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VERY URGENT

15 October 1993

The Chairperson
Technical Committee on Constitutional Issues
The Multi-Party Negotiation Process
World Trade Centre
Kempton Park

Attention: Dr. Theuns Eloff
Mr. Mac Maharaj
The Chairperson, Technical Committee
on Constitutional Issues

Dear Sirs,

Re: **SUBMISSIONS BY NADEL IN RESPECT OF THE TWELFTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES.**

Our previous communications refer.

As indicated, please find enclosed herewith our submissions in respect of the Twelfth Report of the Technical Committee on Constitutional Issues dated 02 September 1993.

We would like to record that we shall be available at your convenience, to elaborate or elucidate upon any of the issues raised in our submissions, if required to do so.

Yours faithfully

ADV. J.H. DE LANGE
LEGAL EDUCATION, RESEARCH AND TRAINING PROJECT OF NADEL

Fax.no: 011-3972211

MEMORANDUM SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS ON THE TWELFTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES.

A. EXECUTIVE SUMMARY

1. The views contained herein are those held by the National Association of Democratic Lawyers (hereinafter referred to as Nadel).

2. The purpose of this report is to comment on the Twelfth Report of the Technical Committee on Constitutional Issues dated 02 September 1993 (hereinafter referred to as the Twelfth Report).

3. Nadel would at the outset respectfully acknowledge and congratulate the committee on the careful consideration, scholarship, draftsmanship and in particular, the approach, underpinning the Twelfth Report. It is our considered opinion that the model being proposed is on the whole appropriate for our country in the transitional period, although we differ, in some respects fundamentally, with certain aspects of the model being proposed. We would like to emphasize that the model being proposed must be regarded as a transitional arrangement, until the Constitutional Assembly has pronounced itself definitively on the issues under discussion. To this end, we acknowledge that whatever transitional model is agreed upon will not and cannot be everything to everyone.

4. The key elements that Nadel would want to see contained in a transitional model for our court structures and judiciary, are:

(i) Proposed Model

a) that a new and separate Constitutional Court (hereinafter referred to as a CC) be established, parallel to the Appellate Division of the Supreme Court (hereinafter referred to as the AD), creating a hybrid split stream system, within the existing two- tier court structures, with its own seat, its own President, its own judges, its own jurisdiction and its own rules and procedures;

b) that the CC will be the court of final instance in respect of all constitutional matters, and in some instances even a court of first instance in certain specified Constitutional matters;

c) that provision should be made for direct access to the CC in certain circumstances, as listed in paragraph 43 below;

d) that the CC should be provided with abstract review in certain circumstances;

e) that the CC will be able to provide legislation with relative validity in certain circumstances;

f) that only the CC be granted jurisdiction to adjudicate in disputes between different organs or levels of government;

g) that the CC will be composed of eleven judges;

h) that in certain specified constitutional matters the CC shall preside en banc;

i) that in certain unspecified constitutional matters the President of the CC may appoint a Bench comprising three (3) to eleven (11) CC judges to hear the matter;

j) that in all unspecified appeals of a constitutional nature the President of the CC may decide to appoint a joint panel of three (3) to eleven (11) judges, composed of an equal number of judges from the AD and CC, with an additional CC judge being appointed as senior presiding judge;

k) that the President of the CC will be empowered in any constitutional matter of first instance in which a dispute of fact exists, or a ruling on the facts is necessitated, to take whatever steps are necessary and appropriate to obtain a ruling in respect of such factual issue;

l) that it would be undesirable to make more changes to the structure, organization and functioning of the present court system than is absolutely necessary;

m) that provision must however be made in the constitution for a competent legislative authority to effect whatever changes are necessary to the existing court structures and judiciary, during the transitional period, including a provision to establish a single court system and specialized courts, if deemed necessary;

n) that in all matters of a non-constitutional nature the existing court structures shall retain their jurisdiction, with the AD retaining its appellate jurisdiction in all such matters;

o) that the AD may only exercise such constitutional jurisdiction, as may be derived

jointly with the CC, in terms of paragraph (j) above;

p) that the Supreme Court (hereinafter referred to as the SC) be provided with jurisdiction in all matters of a constitutional nature, which do not fall within the exclusive constitutional jurisdiction of the CC;

q) that in the event of the SC being granted jurisdiction to pronounce on the constitutionality of Parliamentary legislation, then the operation of such a ruling should be made subject to a definitive ruling by the CC, which must be dealt with and delivered expeditiously;

r) that the Magistrates Court (hereinafter referred to as the MC) be provided with constitutional jurisdiction, except in respect of adjudication relating to the constitutionality of any legislation or subordinate legislation, as well as disputes between different organs or levels of government;

s) that in the event of the constitutionality of any legislation or subordinate legislation being disputed in the MC, it shall deem same to be constitutional and adjudicate in the matter accordingly; and

t) that all qualified members of the legal profession shall have a right of appearance before the CC.

(ii) <u>Alternative Model</u>

a) that a new and separate CC be established at the apex of the existing court structures, as a third tier in a single stream court system, within the existing court structures, with its own seat, its own President, its own judges, its own jurisdiction and its own rules and procedures;

b) that the CC will be the court of final instance in respect of all constitutional matters, and in some instances even a court of first instance in certain specified Constitutional matters;

c) that provision should be made for direct access to the CC in certain circumstances as listed in paragraph 43 below;

d) that the CC should be provided with abstract review in certain circumstances;

e) that the CC will be able to provide legislation with relative validity in certain circumstances;

f) that only the CC be granted jurisdiction to adjudicate in disputes between different organs or levels of government;

g) that the CC will be composed of eleven judges;

h) that in certain specified constitutional matters the CC shall preside en banc;

i) that in certain unspecified constitutional matters the President of the CC may appoint a Bench comprising three (3) to eleven (11) CC judges to hear the matter;

j) that the President of the CC will be empowered in any constitutional matter of first instance in which a dispute of fact exists, or a ruling on the facts is necessitated, to take whatever steps are necessary and appropriate to obtain a ruling in respect of such factual issue;

k) that it would be undesirable to make more changes to the structure, organization and functioning of the present court system than is absolutely necessary;

l) that provision must however be made in the constitution for a competent legislative authority to effect whatever changes are necessary to the existing court structures and judiciary, during the transitional period, including a provision to establish a single court system and specialized courts, if deemed necessary;

m) that in all matters of a non-constitutional nature the existing court structures shall retain their jurisdiction, with the AD retaining its appellate jurisdiction in all such matters;

n) that the AD shall have jurisdiction in all appeals of a constitutional nature, except if one or more of the issues in dispute fall within the exclusive constitutional jurisdiction of the CC, or if the CC under any of the powers it may have decides that a specific appeal should be heard directly by the CC before and without being adjudicated upon in the AD;

o) that the SC be granted jurisdiction in all matters of a constitutional nature, except if such matter falls within the exclusive

constitutional jurisdiction of the CC, or if the CC under any of the powers it may have decides that a specific appeal should be heard directly by the CC before and without being adjudicated upon in the SC and/or AD;

p) that in event of the SC, including the AD, being granted jurisdiction to pronounce on the constitutionality of Parliamentary legislation, then the operation of such a ruling should be made subject to a definitive ruling by the CC, which must be dealt with and delivered expeditiously;

q) that the MC be provided with constitutional jurisdiction, except in respect of adjudication relating to the constitutionality of any legislation or subordinate legislation, as well as disputes between different organs or levels of government;

r) that in the event of the constitutionality of any legislation or subordinate legislation being disputed in the MC, it shall deem same to be constitutional and adjudicate in the matter accordingly; and

s) that all qualified members of the legal profession shall have a right of appearance before the CC.

iii) <u>Appointment Mechanisms</u>

a) that different selection mechanisms should be created for appointments to the CC, appointments to the SC and appointments to the magistracy;

b) that judges of the CC should be appointed by a multi-party Parliamentary committee, in which each party is represented proportionally and decisions are to be taken, by way of a two-thirds vote. Such a mechanism must also provide for Parliament to approve the nominees en bloc with a two-thirds vote; for the legal sector to be consulted in respect of such CC appointments; and for appropriate and effective deadlock-breaking mechanisms;

c) that judges of the SC should be appointed by a Judicial Service Commission (hereinafter referred to as a JSC), which should be broad-based and balanced with regard to race, gender and background, and in which a majority of members should come from outside of the legal sector, whilst retaining appropriate representation from such sector;

d) that the Chairperson of the JSC shall be appointed from amongst its members and by its members, at its first sitting; and

e) that judges should be appointed from all branches of the legal sector, without discrimination and in accordance with certain specified criteria.

5. In our submissions hereafter we elaborate upon each of these aspects, and we also deal with a few other pertinent and related issues.

B. INTRODUCTION

6. In these submissions we shall confine our comments and opinions, in the main, to the Twelfth Report. However, we have also had regard to and may comment on aspects of the Chapter On the Administration of Justice of the Technical Committee on Fundamental Rights; the Memorandum submitted on behalf of the Judiciary of South Africa on the Chapter on the Administration of Justice in the Draft Interim Constitution (hereinafter referred to as the Judges First Memorandum); the Memorandum submitted on behalf of the Judiciary of South Africa on the Twelfth Report of the Technical Committee on Constitutional Issues (hereinafter referred to as the Judges Second Memorandum); the submissions made by the General Council of the Bar to the MPNP in respect of the Twelfth Report (hereinafter referred to as the GCB submission); and the submissions made by the Association of Law Societies to the MPNP in respect of the Twelfth Report (hereinafter referred to as the ALS submissions).

7. These submissions are informed by decisions taken over the years by our General Council and our National Executive Committee, as well as the deliberations and recommendations emanating from our Conference on "Reshaping the Structures of Justice for a Democratic South Africa", which was held at the Farm Inn, Pretoria, on 30 September and 01 October 1993 (hereinafter referred to as the Conference).

8. Invitees to the Conference were drawn from a very wide spectrum of South African opinion, including: representatives from the Nadel membership; international speakers; representatives from South Africa's liberation movements, i.e. the African National Congress (ANC), the Pan Africanist Congress (PAC) and the Azanian Peoples' Organization (AZAPO); representatives from other lawyers organizations and structures like the Black Lawyers Association (BLA), the Lawyers for Human Rights (LHR), the Association of Law Societies (ALS), the GCB; representatives in the employment of the State, from the judiciary,

South African Law Commission (hereinafter referred to as the SALC), the Office of the Ombud and the Goldstone Commission; individual lawyers in private practice at the Bar and Side-Bar; and legal academicians from many of the South African Universities.

