"

OD880593

## PRELIMINARY VIEWS AND PROPOSALS OF THE GOVERNMENT REGARDING THE INDEPENDENCE OF THE JUDICIAL AUTHORITY

1. Introduction

1.1 It is common cause that our law requires of the judicial authority to act with fearless objectivity and independently of the executive authority. Perseverance in this line of conduct is furthermore one of the most important qualities underlying the *Rechtsstaat* principle.

1.2 It is therefore clear that, in order to ensure an independent judiciary also in a future dispensation, certain structures, such as a Council of Justice, a Judges Commission and a Constitutional Court, should be established. It is common knowledge that the Commission of Inquiry into the Structure and Functioning of the Courts ("Hoexter Commission") recommended that a Council of Justice should be established. This recommendation was supported in principle by the South African Law Commission (Report on Constitutional Models, 1991 (Volume 3)). In addition the South African Law Commission made certain recommendations regarding the establishment of a Judges Commission and a Constitutional Court (p 1103 *et seq*). It should furthermore be mentioned that the Ombudsman Act, 1979 (Act 118 of 1979), a copy of which is attached, has already been amended in accordance with the recommendations of the South African Law Commission. (p 1221 *et seq*).

1.3 The Government is in favour of the establishment of a Council of Justice, a Judges Commission and a Constitutional Court, in order to ensure the independence of the judicial authority. The Government is also in favour of the establishment of an instrument similar to the Human Rights Commission as proposed by the South African Law Commission to deal with preliminary conflict resolution between the State and individuals as well as the different organs of the State. The Government therefore wishes to make the

undermentioned preliminary proposals regarding the establishment, constitution, objectives and powers of such bodies.

## 2. Council of Justice

2.1 The legal profession as a whole should be represented on the Council. Since it would not be practical to have more than 15 members (preferably less) serving on the Council, it is recommended that the Council consist of representatives of members of the bench and also of members of the various legal professions (*inter alia*, advocates, attorneys, attorneys-general) and the executive authority. The Chief Justice should be the Chairman of the Council.

2.2 Although the Council will necessarily have wide-ranging powers, its main objective should be to establish and further the needs of the administration of justice. In order to attain the afore-mentioned objective, the Council should be able to carry out any investigation, make known any finding or recommendation and also report to Parliament. Furthermore, the Council should be able to establish committees to perform such functions as the Council may assign to them.

2.3 The Council would need staff for the administrative work incidental to the functioning of the Council. There appears to be no reason why such work should not be performed by officials of the Department of Justice.

2.4 Finally, it is recommended that provision should be made for the remuneration and expenses of members of the Council and its committees.

## 3. Judges Commission

3.1 The establishment of Judges Commissions is not unknown in the democratic world. On the contrary, this practice seems to be gaining in popularity. However, a Judges Commission ("Commission") would be of no value if it did not function independently of the executive authority.



3.2 The Commission should, in our view, consist mostly of members representing the various divisions of the Supreme Court, and also of members of the General Council of the Bar, the Association of Law Societies of South Africa, the attorneys-general and the executive authority. The Chief Justice should also be the Chairman of the Commission.

3.3 Although the functions of the Commission should include the appointment, discharge and transfer of judges, the opinion is held that the executive authority should not be totally removed from this process and that the State President should still play a role. The involvement of the executive authority should, however, be limited to -

- (a) one member of the executive authority who serves on the Commission; and
- (b) the appointment of judges, by the State President, exclusively from persons designated for this purpose by the Commission.

3.4 It should be mentioned that, with due allowance for current provisions, the transfer and discharge of judges should not occur unless the Commission has recommended it. It is suggested that specific provisions should be enacted in this regard.

3.5 In order to achieve its objectives the Commission should be able to carry out investigations, make known any finding or recommendation and also report to Parliament. Furthermore, the Commission should be able to establish committees to perform such functions as the Commission may assign to them.

3.6 The suggestions in paragraph 2.3 and 2.4 apply *mutatis mutandis* to the administrative work incidental to the functions of the Commission and the remuneration of members of the Commission and its committees.

#### 4. Constitutional Court

4.1 Since it is accepted that a future South African constitution will be of a higher legal order than other laws and enactments, the question of judicial review comes to the fore. Judicial review implies the right and duty of a court or courts to interpret authoritatively the constitution of the country, to decide authoritatively the constitutionality of legislative, executive and administrative acts and, in appropriate cases, to declare such acts invalid and unenforceable when they conflict with the country's constitution. The opinion is held that such functions should be performed by a Constitutional Court.

4.2 Such a Constitutional Court should, in our view, form part of the Appellate Division in all respects, so that all the rules of the law of procedure that at present apply to the Appellate Division would also apply to the Constitutional Court. It is therefore recommended that the Appellate Division should consist of two Chambers, namely a General Chamber and a Constitutional Chamber. The latter should deal with all issues arising from the constitution and the field of administrative law.

4.3 Since the Constitutional Chamber would be an integral part of the Appellate Division, it would not be possible to lodge an application with that Chamber directly, and each application, action or appeal would have to follow the normal course through the existing structure of the courts. The Constitutional Chamber of the Appellate Division should hear all appeals in which the only or main issue or issues arise from the provisions of the constitution in general, and executive or administrative acts.