9. We intend responding to the Twelfth Report by broadly addressing the following key issues:

(a) The structures and functioning of our court system during the transitional period;

(b) The composition and appointment of our judiciary and magistracy during the transitional period; and

(c) Miscellaneous Issues.

C. **STRUCTURE AND FUNCTIONING OF OUR COURTS**

10. Under this heading the issues in the Twelfth Report to be addressed and in respect of which Nadel wishes to make recommendations relate to:

a) Whether there should be a new and separate CC, parallel to the AD, within a split stream two-tier court system, or whether the CC should be a Constitutional Chamber in the AD within a single stream court system.

b) The composition and functioning of the CC.

c) The structure of the ordinary courts during the transitional period.

d) The jurisdiction of the CC.

e) The jurisdiction of the AD in constitutional matters.

f) The jurisdiction of the provincial and local divisions of the SC in constitutional matters.

g) The jurisdiction of the MC in constitutional matters.

h) Single or split court system and judiciary.

i) Specialized courts.

j) Right of appearance in the CC.

k) Alternative model: whether there should be a new and separate CC, at the apex of the existing court structures, as a third tier, within a single stream court system.

11. We deal with these matters seriatim.

(a) <u>Separate CC or a Constitutional Chamber of the A.D.</u>

12. We are convinced that the arguments in favour of the creation of a CC are clearly decisive. In fact, we have noted that no serious or logical arguments have been put forward in the public domain for debate, nor in submissions to the Multi-Party Negotiation Process (hereinafter referred to as the MPNP), advocating a contrary position. However, that is where the consensus ends. Although there appears to be almost unanimity on the creation of such a CC, for the new constitutional state during the transitional period, almost all other aspects of such a CC appear to be in dispute, for example, the structure, composition and functioning of the CC; the relationship of the CC with the existing courts; and the appointment of judges to the CC; and so forth.

13. Nadel has noted and thoroughly discussed all the different models being proposed for consideration in the Twelfth Report, SALC Report, Judges Memoranda, the GCB submission and the ALS submission. Nadel is of the view that there would appear to be three possible models that should be considered:

a) a new and separate CC, parallel to the AD, within a split stream court system, creating a two-tier hybrid system within the existing court structures (hereinafter referred to as Model A);

b) a new and separate CC, at the apex of the court structures, creating a three-tier single stream system, within the existing court structures (hereinafter referred to as Model B); or

c) the CC should be a Constitutional Chamber in the AD, within the existing single stream court system (hereinafter referred to as Model C).

14. We intend dealing with Models A and C, by way of comparison, in paragraphs 12 - 29, as elaborated upon in paragraphs 30 - 70 herein; whereas Model B, we deal with, as an alternative option, in paragraphs 71 - 73 below. However, the comments made in respect of Model A, in paragraphs 29 - 70 herein, are to a large extent equally applicable to Model B. It would become clear that we completely reject Model C, as wholly inappropriate for our country, in the transitional period. On the other hand, we support both Models A and B, which to a large extent are similar in most respects, except for certain differences in terms of structuring, functioning and, in the main, in respect of the AD's constitutional jurisdiction.

15. Nadel, in broad terms, agrees with the model (Model A) being proposed by the Technical Committee on Constitutional Issues (hereinafter referred to as the TECCOM), as set out in paragraphs 3.1, 3.5, end of 3.6, 3.7, end of 4.2 and 4.6, pertaining to the structure and relationship of a new CC vis-a-vis the existing court structures. In other words, Nadel agrees to the establishment of a CC, parallel to the AD, as a new, independent and entirely separate court from the existing court structures, within a hybrid system, in which it will be the court of final instance, and in some specific instances even a court of first instance, on constitutional issues. To this end, we disagree with the proposals put forward by the SALC, GCB and the Judges for an integrated single stream model, where the CC is to be made a special Chamber of the AD.

16. Our support for Model A, a separate CC within a hybrid model, as outlined in paragraph 5.3 of the GCB submission, finds its rationale in the reasons listed in the Twelfth Report, at paragraphs 2.3, 3.7 and to some extent paragraphs 2.1 and 2.2, without having to list and elaborate on all such reasons again. However, to some extent, these arguments, although wholeheartedly supported, are of a technical nature, and Nadel would want to state hereafter what it regards as the fundamental reason for its support of a separate CC, whether as proposed in Model A or B above.

17. It has been accepted by the MPNP that South Africa will become a constitutional state in which the judiciary will have the power to review and set aside unconstitutional legislation and actions. Therefore the role of the courts in the future is going to be different to their role in the past. In the past they were called upon to apply statutory enactments and the common law to the facts of the cases before them. Part of their work involved the enforcement of apartheid and the draconian security laws by which apartheid was kept in place. That will now change. The courts will continue to interpret statutes and apply the common law, but the apartheid and security laws will be repealed, and the courts will be given a new responsibility. They will be required to interpret the constitution, to enforce and give substance to the fundamental rights which it contains, and to pronounce upon the validity of legislation that is challenged as being unconstitutional. In carrying out these tasks they will be dealing with sensitive and contested social and political values, and as a result, could easily be drawn into controversy over the decisions that they make.

18. The issue of constitutional adjudication therefore calls for special attention. The question which

must be squarely faced by the MPNP and the TECCOM is, whether the present court structures and judiciary, in particular the AD, which served and underpinned the Apartheid edifice, are the most appropriate structures to solely fulfill such a function of constitutional adjudication in the new emerging democracy during the transitional period. The representatives of the SALC, GCB and the Judges in their proposals do not address the disabling effects of the historical role of the South African courts. There seems to be an assumption that the old structures, which were part of an apartheid dispensation, can simply be transported into a democratic, rights-based society and be received with open arms by the community, of whom the majority were the victims of the prior system. For the reasons set out hereunder, Nadel believes that this assumption is wrong.

Legitimacy crisis facing our legal system and institutions.

19. Nadel believes that the whole South African legal order suffers from a very serious crisis of credibility, efficacy and legitimacy. This submission would apply equally to the substantive law itself, as well as the structures administering, underpinning and implementing such law. The reasons for this crisis are not hard to find.

20. The majority of South Africans have, for almost three and a half centuries, been excluded from, meaningfully and on a footing of equality, participating in the political and economic life of our nation. For instance, all constitutional orders devised to date, in 1910, 1961 and 1983, excluded Africans from a meaningful involvement in the political and economic arena. Therefore, each of these constitutional orders have allowed successive white minority governments to adopt and implement social and economic policies, which allowed for systematic and deliberate dehumanizing and degrading experiments at social engineering, particularly in the last four and a half decades. This has meant that the use of coercion, force and even violence by the state and those with economic power, against persons who in the main have been regarded as objects of the law, has not only been sanctioned by the law and become institutionalized in our legal system and governmental institutions, but it has become ingrained and entrenched in the very social fabric of our society itself.

21. Furthermore, our society has promoted and encouraged a culture of male patronage and patriarchy, leading to enormous gender inequalities, particularly in respect of Black women.

22. Small wonder that the social fabric of our society is tearing itself asunder, in every conceivable way, as all kinds of energies and forces, which have in the past been suppressed or hidden by a veil of secrecy and exclusion, have been released by the transitional processes. The legal system and its institutions, being part of the social fabric of society, is not spared the crisis. When the tide started to turn from the mid-seventies it was inevitable that the legal system and its institutions would become one of the focal points around which the resistance and abhorrence against Apartheid would be focussed.

23. There were of course individuals, who in their area of functionality, upheld all that which is decent and proper, to the best of their abilities. However, the crisis does not turn on the actions of a few, but is focused upon everything this society has been and is.

24. Therefore, perceptions of the disenfranchised, mostly black communities, with regard to the judiciary, as well as interaction between such communities and the structures involved in the administration of justice have also been adversely affected.

25. Nadel contends that the achievement of democracy in itself will not bring about the automatic legitimization of the structures which formed part of the Apartheid edifice, including and in particular the court structures.

26. In light of the above it is our view that with the creation of a new constitutional state, underpinned by a constitution based on non-racialism, non-sexism, democracy and a Bill of Fundamental Rights, we will be ushering in a complete move away from the Apartheid system, which was underpinned by a system of Parliamentary sovereignty. Equally, then in our view, it is imperative that the structures administering justice, in particular the CC, which will have to interpret and breathe life into the new and very different legal and constitutional order, should be new and different from the structures presently fulfilling such function and should clearly bring about a break with the past.

27. In practical terms we accept that it will take longer for the existing courts to be sufficiently transformed to be imbued with the required legitimacy. With regard to the CC, however, we do not enjoy the luxury of time. Our view is most eloquently captured by Professor Tony Honore, who after concluding that it was inevitable that the judiciary would for the most part remain unchanged under a new political order, stated that it was

"all the more important that the body which will in the last resort set the law to the other organs of state should be a body freshly recruited and not just an existing court with extended jurisdiction. Constitutional adjudication is unlike ordinary adjudication in that it is strongly political, not in the party sense, but in that it requires judges who are sensitive to the ways in which the values enshrined in the constitution can be translated into concrete rights and duties and in which a balance can be maintained between the different organs of government. It is equally important that the court of last resort should be of a representative character which commands confidence."

28. If the CC is established as a new and separate court it will from the first moment of its existence be able to shake off the distorted profile of the past and be constituted, without any links to the apartheid era, as a new court composed without regard to considerations of race or gender. We support the view that for the CC to divest itself of the baggage of the past, it should have its own seat, its own President, its own judges, its own jurisdiction and its own rules and procedures, to ensure that it is able to establish its own identity and particularly its own legitimacy. This is of vital importance to the nation both as a symbolic gesture, as well as a matter of substance. We accept Professor Honore's suggestion that we could in this regard learn from the experience of Germany, where following the collapse of the Nazi regime, a CC was established under the Basic Law of 1949 to uphold the new constitution. The fact that this was a new court without links to the past was seen at the time as being of particular importance and it has grown to be one of the most respected governmental institutions in Germany.

29. Finally, we wish to respond to the argument in the Judges Second Memorandum that the CC should be seen as a <u>Court of Law</u> and not as a "political" tribunal dealing with legal issues on "political grounds". From our understanding of most CC's all over the world, including the United States of America, Germany and so forth, is that they play a highly political role in the broad sense of the word, not in the party political sense of the word. In fact that is what they have been created for and that is what gives them legitimacy as a state institution in the eyes of the public at large and the body politic. However, they remain and operate as a <u>court of law with a broad political role</u>. In any case, a CC will be no more political than the role which has been played by our present SC, in particular the AD, which has always been the

legitimizing arm of the Apartheid edifice. The proposed separate CC, in our view would lead to the opposite contended for by the Judges, as it would reflect the diverse views of all our people. Also see the comments made in paragraph 89 below in this regard.

(b) **Composition and functioning of the CC**

30. Nadel broadly agrees with the composition of the CC, as proposed in paragraph 3.7 (d) of the Twelfth Report and section 87 (1) of the Addendum, although it must be pointed out that the exact manner of the functioning of the CC as a single panel of all eleven judges, as explained in paragraph 3.7 (d), is not contained in the Addendum. In other words, that in principle there should be one panel of eleven (11) CC judges which will preside in each constitutional matter brought before the CC, to ensure that the diversity of views of our nation, represented in the CC is brought to bear on each constitutional matter being adjudicated upon.

31. Nadel, however proposes that there should be a measure of flexibility with regard to the composition and functioning of the CC, as proposed in the Twelfth Report. There is a fear that the CC with one panel sitting en banc in all constitutional matters may only be able to hear a very small number of cases annually, as is the case with the Constitutional Courts in the USA, Canada and elsewhere. They hear approximately one hundred (100) cases each per year, in comparison with the German Constitutional Court which comprises two panels and adjudicates upon approximately four thousand (4000) cases each year. If litigants are not able to have their matters heard expeditiously and cost effectively by the CC, the stature and image of the CC in the eyes of the public may be diminished.

32. As a principle it should be stated in the constitution that the full panel of the CC must sit en banc in certain specified cases, for example, where it is necessary, in the interest of our nation and/or justice, for the full diversity of views of our nation to be brought to bear on a constitutional matter. These examples could include rulings as to whether the constitution being drafted by the Constitutional Assembly is in conformity with the agreed constitutional principles; when giving advice to the State President as to whether or not a bill which he or she is called upon to sign is in conformity with the Bill of Rights; when deciding upon the validity of Parliamentary legislation; when adjudicating upon disputes between organs of the State; and other matters permitted by rules to be

formulated by the CC itself. This list is by no means meant to be exhaustive.

33. In all other matters where the CC is not obliged to preside en banc, the President of the CC should be given a discretion to allow:

a) any unspecified constitutional matter to be heard by a panel of CC judges comprising of any size from three (3) to eleven (11) CC judges; or

b) to allow any appeal from the SC, on a constitutional issue, to be heard by a joint panel of CC and AD judges, as proposed in paragraph 57 below.

34. The President of the CC should also be clothed in the CC rules with the discretion, in any constitutional matter of first instance, in which a dispute of fact exists or in respect of which a factual finding has not been made by a court of law, to take whatever steps are necessary and appropriate to obtain a finding in respect of such factual issues. (See paragraphs 48 - 50 below in this regard).

35. Nadel is of the view that by not laying down rigid rules cast in stone in the Constitution and by leaving the President of the CC, within certain prescribed parameters, with the discretions outlined above, that the CC would be given the necessary space and creativity within which to breath life into the new legal and constitutional dispensation. Otherwise, the CC runs the risk of becoming discredited as it may not be able to creatively, expeditiously and in a cost effective manner deal with the flood of constitutional litigation we anticipate in the first months of its creation. The Indian experience could serve as an example in this regard. At times, their CC has had a backlog of ten to twelve years, for cases to be finalized. With our history we cannot afford such luxuries.

36. Nadel disagrees with the proposals made in paragraph 6 (e) of the Judges First Memorandum and paragraph 5 of the Judges Second Memorandum in this regard.

(c) **<u>The structure of the ordinary courts during the transitional period</u>**.

37. Nadel is strongly of the view that it is the prerogative of the first democratically elected Parliament, the Constitutional Assembly and the Government of National Unity to make the final pronouncement on the structure and functioning of our courts in a democratic, non-racial and non-sexist society.

38. Therefore Nadel agrees with the conclusion reached in the Twelfth Report that it would be undesirable in a Constitution for the transitional period to make more changes in the organization and functioning of the present court system than are absolutely necessary. Nadel recommends that the present two-tier court structure should be changed as little as possible during the transitional period, except insofar as the creation of the proposed CC and the other factors listed in paragraph 39 below may necessitate change to the structure and functioning of the existing court structures.

39. However, Nadel acknowledges that certain changes to the structures and functioning of the existing court system would be inevitable, even in the transitional period, inter alia, as follows:

a) that with South Africa's move away from a state based on parliamentary sovereignty to the creation of a CC, and the establishment of a CC, it is inevitable that such drastic changes in the basis of state power will impact upon and influence the functioning of the structures and relationship between the different levels of courts. To this end, it will be necessary to provide for transitional mechanisms in the constitution to provide for such changes to be made to the structures and functioning of the ordinary courts, if and when they arise;

b) that the existing system of courts will have to be adapted to allow each SPR to have its own division of the SC. This restructuring should be catered for in the Constitution through appropriate transitional provisions, which would allow for time and resources for the reorganization of the Courts after the SPR's have been established. We are however not in favour of having a dual structure of "Federal Courts" and SPR courts, during the transitional period;

c) that the existing court structures and the new court structures which will be established must of course conform and be in accordance with all principles enunciated in the Constitution for the transitional period, including non-racialism and non-sexism. To this end, some problems may arise in respect of the composition and functioning of the Courts of Chiefs and Headmen and the necessary restructuring will have to be done to bring such courts in conformity with the dictates of the Constitution; and

d) that although Nadel in principle agrees that the Constitutional Assembly is best placed to effect the necessary restructuring in respect of the structures administering justice, mechanisms and processes, like the National Legal Forum being proposed, should be put in place at this stage to investigate and research new models and if consensus is reached, implement same, even during the transitional period.

40. To achieve the restructuring in paragraph 39 above and the possible restructuring mentioned in paragraphs 68 and 69 below, we recommend that provision should be made in the Constitution to allow for such changes to be effected, if and when necessary.

(d) <u>Jurisdiction of the CC</u>.

41. The respective jurisdictional capacities of the different levels of courts in a future dispensation are dealt with in this section, in section (b) above and in sections (e), (f) and (g) hereafter, and should be read as a whole. Nadel, to a very large extent, agrees with the approach in the Twelfth Report and the Addendum to the Twelfth Report (hereinafter referred to as the Addendum) in respect of the jurisdictional capacity of our courts in a future dispensation.

42. In broad terms, Nadel agrees with the jurisdictional capacity of the CC being proposed, as set out in paragraphs 4.6 and 5.1 of the Twelfth Report and sections 87 (2) - (7), read with sections 90 (2) - (12) and sections 90 (1) to (4) of the Addendum, save and except to the extent that any view to the contrary is expressed in this section, section (b) above, and/or sections (e), (f) and (g) below. In other words, the CC shall act as the final court of appeal in all matters involving a constitutional issue and in certain specified constitutional matters, the CC shall even enjoy a jurisdiction at first instance. To this end, the CC should have the jurisdiction to protect and enforce the Constitution. This would include the protection of fundamental rights, adjudication of the constitutionality of government actions and the validity of laws, disputes between organs of state, including disputes between different levels of government, and compliance with the Constitutional Principles in the process of constitution-making.

43. Nadel in particular endorses the TECCOM's recommendation that provision should be made for direct access to the CC in certain circumstances. Nadel suggests that these would include rulings as to whether the constitution being drafted by the Constitutional Assembly is in conformity with the

agreed constitutional principles; advice to the President as to whether or not a bill which he or she is called upon to sign is in conformity with the Bill of Rights; the validity of Parliamentary legislation and other matters permitted by rules to be formulated by the CC itself.

44. The reason for direct access in cases concerned with the constitutional principles and the giving of advice to the State President in regard to the signing of a bill is clear. The reason for direct access in cases concerning the validity of Parliamentary legislation is to avoid uncertainty and to ensure that the ruling has effect throughout South Africa, which would not necessarily be the case, if such a ruling were to be given by one Provincial Division only. The discretion to permit direct access in other matters under the rules would be to allow the CC to deal immediately with urgent matters if it is necessary to do so. One issue that Nadel wishes to stress in this regard is that it is important that the rules and procedures of the CC, as well as the rules as to locus standi in the CC, must be flexible and adaptable, within reason, inter alia, to provide for direct access to the CC, as advocated above.

45. Nadel strongly recommends that the CC must be granted exclusive constitutional jurisdiction in all disputes between different organs and levels of government. We are of the view that due to the fact that constitutionalism and regionalism/federalism is going to be introduced for the first time ever into our legal and constitutional dispensation, by the Constitution for the transitional period, such a provision is necessary to bring about legal certainty, in uncertain and uncharted constitutional waters, and to minimize forum-shopping, as well as friction between different organs and levels of government.

46. In respect of the issue of relative validity, as proposed in paragraphs 5.2 and 5.3 of the Twelfth Report and sections 87 (4) - (6) of the Addendum, as stated, Nadel endorses the proposal of the CC being clothed with such constitutional jurisdiction. It should be pointed out that this is not a novel suggestion and that other countries also have similar provisions relating to the jurisdiction of their CC to give such relative validity to legislation.

47. In respect of the question of abstract review, as proposed in paragraph 5.4 of the Twelfth Report, as stated, Nadel agrees with the proposal to clothe the CC with such a constitutional jurisdiction. We note that this power of abstract review has not been included or dealt with in the Addendum. We suggest

that consideration should be given to including such a power in the Constitution and to add a proviso that once the CC has pronounced itself on the validity of an Act of Parliament, under this abstract review, then the constitutionality of such an Act may not later be challenged in the MC, SC or AD, except, if necessary, in certain specified instances.

48. One issue which needs to be resolved, as it is not dealt with in the Twelfth Report, is whether the CC will only deal with matters on the basis of an appeal or whether it will have the capacity to hear evidence. For example, in those instances where the CC acts as a court of first instance, will this only include cases in which no dispute of fact exists? And if a dispute of fact does exist what procedure is suggested to dispose of the matter before the CC as a court of first instance? The same questions arise in those cases where the CC has direct access to a matter, but where a dispute of fact exists which has not yet been pronounced upon by a court of law. Clearly the CC cannot be bogged down by hearing lengthy evidence in matters of first instance before it, yet on the other hand it would not appear to be the intention that the only matters of first instance which can be brought before it are those which do not contain a dispute of fact.