4.4 In view of the suggestions made in paragraph 3 *supra*, it is envisaged that the Judges Commission will appoint the judges of both Chambers. This would create the opportunity to appoint constitutional experts, such as legal academics, to the Constitutional Chamber. Judges who would serve in this Chamber should, however, be Judges of Appeal in the full sense of the word and should therefore enjoy the same independence as any other Judge of Appeal.

## 5. Conclusion

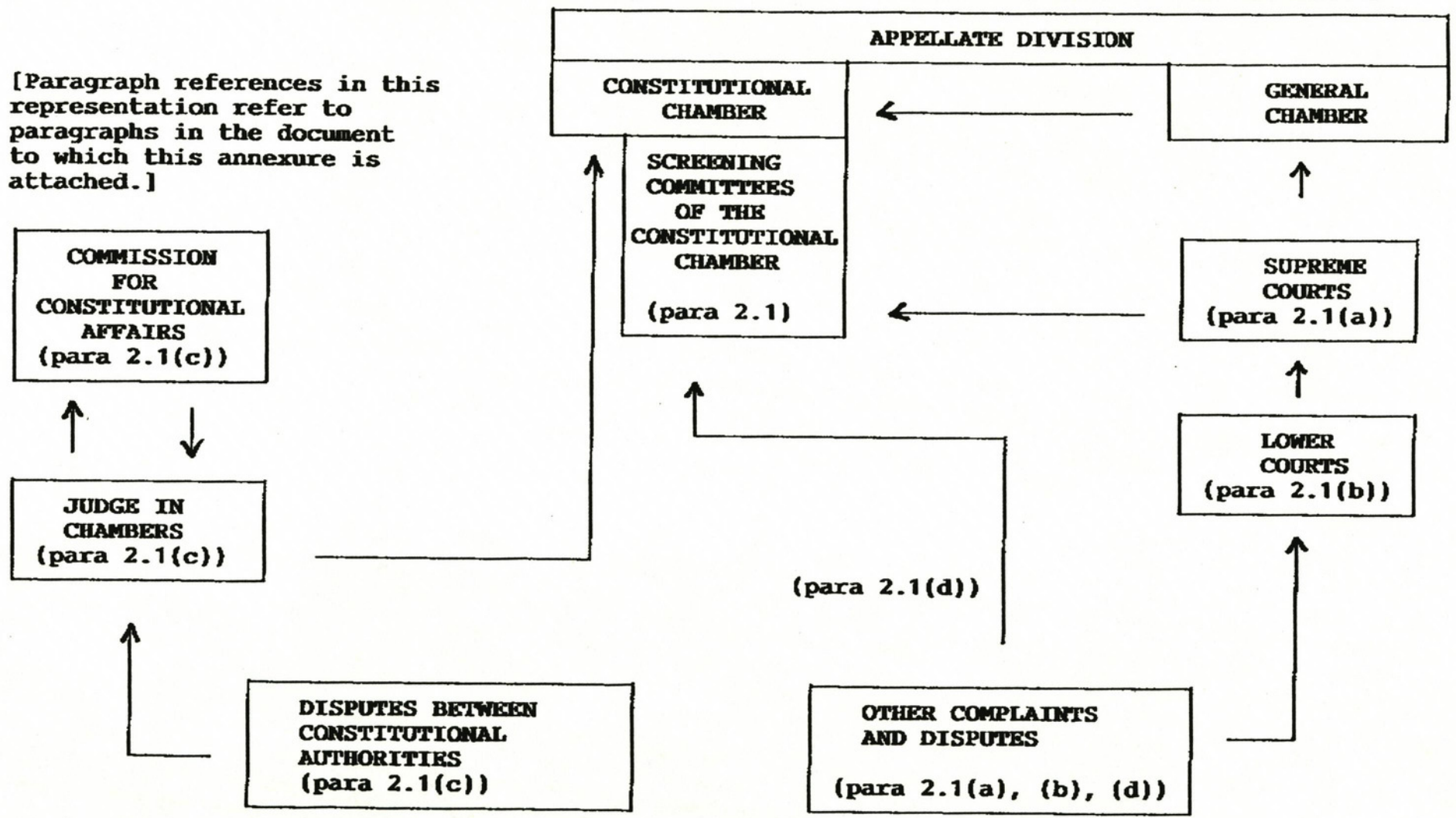
5.1 In conclusion, it should be mentioned that, in our view, it is an absolute necessity that the above-mentioned bodies be established at this stage and that they be entrenched in a transitional constitution. Endeavours should therefore be made to establish at the earliest possible date the Council of Justice, the Judges Commission and the Constitutional Court as structures which would, were they to function effectively, promote their inclusion in a transitional as well as final Constitution.

H J COETSEE, MP  
MINISTER OF JUSTICE

ANNEXURE "B"

**SCHEMATIC REPRESENTATION OF THE MANNERS IN WHICH THE CONSTITUTIONAL CHAMBER MAY BE APPROACHED**

[Paragraph references in this representation refer to paragraphs in the document to which this annexure is attached.]



(para 2.1(d))