49. A flexible, common sense approach needs to be adopted in this regard. Nadel would suggest that the proposal made in paragraph 34 above be considered as one possible option in this regard. In terms of this proposal the <u>President of the CC</u> would have the discretion to obtain a ruling on a question of fact, by employing, inter alia, one of the following mechanisms:

a) a panel of the CC, composed of one or more CC judges;

b) a panel of the CC, composed of one or more CC judges and such other lay persons and/or experts, as are deemed necessary by the President of the CC;

c) to appoint a commission composed of whomsoever the President of the CC may deem necessary; or

d) to refer the matter to any court of the land.

50. It would go without saying that provision must be made to ensure that the CC is not bound by such a ruling in respect of a factual issue. The President of the CC could be clothed with an appropriate and effective discretion to take whatever further steps he or she may deem necessary in respect of factual

issues in dispute or in respect of a ruling on a factual issue which the CC may not agree with.

(e) <u>Constitutional Jurisdiction of the AD</u>.

51. In summary, the effect of the proposal in the Twelfth Report, is that the CC shall only have jurisdiction to hear matters of a constitutional nature, whereas all matters of a non-constitutional nature shall be heard by the existing court structures, with the AD retaining its appellate jurisdiction in all such matters. Furthermore, that the SC and MC shall have jurisdiction to hear certain specified matters of a constitutional nature, whereas the AD shall have no jurisdiction in matters of a constitutional nature.

52. In section 90 (3), (8) and (9) of the Addendum it is proposed that the AD shall have no jurisdiction whatsoever to adjudicate on any matter within the jurisdiction of the CC. Therefore, in respect of all constitutional matters in terms of which the SC has jurisdiction, for example, as proposed in section 90 (4) of the Addendum, an appeal shall be noted directly to the CC and not via the AD. As stated, the AD of course retains the jurisdiction it presently has in non-constitutional matters.

53. Nadel has a strong sympathy with the dilemma faced by the TECCOM in the Twelfth Report in this regard and the ultimate approach adopted by it.

54. On the one hand, those who argue for the AD to be granted such jurisdiction, could strongly argue:

a) that there is a certain anomaly and irony in granting limited constitutional jurisdiction to the SC and then to preclude the AD completely from hearing constitutional matters, even such matters as are to be heard by the SC;

b) that to restore the rule of law and to secure fundamental human rights in our land, we must develop a human rights culture which is respected, nurtured and enforced at every level of every branch of government; and

c) that every judicial officer and indeed every officer of the state, must be faced with and engaged in the new legal and constitutional order, in which all state action is governed by law.

55. On the other hand, those who argue for the AD not to be granted constitutional jurisdiction, could equally strongly argue:

a) that it could diminish the stature and efficacy of the CC;

b) that to give the AD even limited jurisdiction on constitutional matters whilst retaining the CC as a court of final instance, will place the CC at the apex of the court structure in such a manner as will in fact diminish the standing of the AD; and

c) that it would make it even more difficult and costly to reach finality with regard to constitutional matters.

56. We are mindful of the difficulties inherent in whatever approach is adopted. On balance, however, we would endorse the proposal in the Twelfth Report and raise one possible option for consideration in this regard.

57. In accordance with the proposal in sections 90 (3) and (8) the President of the CC could be vested in all matters of appeal, in which a right of appeal to the CC does not exist, with the exclusive power to grant leave to appeal from the SC to the CC in respect of a constitutional matter, in which such leave was refused by the SC. (The CC shall of course retain all its powers in respect of direct access).

The President of the CC could be vested with a further discretion to decide whether any appeal of a constitutional nature should be heard by:

a) a full panel of the CC presiding en banc; or

b) a panel of the CC, composed of between three (3) and eleven (11) judges, whatever number the President of the CC deems necessary; or

c) a joint panel, comprising an equal number of judges from the AD and the CC, with an additional judge appointed from the CC as senior presiding officer. The number of judges on such a joint panel could vary from three (3) to eleven (11) judges, the size being entirely in the discretion of the President of the CC. The senior presiding officer from the CC and the other CC judges shall be appointed by the President of the CC, whereas the judges from the AD shall be appointed by the Chief Justice.

In this manner, it will be left to the complete discretion of the President of the CC which appeals of a constitutional nature merit consideration by the diverse views of the whole CC panel and which are of such a nature that they could be dealt with

either by a smaller CC panel or such a joint panel. It would appear that there may be a large category of cases, although of a constitutional nature, which may not have far-reaching implications to society as a whole and which could be dealt with by a smaller CC panel or a joint panel. In particular, one has in mind here those areas in which the MC and SC have been granted constitutional jurisdiction as a possible area in which the AD could be jointly involved with the CC in hearing matters in which an appeal has been noted and granted. It would also provide the President of the CC with a mechanism to allow such a smaller CC panel or a joint panel to deal with many of those cases that contain both matters of a constitutional and non-constitutional nature and which need not necessarily be dealt with by the full panel of the CC. This mechanism may also very well enable the CC to deal with and dispose of a far greater case load than when it sits as a single panel en banc, and thus dispel some of the fears raised in paragraphs 31 and 35 above and paragraph 67 below.

(f) <u>Constitutional Jurisdiction of the SC</u>

58. Section 90 of the Addendum proposes that the provincial and local divisions of the SC should retain their present jurisdiction, including inherent jurisdiction, (Section 90 (2)), and that the SC is further to be vested with a constitutional jurisdiction in three main areas, set out in Section 90 (4) of the Addendum. On a reading of sections 90 (4), (5), (6) and (10) this in effect would mean that these divisions of the SC will not have a constitutional jurisdiction in regard to:

a) a dispute dealing with the validity of an Act of Parliament (including presumably any provision of an Act of Parliament); and

b) disputes of a constitutional nature between organs of the state, or within the same organ of state, or between different levels of government.

59. Nadel broadly agrees with these proposals in the Twelfth Report pertaining to the constitutional jurisdiction of the SC, in particular in respect of paragraph 58 (b) above. However, some reservations are expressed in respect of the matter dealt with under paragraph 58 (a) above, which requires clarification and may even have to be revisited. Some questions which arise are: Is the constitutional jurisdiction of the SC also to be excluded when the validity of a provision of an Act of Parliament is being challenged in the course of a matter being heard before it? Will the SC in such an instance be obliged to suspend the proceedings

and refer the matter immediately to the CC, as proposed in Section 90 (5) of the Addendum? And what happens if the evidence has not yet been finalized, disputes of fact still exist and/or a finding has not been made on factual issues?

60. Certain practical problems arise when excluding such jurisdiction from the SC, for example, to mention but a few:

a) When disputing the validity of an Act of Parliament, such an issue may be one of ten points relating to general factual and/or legal issues. In the event of the constitutional point being decisive of the matter it could mean that the SPR/provincial division will have to deal with the other general matters and then thereafter refer the constitutional point for adjudication to the CC. This could prove to be a very time-consuming and expensive exercise as one particular case will have to be dealt with in different forums.

b) If on each occasion that a constitutional issue is raised, in respect of an issue on which the SC or MC has no jurisdiction, the matter must be suspended and referred to the CC this could have negative consequences. It could lead to time-consuming and costly delays, and could very well lead to the CC being overloaded with cases. It could also lead to legal uncertainty if matters are not resolved and dealt with expeditiously. Unscrupulous practitioners and litigants would exploit every such procedure to the utmost, allowing for abuses. It is difficult to envisage all the practical difficulties which could arise but there are numerous. For example, who would bear the costs of all such suspended cases from across the country, which would have to then be heard at the seat of the CC, presumably in Johannesburg?

61. A possible contradiction exists between sections 90 (2) and 90 (4) (a) of the Addendum which requires clarification. On the one hand, section 90 (2) proposes the retention of the SC's present jurisdiction, which includes the power to invalidate Parliamentary legislation, whereas section 90 (4) (a) excludes such power in the case of a constitutional matter from the jurisdiction of the SC. Or is section 90 (2) only referring to the SC's future general jurisdiction of invalidating pre-Interim Constitution legislation and not post-Interim Constitution legislation? To this end, Nadel suggests that the SC should at the very least have the power to pronounce on the validity of pre-Interim Constitution legislation. SC's have this

power at present and such a recommendation is in accordance with section 90 (2) of the Addendum.

62. If it is decided to exclude the constitutional jurisdiction of the SC to pronounce on the validity of Parliamentary legislation being challenged, the following two options/procedures could be considered, instead of or as an alternative to section 90 (5).

63. The SC should not have a constitutional jurisdiction relating to the validity of Parliamentary legislation, but should have constitutional jurisdiction in respect of SPR legislation and local government ordinances. Should such a constitutional issue arise in a case coming before it where the validity of an Act of Parliament is challenged, then the law in question must be presumed to be constitutional, but the constitutional point may be taken on appeal to the CC, if leave of appeal is granted. A similar proposal is made in section 91 (2) of the Addendum in respect of MC's.

64. The other option is to clothe the SC in this type of matter, with constitutional jurisdiction, with the state being given a right of appeal to the CC if any provision of an Act of Parliament is struck down and to provide the SC and the CC with the power to grant leave to appeal to any other litigant which does not agree with the SC's decision to uphold the validity of an Act of Parliament or a provision of an Act of Parliament. It could further be provided that a decision by the SC to invalidate a provision of or an Act of Parliament, shall be suspended, until the CC has pronounced itself on the matter. The rules of the CC could provide for such matters to be heard as a matter of urgency.

(g) Constitutional jurisdiction of the MC

65. In section 91 of the Addendum it is proposed that all matters pertaining to the MC and other courts, including the issue of jurisdiction, should be regulated by statute and not by the Constitution. As the proposal recommends that the jurisdiction of the MC be regulated by statute and such statute is not available for perusal, one is left somewhat in the dark as to what constitutional jurisdiction, if any, is envisaged for the MC, from the Addendum. However, if one has regard to paragraph 4.6 of the Twelfth Report, it would appear that the TECCOM envisaged that the ordinary courts, which we assume includes the MC, will have constitutional jurisdiction to apply and interpret the Constitution, adjudicate on matters relating to fundamental rights (and to determine the validity of legislation of SPR and local governments) but subject to appeal to, and the authoritative

interpretation of, the CC (we assume that the portion we placed in brackets above only applies to the SC and not the MC).

66. Nadel agrees that MC's should have constitutional jurisdiction as specified above, except in those instances where:

a) the validity of an Act of Parliament or legislation of a SPR or a local government, or a provision of such an Act or legislation is being challenged; and

b) disputes of a constitutional nature between organs of the state, or within the same organ of state, or between different levels of government are being adjudicated upon. (This latter exclusion is not dealt with at all in the Twelfth Report and Nadel would suggest that it should be specifically excluded from the jurisdiction of the MC).

67. However, one aspect of the jurisdiction of the MC though is dealt with in section 91 of the constitution, creating a mechanism for the MC to deal with matters where the validity of <u>any</u> law is being challenged, as being repugnant to the constitution. In such instances it is proposed that the matter be postponed and suspended, if the Magistrate deems it to be in the interests of justice, pending the matter having been dealt with as proposed in sections 90 (3) and (4). The issues raised in paragraph 60 above, are applicable mutatis mutandis here. We would want to recommend that the procedure provided for in sections 90 (3) and (4) must only be provided for in the most exceptional cases, otherwise speedy adjudication of matters may become a pipedream, because of inflexible and impractical provisions in our constitution.

(h) <u>Single or split court system and judiciary</u>

68. Nadel finds the notion of transforming the existing South African split court system into a single court system, on similar lines to the continental systems most appealing and with much merit. The merits and demerits of such a system are for obvious reasons not dealt with herein. This issue has not been raised at all in the Twelfth Report and it would appear that it has been assumed that the existing split court system will remain unchanged. Therefore, Nadel recommends that this issue be referred to the MPNP and National Legal Forum, for further investigation and research, as it would require major restructuring of the present legal institutions. However, Nadel would want to warn that this issue is of vital importance and should not be left on the shelf to gather dust, but should

be dealt with urgently and, if broad agreement is reached it should be implemented, to dispel the notion of a system of A justice in the SC and B justice in the MC, existing in our court system. To this end, we propose that provision be made in the Constitution to allow for such restructuring, if and when necessary.

(i) **Specialized Courts**

69. The idea of specialized courts, particularly in the administrative, family and labour arena, also appeals to Nadel. The question to be posed for the transitional period is whether specialized courts should be divisions of the present court system or whether there should be a separate system of courts, as is the case in the continental legal systems. The merits and demerits of each system are for obvious reasons not dealt with herein. It is accepted by Nadel that specialization, even during the transitional period, should not be resisted. However, the introduction of the continental system, i.e. to have specialized courts as separate court systems, although having much merit, may be too drastic and far-reaching at this stage. It seems more appropriate that the Anglo-Saxon system, where specialized courts are divisions of the ordinary courts, should be implemented during the transitional period, particularly in the area of administrative, family and labour law. To this end, we propose that provision be made in the constitution to allow for such restructuring, if and when necessary.

(j) **Right of appearance in the CC**

70. Although raised out of context, we wish to make one further point here. Nadel is strongly of the view that all qualified members of the legal profession should have a right of appearance before the CC and such a right of appearance must definitely not be restricted to the advocates profession.

(k) **Alternative model: A new and separate CC, at the apex of the existing court structures, as a third tier within a single stream court system**

71. As stated above, our alternative, Model B, is in most respects similar to our Model A. The major points of difference turn on two aspects. Firstly, in Model A, the existing single stream two-tier court system is only retained to the SC level, with the CC and AD splitting into parallel structures, the former being the exclusive court of final instance (and sometimes first instance) in constitutional matters, the latter being the exclusive court of final instance in general matters; whereas Model B retains the existing

single stream court system, with the CC being created at the apex, as a third tier, having the exact same jurisdiction as in Model A. Secondly, the AD's constitutional jurisdiction in some respects differs in the two models.

72. The principles underpinning our Model B have already been spelt out in detail, in paragraph 4 above, which are applicable mutatis mutandis here, and we do not intend repeating same here again. In the event of the AD being granted constitutional jurisdiction to adjudicate in disputes challenging the validity of an Act of Parliament, it is suggested that the comments made and options raised in paragraphs 62 - 64 above, be repeated here mutatis mutandis.

73. On balance, we favour Model A, as it may in some instances be more cost-effective and less time-consuming, although in principle there is not much difference between Models A and B. In the event of Model A not being found to be appropriate for the transitional period, we shall strongly suggest that Model B be adopted instead, as the only other appropriate option. To this end, we strongly disagree with the comments and proposals of the Judges, GCB and SALC, to the contrary, in respect of either Model A or Model B.

D. APPOINTMENT MECHANISMS FOR JUDICIAL OFFICERS

74. Under this heading the issues in the Twelfth Report to be addressed and in respect of which Nadel wishes to make recommendations relate to:

a) Appointment mechanisms in general.

b) Appointment mechanism for judges of the CC.

c) Appointment mechanism for other judges.

d) Appointment mechanism for magistrates.

e) Criteria for the appointment of judicial officers.

f) Continuation in office of existing judges and magistrates.

g) The prosecuting authority.

75. We deal with these matters seriatim.

(a) Appointment mechanisms in general

76. The World Conference on the Independence of Justice of 1983, which was attended by an extraordinarily wide range of lawyers' organizations, adopted the

Universal Declaration on the Independence of Justice at its final plenary session, in Montreal, Canada (hereinafter referred to as the Montreal Declaration). The Conference recommended to the United Nations the consideration of the Declaration, which includes the following provisions relating to the appointment of judges:

"Qualifications, selection and training:

2.11 Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.

2.12 In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

2.14 (a) There is no single proper method of judicial selection but the method chosen should provide safeguards against judicial appointments for improper motives.

(b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate."

The Basic Principles on the Independence of the Judiciary adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, Italy in 1985, contain a briefer version of the above, to much the same effect.

77. Evaluating the appointment procedures applied, the composition and the extent to which the present judiciary reflects South Africa's society in all its aspects, against the aforesaid international norms, it is beyond dispute that our judiciary fails to meet the criteria and norms laid down.

78. Nadel is of the view that no matter how competent they may be, as a group the present judiciary is not consequently perceived to be sensitive to the needs and aspirations of all the people of South Africa, nor to enjoy the confidence of all South Africans.

79. There can be no doubt that the profile of the judiciary needs to be changed to be broad-based and enjoy the confidence of the people it serves, but it should also be skilled and competent. On the other hand, because of the distorted profile created by the historical exclusion of blacks and women, the present pool from which appointments can be made to all levels of the judiciary is relatively small. Therefore, if we look at both sides of the equation we must acknowledge the enormity of the task in the short term of attempting to transform the existing white male dominated structures, into broad-based structures that reflect the diversity of our population. (Also see the comments made in paragraph 111 below in this regard). However, the dilemma does not lie in identifying the pitfalls, but rather in how to achieve this objective. Hereinafter we deal with our proposals for achieving this short term objective.

80. At present in South Africa, the power to appoint judges rests in the Executive . Since Union in 1910, the Executive conventionally exercised this power by making appointments from the ranks of Senior Council practising at the Bar, after consultation between the Minister of Justice and the senior judge of the division to which the appointment was being made. We fully support the TECCOM's rejection (by implication) of this specific appointment mechanism for judges in a future legal and constitutional dispensation.

81. The TECCOM in the Twelfth Report proposes that a distinction should be made between the appointments to the CC, and appointments to other courts, drawing a further distinction between appointments to the SC and MC. For the reasons stated herein, we endorse this approach. We disagree with the suggestions to the contrary, as contained in paragraph 5.4 of the GCB's submission, as well as in the Judges' memorandum.

82. Nadel is broadly in agreement with the proposition in the Montreal Declaration that there is no single proper method of judicial selection, but the method chosen should provide safeguards against judicial appointments for improper motives. It is our view that deciding on an appropriate method of judicial selection for our country during this transitional period will be dependent on a whole host of historical factors and practical realities, mixed with a good dose of common sense and practical and political expediency. Furthermore, that there is no individual, political party, organization or sector of our society which is able to propose the correct mix, so as to please everybody.

(b) **Appointment mechanism for judges of the CC**

83. It is in accordance with the short term objective, stated in paragraph 79 above, which will also lead to positive medium and longer term results, that we have proposed the creation of a separate CC, either parallel to the AD or at the apex of the judiciary, to be the final arbiter in all constitutional matters. It will establish the precedents which will be binding on all other courts; precedents which will have to be adhered to by all organs of the State, and people, subject to the Bill of Rights. If it is established as a new and separate court it will from the first moment of its existence be able to shake off the distorted profile of the past and be constituted, without any links to the apartheid era, as a new court, constituted and composed without being influenced by prejudicial race or gender bias, as in the past.

84. The pool from which to make eleven (11) appointments to such a single court is sufficiently large to enable these requirements to be met and to appoint persons of ability and integrity. It could include existing judges, but need not necessarily do so. All candidates will be considered on their merits, and a court which has the confidence of all the people of South Africa, can be brought into existence. It is for these reasons, as more fully elaborated in paragraphs 12 - 29 above, that we strongly oppose the CC being a chamber of the AD, and we propose a new and separate court with its own seat, its own president and its own members.

85. In the Twelfth Report it is proposed that appointments to the CC be made by a joint committee of both houses of parliament on which all political parties will have one representative. The proceedings of the joint committee shall be conducted in camera. The CC should consist of 11 judges who should, if possible, be appointed en bloc by a unanimous resolution of the joint committee, which should in turn be approved by a majority of at least 75% of all the members of parliament. A deadlock-breaking mechanism is provided for. Cases should be heard by all the judges to ensure that the different attitudes existing within a broad-based court are brought to bear on all the decisions that are made.

86. The judges in their memorandum agree that the CC should sit as a bench of 11 judges, but disagree with the TECCOM proposal as to how such judges should be appointed. They say that a court appointed by a Multi-Party Committee of Parliament in the manner suggested by the TECCOM would be seen as a "political" tribunal dealing with fundamental legal issues on political grounds, and would

accordingly not gain acceptance by the public. In their view judges of the SC, including the CC, should be appointed on the advice of a Judicial Service Commission.

87. The GCB in paragraphs 15.4, 16 and 17 of their submissions also favour the approach that all judges be appointed by an independent JSC, rather than a joint parliamentary committee.

88. Nadel in broad terms agrees with the approach and principles underlying such approach, as is being proposed in paragraphs 7.6 and 7.7 of the Twelfth Report and section 88 of the Addendum, in respect of the appointment of CC judges, although we differ, in some respects markedly, in respect of the details of such proposal.

89. We state some of our reasons for supporting the proposal in the Twelfth Report:

a) The reasons, historical and otherwise, already dealt with elaborately herein;

b) This proposal is in accordance with the principle enunciated in section 2.14 (b) of the Montreal Declaration.

c) We endorse the comments and the reasoning for the selection procedure proposed, as outlined in paragraphs 7.6 and 7.7 of the Twelfth Report, but only to the extent that they have not been amended in terms of our proposal in paragraph 91 below. We in particular want to echo the sentiments that no party, person or profession should be in a position to dominate the selection process.

d) It is common throughout the world for CC's to be appointed through procedures involving either Parliament or the Executive. Indeed, as far as we are aware, there is no example of a specialized CC anywhere in the world that is appointed in any other manner. The reason why Parliament is involved in the appointment of CC's seems to be that such courts do have a political role to play, and should accordingly have the confidence of the participants in the political process. The role is not party political, but political in the sense that they will be dealing with highly charged political issues, to which they should be sensitive. In the proposal in the Twelfth Report, Parliament, and not the executive, is involved, to ensure that the court is broad-based and acceptable to all the major actors in the political process, and not only the party from which the executive is composed.

e) It is not clear why the Judges suggest that a CC appointed by a multi-party joint parliamentary committee will not be accepted by the public. That proposition is not supported by experience in other countries that have CCs; on the contrary, the German CC which is appointed in this way, has consistently been rated as one of the most respected and valid institutions in Germany, and CCs in other countries where this type of selection process is followed are also held in high regard. The assertion made by the Judges also ignores the fact that the overwhelming majority of the South African population had no say in electing the government which appointed the present judges, and may wish to see a new court, with no links to the past, appointed by their elected representatives to act as guardians of the Constitution.

f) The objection by the Judges and the GCB that the process proposed is entirely in the hands of the politicians and that politicians should play no role at all or a very limited role, is not sound and is flawed in many ways. Firstly, this aspect has been dealt with to a large degree in paragraphs 27 - 29 and paragraphs 89 (d) and (e) above. Secondly, the argument conflates the present National Party politicians in the form of the Executive, who presently appoint judges, with a multi-party joint Parliamentary committee which is being proposed. Thirdly, an erroneous assumption underlies their whole proposition, i.e. that the present judges and senior lawyers, who are mainly white males, are the only or most appropriate sector of society which could be trusted to select not only judges of the highest independent spirit, integrity and ability, but who also will act without fear or favour. The present judiciary is in a privileged position precisely because of the wrongs of the past. It is our view that they should not now be placed in a position to decide how those who have been deprived and denied privileges in the past should be allowed to participate. This is morally and politically unacceptable to Nadel. The present judiciary, as well as other institutions involved in the administration of justice need to come to terms with the fact that their role in the past is tainted by apartheid, and, further, that until there is significant and visible transformation within these structures, it will not be appropriate to place them centrally within the scheme of things.

90. In our view, although broadly in agreement with the approach in the proposal, the proposal as it now stands, if implemented, will in all probability have disastrous consequences and will undermine, to a large extent, the very basis for creating a new and separate CC. We say so because to allow each political party, no matter how big or small, to have an absolute veto over the composition of the CC, will mean that the CC will comprise of eleven men and women who are everything to everybody. In the end we envisage that the proposed formula would bring about an insipid, pallid Bench, once again, comprising mainly white males. That is hardly in accordance with the letter and the spirit of the Twelfth Report, as it pertains to the CC. It is also not the type of CC Bench Nadel believes would restore the sensitivity and legitimacy of the Bench, required during the transitional period. It is of vital importance that a formula be found which would allow for a CC Bench, which will be broad-based, reflecting the wide diversity of views within our nation. We are of the opinion that the practical effect of the present proposal will not achieve such an objective.

91. As stated above, in some respects we differ on detail in respect of the proposed selection mechanism for appointing judges of the CC. In our opinion a mechanism must be established which comprises the following principles:

a) that the selection committee shall comprise of a multi-party committee of Parliament;

b) that each political party represented in Parliament shall have a representative or representatives on the committee, commensurate with the proportion of the vote received by each such party in the elections;

c) that decisions are to be taken within the committee by way of a two-thirds majority vote both in respect of the appointment of the President of the CC and the other CC judges;

d) that the nominees agreed to by the committee must be approved en bloc by resolution adopted by a two-thirds majority of the members present at a joint sitting of the National Assembly and the Senate;

e) that no debate shall be allowed in respect of such a resolution;

f) that in the event of the joint committee being unable to reach a decision in respect of the nominees, an appropriate and effective

deadlock-breaking mechanism must be devised, in accordance with the principles stated above;

g) that in the event of Parliament being unable to reach a decision in respect of the nominees, the matter be referred back to the joint committee and an effective and appropriate deadlock-breaking mechanism must be devised, in accordance with the principles stated above, to enable the joint committee to deal with the matter;

h) that in accordance with section 2.14 (d) of the Montreal Declaration, a mechanism must be established within the above framework, to consult the legal sector, in respect of the proposed appointees to the CC Bench; and

i) that the State President shall appoint such nominees as President of the CC and as judges of the CC, if all the above procedures have been properly adhered to.

92. Nadel proposes that the selection mechanism being proposed in section 88 of the Twelfth Report, be amended to reflect the principles enunciated in paragraph 91 above.

93. Nadel disagrees with the proposal that there should not be separate selection mechanisms, for judges of the CC and other judges, as suggested in the Judges Memoranda and in the submission by the GCB. More specifically, we do not agree that appointments to the CC should be by way of the JSC. We obviously also disagree with the composition of the JSC, as proposed in the Judges Memoranda and in the GCB submission, as is more fully elaborated upon hereafter.

(c) **Appointment mechanism for other judges**

94. The Twelfth Report recommends that appointments to all divisions of the SC, other than the CC, be made on the advice of a JSC.

95. This is also the view of the SALC, the Judges and the GCB, although, as stated above, they all go a step further and include the appointment of the CC judges in such an arrangement.

96. There are however differences between the proposals in the Twelfth Report and the submissions made by the Judges, GCB and SALC, pertaining to the composition of a JSC. Furthermore, there are even differences between the proposals put forward by the latter three, although the effect of each of their proposals will be to maximize the representation of

the existing legal institutions and minimize parliamentary representation.

97. A JSC is usually composed of representatives of the judiciary, the practising legal professions, Parliament and/or the Executive.

98. In the Twelfth Report it is proposed that a JSC be established, composed in a balanced way of representatives of the judiciary, the executive, the legislature and the legal profession. It should, however, be constituted in a way which does not permit any person, party or profession to dominate the selection process.

99. The Twelfth Report suggests that a JSC composed as follows meets these requirements: the Chief Justice; the President of CC; the Minister of Justice or a person designated by him/her; a practising advocate designated by the GCB; a practising attorney designated by the ALS; a Professor of Law designated by the deans of the law faculties of the South African universities; and five senators designated en bloc by the Senate by a two-thirds majority. When the appointment of judges to SPR/Provincial Divisions are under consideration, the Judge President and the head of the SPR Executive or his or her designate should be included.

100. The judges object to the inclusion of senators in the JSC. They support a suggestion that the JSC should consist of the Chief Justice; two judges of Appeal; four other judges; three representatives of the executive; an advocate; an attorney and a law teacher nominated by a Council for Justice; and a representative of the Attorneys-General. The proposed Council of Justice would consist of the JSC and a Magisterial Services Commission, sitting together. In effect the judges would dominate the process having half the members of the JSC and a significant voice in the choice of the advocate, attorney and law teacher representatives.

101. The GCB have a more flexible approach, broadly accepting the proposal embodied in section 93 of the Addendum, although they are of the view that the parliamentary representation is unduly loaded.

102. The SALC recommends that the JSC be composed as follows: the Chief Justice; the Minister of Justice; the six Judge Presidents of the SC's; two members of Parliament; one senior advocate of the GCB and one senior attorney of the ALS.

103. The question which is raised by the various proposals are whether technical expertise as a judge, and a standing in the legal profession,

should be a requirement for appointment to the JSC, or whether the JSC should be broad-based and more balanced with regard to race, gender and background.

104. In approaching this matter Nadel, in accordance with paragraph 7.5 of the Twelfth Report, is of the view that in the circumstances that presently exist in South Africa, the judiciary, senior advocates and senior attorneys, consist almost entirely of white men. We are of the view that if they dominate the appointment panel of a JSC this could have a very serious bearing on perceptions concerning the legitimacy of the Courts. Furthermore, we are of the view that no party, person or profession should be in a position to dominate the selection procedure of our future judges.

105. The proposals of the Judges and the SALC, in respect of the composition of the JSC, are wholly inappropriate for the transitional period. The GCB submission, which attempts to minimize parliamentary representation in the proposal of the Twelfth Report, is also inappropriate for this reason. The proposal made in the Twelfth Report has much more merit and is more in line with thinking within Nadel, although we differ in certain respects.

106. On balance, and in accordance with sections 2.11 - 2.14 of the Montreal Declaration, Nadel is in favour of a JSC which should be broad-based and balanced with regard to race, gender and background. To this end, we propose a JSC composed of the following:

a) the President of the CC;
b) the Chief Justice;
c) the Minister of Justice or his/her nominee;
d) two representative designated by the legal profession as a whole;
e) one professor of law designated by the deans of all the law faculties at South African universities;
f) five Parliamentarians designated by Parliament en bloc by a two-thirds majority;
g) six men and women to be designated by the State President, after consultation with the Government of National Unity, taking into account the need to achieve an appropriate balance of race and gender; and
h) on the occasion or the consideration of matters specifically relating to an SPR division of the SC, the Judge President of the relevant division, the Premier or a member of the SPR executive designated by the Premier and one member of the SPR Legislature of the SPR.

107. It is further recommended that the Chairperson of the JSC should be elected from its ranks by all its

members at its first sitting and should not be appointed.

108. Two aspects of our proposal require emphasis. Firstly, we are firmly of the view that the majority of the members of the JSC must come from outside of the legal sector, although retaining appropriate representation from the legal sector. Our proposal does just that. Secondly, the two representatives from the legal profession must be appointed by the legal profession as a whole, not only from the GCB and ALS. To this end, a mechanism must be established to ensure that organizations like Nadel, BLA and LHR are consulted with regard to such appointments from the legal profession.

109. We recommend that the above-mentioned changes should be made to the Twelfth Report with regard to the JSC. All other aspects pertaining to the JSC, as contained in the Twelfth Report, are fully endorsed and supported by Nadel.

(d) Appointment mechanism for Magistrates

110. Subject to the comments made in paragraphs 39, 40 and 68 above, we endorse the proposal made in section 90 of the Addendum.

(e) Criteria for appointment of judicial officers

111. The views of Nadel in this regard, are rather eloquently encapsulated in the following quotation from a paper, recently delivered by Adv. Arthur Chaskalson S.C, which we quote at length:

"When it comes to the pool from which appointments to the judiciary can be made there may be a need to re-examine the convention which has been followed in South Africa for many years. The convention is that appointments to the Bench are made from the ranks of senior counsel in practice at the Bar. There is no doubt that this convention has resulted in the creation of a technically skilled Bench. But it is not the only way in which competent and well trained judges can be found. If the ranks of senior counsel were balanced from the point of view of race and gender, there would be more to be said in favour of retaining the present system. But they are not, and as we all know senior counsel in South Africa consists overwhelmingly of white men. Once again, there is a need to bring into the equation the question of race and gender, and to look for ways of identifying a much broader pool from which judicial appointments can be made of persons with the necessary skills and integrity to be our judges.

This is not simply a cosmetic exercise. A greater degree of representativeness in the judiciary than

is produced by the present method of selection is valuable, not only because of the impact that it will have on the many litigants who presently feel alienated from the courts, but also, because the broadening of the base of the judiciary, sensitizes the judges to different views. There is a difference between debates which take place between persons of the same backgrounds and attitudes, and debates between persons with different life experiences and different backgrounds. The broadening of the debate is important, not only because of the greater fairness that is likely to result therefrom, but also because it will enhance the way in which the law develops and bring it closer to the needs of the population as a whole. Professor Jeremy Webber of McGill University explains the need for diversity among judges in the following terms:

> 'Justice never utters itself, but depends upon women and men for its formulation. That being the case, we must have more of the diversity of our society represented on the Bench so that the inescapable residue of attitudinal bias in adjudication reflects something of the range of attitudes present in our society.'

This statement is particularly apposite to the situation in which we presently find ourselves in South Africa. We are emerging from a long history of racial discrimination and authoritarian rule. It is simply not appropriate that at a time of political change of these dimensions, a white judiciary which was appointed by the apartheid government, and enforced its laws, should be given control over judicial appointments, and, without even securing the approval of the new democratically elected legislature, should become the guardians of the constitution.

The principal argument against a deliberate policy of changing the profile of the judiciary is that appointments to the Bench should be based solely on merit. But what is merit? No one could deny that appointments to the South African Bench, including appointments to the Appellate Division, have historically been influenced by language, religion and political attitudes. When the National Party came to power it immediately embarked upon a deliberate policy of appointing white Afrikaans speakers to the Bench. At the time Afrikaans speakers were heavily under-represented within the white population both on the Bench and at the Bar. As a result of this policy of affirmative action within the white community, Afrikaans speaking judges gradually increased in number, and became a substantial majority on the Bench. In the early days of this process, Afrikaans speaking juniors

with comparatively modest practices took silk (sometimes being appointed without the recommendation of the Chairman of their Bar Council) and shortly afterwards were appointed to the Bench over the heads of more experienced and more skilled English speaking counsel. One of the results of this policy was to encourage Afrikaans speakers to join the Bar, because of the opportunities which were opening up for them. And today, Afrikaans speakers are the leaders of most of the Bars and the core of the present judiciary.

What needs to be understood is that appointments to the South African bench have not in recent memory ever been made solely on merit, and there is no reason why at this crucial time in our history, when there is an urgent need to reconstruct our society, we should become converts to that abstract standard. This does not mean that merit is irrelevant and should be ignored, or that the sole criterion for appointment to the Bench should be the race or gender of the candidate. Merit is an elusive concept. It certainly includes technical skills, but that is not all; it also includes other qualities which are attributes of good judges, and which may be as important as technical skills. There is a minimum threshold of skills and qualities that all judges require, and these should be met in every case. They include integrity, experience, an ability to listen to and understand witnesses stories (a quality which is not always valued under the present system) and an intellectual capacity to master the law, to deal with arguments, and to write judgements in a clear and reasoned manner. This minimum threshold should always be met, and to that extent merit must always be a requirement, and the appointment of persons who do not meet the threshold requirements should not be entertained.

Those whose responsibility it will be to appoint, or advise on the appointment of judges, should set an appropriate threshold. They should also accept that the profile of the judiciary needs to be changed with all deliberate speed, and set themselves that goal. It would be appropriate for them to identify and compile lists of black and women lawyers who meet the threshold requirements. They should be willing to go beyond the ranks of Senior Counsel and look to all branches of the profession for candidates whose appointment to the Bench would bring about a change in the racial and gender composition of the present judiciary. Positive action should be taken through training courses and seminars to promote the development of the technical skills of these potential candidates for appointment to the Bench, and everything possible should be done to increase the size of the pool of suitable candidates.

It will, I believe, take time before the process is completed. But the process must begin, and all of us in the legal profession, including the existing judiciary, should give it our wholehearted support. The new appointments when made should be welcomed and encouraged, and should not meet with hostility or carping criticism from the judges and the profession." (Our underlining, for emphasis).

112. In accordance with the above approach, which we fully subscribe to, Nadel is of the opinion that the appointment of judges should be made from all branches of the legal profession without discrimination and broadly in accordance, inter alia, with the following criteria: integrity and independence of judgement, professional competence, experience, humanity and commitment to uphold the rule of law and human rights. These principles are in accordance with international norms, reflected in various written instruments, including the Montreal Declaration and the report of the Banjul Seminar, held in Gambia, in 1987. (See the International Commission of Jurists, The Independence of the Judiciary and the Legal Profession in English-speaking Africa (1987) at 144- 145).

113. In light of the criteria laid down above for appointment to the Bench, we are of the view that the expression fit and proper, to connote a candidate suitable for appointment to the Bench, is vague and devoid of any meaning, other than the technical and very rigid meaning presently ascribed to it, and we suggest that it should be replaced in favour of the aforesaid criteria.

114. Accordingly, we disagree with the Judges proposal in paragraph 7 (c) of the Judges First Memorandum that as a rule judicial appointments should be made from the ranks of senior advocates in private practice, as is the present position. We agree with the Judges Memoranda, insofar as it recognizes that a distinction must be made in the appointment of Judges to the CC. However, we disagree on the criteria for such appointment, as has already been dealt with more fully herein. Indeed, the Judges' proposal would once again entrench and promote all the historical imbalances and exclusions of the past. In the South African context we believe that this proposal does not begin to deal with fundamental issues which deprive the present judiciary of the legitimacy and credibility a judiciary should enjoy.

(f) Continuation in office of existing judges and magistrates

115. We leave this issue, as dealt with in paragraph 8 of the Twelfth Report and section 96 of the Addendum,

open in these submissions, as we intend making representations in this regard in the future, as we are not satisfied with the approach adopted in this regard.

(g) **The Prosecuting Authority**

116. We endorse the proposal in paragraph 97 (3) of the Addendum, in respect of qualifications of an Attorney-General, except that if the section could be interpreted to mean that a suitably qualified attorney or legal academician cannot qualify for the post, then we suggest the section be amended accordingly.

E. **MISCELLANEOUS ISSUES**

117. Two further issues on which Nadel and the Conference have made recommendations must be dealt with, as follows:

(a) **Unilateral Restructuring**

118. In the last year or two the Department of Justice has actively and unilaterally commenced with the restructuring of the legal system and its institutions. To this end, some important and far-reaching changes to the structures administering justice have been introduced. Most of these changes appear to be designed to have an impact, directly or indirectly, on the future structures which shall be tasked with administering justice, regardless of the form of the constitution South Africa finally adopts.

119. Nadel finds these actions of the Department of Justice totally unacceptable and will thus neither for reasons of political or practical expediency provide such changes with any credibility, efficacy or legitimacy. Nadel rejects the unilateral imposition of such changes upon the populace and records its intention to actively oppose the imposition of same, and further calls on the Department to immediately place a moratorium on all unilateral restructuring, as well as the further implementation of steps already taken in this regard.

(b) **National Legal Forum**

120. It is Nadel's view that proper, effective and appropriate administration of justice is one of the pivotal cornerstones of any democracy. This issue therefore needs to be handled with the utmost sensitivity, care and diligence. If any of the legal institutions we have at present are to be transported into the future, in their present or changed form, and if any changes need to be made to

any aspect of the legal system, the legal fraternity needs to ensure that all restructuring is done through a broad consensus, with the legal fraternity and society more broadly to generate maximum confidence in such changes and to ensure that we are all able to defend such transformation of our legal institutions and the institutions of our legal profession. Otherwise, in Nadel's humble submission it is preferable not to make any changes at all until appropriate, representative and accountable structures are in place.

121. To this end, Nadel has initiated a process for the formation of a broad, national forum, the National Legal Forum, composed of representatives of stakeholders in the legal fraternity. The task of such a forum would be to reach consensus on any future, and the implementation of any past, restructuring in respect of the structures, personnel, jurisdiction, powers and other relevant issues of all South African legal institutions.

122. Nadel's views in respect of unilateral restructuring and the formation of a National Legal Forum, are more fully dealt with in Annexure A, annexed hereto.

DATED AT CAPE TOWN THIS 15TH DAY OF OCTOBER 1993.

p.p.

ADV. PIUS N. LANGA
President of Nadel

Compiled by:

The Legal Education, Research and Training Project of Nadel.

(Reference: Adv. Johnny de Lange and Dr. Vela Sibisi).

ANNEXURE A

Unilateral Restructuring

1 In the last year or two the Department of Justice has actively and unilaterally commenced with the restructuring of the legal system and the legal institutions underpinning it. We have in mind here the Attorney-General Act, No. 92 of 1992, The Magistrates Act, No., 90 of 1993, the continued and rapid increase of jurisdiction in the inferior courts, and so forth. Each of these legislative enactments or proposed legislative enactments have important and far-reaching implications. In a period of supposed negotiations and consultations, these legislative amendments have been rushed through Parliament, with indecent haste and without meaningful or any consultation at all, neither with stakeholders in the legal fraternity or with the government's negotiating partners.

2. Most of these changes appear to be designed to have an impact, directly or indirectly, on the future structures which shall be tasked with administering justice, regardless of the form of the constitution South Africa finally adopts. It is thus Nadel's considered view that the predominant intention of the Department of Justice with these changes is not aimed at furthering the interests of all the people of this country, but rather to stifle and even preempt a future democratically elected government from bringing about a meaningful, integrated and comprehensive transformation of the legal system and its concomitant legal institutions.

3. Nadel is of the view that these changes should not be made at this stage, "when the sun is busy setting on our racist past", most certainly such changes should not be made unilaterally by a Government which has not yet won the confidence of particularly those who are still disenfranchised. Moreso, as this government is not only politically and morally bankrupt, but has proven itself to be corrupted and corruptible to its very core, stretching to each nook and cranny of its administration, whether high or low. Every change Government will propose or has brought about as presently constituted, will remain tainted with the same racist, apartheid brush and remains totally unacceptable to Nadel and we believe to the vast majority of South Africans.

4. Nadel finds these actions of the Department of Justice totally unacceptable and will thus neither for reasons of political or practical expediency provide such changes with any credibility, efficacy or legitimacy.

5. Although some of these changes/reforms to the structures and/or procedures pertaining to the administration of justice in our country, may in themselves be deserving of support, Nadel rejects the unilateral imposition of such changes upon the nation and records its intention to actively oppose the imposition of same. Furthermore, we reserve the right to ourselves to lobby and pressurize the present government or any future government, whether transitional or permanent, to reverse such changes, or at the very least any consequences which may flow from the unilateral imposition of such changes, for example, the establishment of any structures or positions to facilitate such changes, the employment of personnel, the promotion of personnel, or material benefits any person may enjoy or derive from such changes. We intend putting the Department of Justice to terms, to immediately place a moratorium on all unilateral restructuring, as well as the further implementation of steps already taken in this regard.

6. We believe that it is equally imperative that the judiciary, magistracy and the organized legal profession are transparently and actively seen to distance themselves from such unilateral restructuring by the Department of Justice and to join in the rejection of, and opposition to, such changes. For the sake of the future credibility of the structures administering justice, now is not the time for the organized legal profession, the judiciary, the magistracy and other stakeholders in the legal sector to be siding with the wrong side of history.

National Legal Forum

7. It is Nadel's considered opinion that a comprehensive, integrated and holistic approach is necessary in all spheres of South African life, to address the legacy and vestiges of Apartheid and to start transforming our society and its institutions into a non-racial, non-sexist, democratic and more human environment. This is not to submit that any particular area of society cannot be addressed or transformed without dealing with the whole. The point merely being that tinkering with one peripheral issue whilst Rome continues to burn, in a manner of speaking, is not going to put an end to the raging flames, in fact it may merely serve to fan and encourage it. Clearly this submission is not intended to address all the social ills of our society and to this end we only intend addressing that aspect of the legal system which pertains to its institutional or structural capacity under the new legal and constitutional order being created. In other words the structures which in the future will administer or implement, or fulfill a role or

function in the administering of justice or the law of the land.

8. Against this background it is Nadel's considered view that the only realistic and correct way of addressing the crisis of credibility, efficacy and legitimacy pervading the South African legal system and its legal institutions, including the legal profession, is by adopting a comprehensive, integrated and holistic approach, to deal with the restructuring and transformation of the legal system and its concomitant legal institutions, as well as the legal profession. To this end Nadel suggests the adoption and implementation of the following approach.

9. Since February 1990, our nation has embarked on various initiatives to address the severe legitimacy crisis facing the organs of state, and in an attempt to reach a political negotiated settlement for our country. These initiatives have emanated from various and varied sources, ranging from the government, to the ANC, other organizations or parties which form part of the negotiation process and to various organs of civil society.

10. It is our submission that all these initiatives need not be enumerated here or even discussed. Suffice to say that these various initiatives, in a number of areas, are aimed at agreeing to and putting in place enduring transitional arrangements, which will at the very least enjoy the confidence and support of the majority of our people during the transitional period. We have in mind here the Multi-Party Negotiating Process (hereinafter referred to as the MPNP) at the World Trade Centre.

11. As you are aware, the ultimate aim of the MPNP being to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races. In order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles. It is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution. To this end and to provide for all the above processes, it is intended, in the near future, to promulgate the Constitution of the Republic of South Africa 1993.

12. In turn, the MPNP have ushered the promulgating of a TRANSITIONAL EXECUTIVE COUNCIL BILL through Parliament to establish a Transitional Executive Council (hereinafter referred to as the TEC), with a view to facilitate the preparation for the transition to the implementation of a democratic order in South Africa. This Act will enable multi-party control and governance over the following areas of government:

a) Regional and Local Government and Traditional Authorities:
b) Law and Order, Stability and Security;
c) Defence;
d) Intelligence.
e) Finance;
f) Foreign Affairs; and
g) the Status of Women.

13. However, there have also been further initiatives, to put in place transitional arrangements, in those areas of government which are not intended to fall under multi-party control of the TEC during the transitional period. We are referring here to the National Economic Forum, National Housing Forum, National Local Government Forum, the proposed National Education Forum, and so forth.

14. These forums invariably comprise of the relevant government department and stakeholders operative in the area of functionality of such department. Although such structures are referred to as advisory, decisions within such forums are usually taken by consensus and the relevant department seizes all unilateral decision-making and restructuring in its area of functionality. In other words, multi-party consultation, control and decision-making has been introduced, as a transitional arrangement, into those areas of government which fall outside the terms of reference of the TEC. The reason for this eminently sensible and inclusive approach, we humbly submit, is to clothe the decisions and functioning of these departments, during the transition, with a measure of multi-party consensus and thus legitimacy.

15. The Department of Justice does not fall within the parameters or realm of any of the above transitional arrangements or intended transitional arrangements.

16. It is Nadel's view that proper, effective and appropriate administration of justice is one of the pivotal cornerstones of any democracy. This issue therefore needs to be handled with the utmost sensitivity, care and diligence. If any of the legal institutions we have at present are to be transported into the future, in their present or changed form, and if any changes need to be made to

any aspect of the legal system, the legal fraternity needs to ensure that all restructuring is done through a broad consensus, with the legal fraternity and society more broadly to generate maximum confidence in such changes and to ensure that we are all able to defend such transformation of our legal institutions and the institutions of our legal profession. Otherwise, in Nadel's humble submission it is preferable not to make any changes at all until appropriate, representative and accountable structures are in place.

17. It is against this background that Nadel proposes the formation of a broad, national forum, the National Legal Forum (hereinafter referred to as the Legal Forum) composed of representatives of those organizations and institutions, which have a vital interest in the administration of justice. This could possibly include representatives from:

a) government institutions, like the Department of Justice, the judiciary, magistracy and the Legal Aid Board;
b) the Legal Departments of the liberation movements;
c) the ALS;
d) the GCB;
e) lawyers organizations, such as Nadel, BLA, LHR and the Association of University Law Teachers;
f) law faculties of the respective universities; and
g) institutions, such as the Legal Resources Centre, the Centre for Applied Legal Studies, the Community Law Centre (University of the Western Cape), the Community Law Centre (University of Natal) and the Legal Education Action Project.

18. Consideration needs to be given to the inclusion of Legal Aid Clinics, Legal Advice Centres and Para-Legal Projects, if practically possible. The list is not intended to be exhaustive, but should merely serve as an indication of the suggested composition of the Legal Forum. There has, for instance, been a view expressed that membership of the forum should include other organs of civil society, whose constituencies bear the brunt of the adverse effects of the actions and even abuses of the structures charged with the administration of justice. We however have to start somewhere.

19. It is proposed that the following terms of reference and procedures, in respect of the forum should at the very least be accepted, as a basis for its existence:

a) The forum shall be patterned on similar lines to the National Economic Forum and other forums of a similar kind;

b) the forum shall mainly act as a policy-making forum in the legal arena and not necessarily as an investigative body. It shall however have all the powers necessary to establish and create mechanisms which shall act as its investigative arm;

c) The forum shall look into and consider all aspects pertaining to formal legal education, the legal profession and the administration of justice (i.e. the Department of Justice) and make recommendations as to the necessary changes, to be brought about in these areas of functionality, during the transitional period;

d) All changes to the legal system and its concomitant legal institutions, as well as the consequences flowing therefrom, which have been unilaterally effected by the Department of Justice, shall be revisited by the forum;

e) This would mean that an immediate moratorium is to be called on all changes, as well as the further and continued implementation of such changes, unilaterally effected by the Department of Justice, including those areas where there has been consultation only with the ALS and GCB, or their constituent parts, respectively;

f) The forum shall exist with these terms of reference only until a democratically elected government is in place. This does not exclude the possibility of such a forum or a similar forum continuing to exist as an advisory body, in respect of aspects pertaining to the legal order, to advise a future democratically elected government, in respect of such issues, provided all affected parties agree thereto;

g) Decisions of the forum should be taken by consensus; and

h) Decisions taken by the forum shall not be ignored or undermined by any of the parties, in the execution or implementation of such decisions.

20. It is now more necessary than ever before to ensure that any restructuring of the legal system and its legal institutions, which is undertaken, is not only in the interests of the broadest consensus concerned, but in fact enjoys their sanction. To this end, Nadel will not be prepared, under any

circumstances whatsoever, to impart any form of credibility, efficacy or legitimacy, to any changes effected in the past, or future intended changes, to either the legal system and its legal institutions, or the legal profession, by either the Department of Justice, or the organized legal profession, without such restructuring being a process of consultation and agreement in a Legal Forum as proposed above.

21. Nadel will thus be urging the Milne Commission in the circumstances to suspend its deliberations, until the said Forum has been established and has decided not only upon the fate of the Commission, but also on the method for dealing with the restructuring of the structures administering justice and the legal profession.

22. It may be recorded that Nadel has taken the first tentative step towards the establishment of the aforesaid Legal Forum. A meeting of some of the organizations and institutions from the legal fraternity, was held in Johannesburg, on 02 September 1993. Absent was the GCB and Lawyers for Human Rights, although invited. All parties present tentatively expressed their support for the kind of forum proposed above.

23. The meeting agreed to establish an interim Steering Committee, comprising Adv. Pius Langa (Nadel), Adv. I. Semenya (BLA) and Mr A. van Vuuren (ALS), with the task of:

a) convening a more representative meeting, including the Department of Justice, within two weeks or as soon as possible;

b) to brief all parties invited and who were not present at the last meeting of its deliberations and the aims and objectives of establishing such a forum; and

c) to draft a discussion document for the next meeting pertaining to the possible composition and terms of reference of the proposed forum.

24. Hereafter, the Conference also gave its approval for the establishment of the Legal Forum, as a matter of utmost urgency. Nadel undertook to continue with its endeavours in this regard with all due haste.

25. A further, much more representative meeting, was held in Johannesburg, on 15 October 1993. It was agreed by all parties present to establish the Legal Forum and it shall be formalized at its next meeting on 04 November 1993.