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From: A J Leon M.P. and
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the Democratic Party

**RESPONSE TO PROPOSALS AGREED UPON BETWEEN THE SOUTH AFRICAN
GOVERNMENT AND THE AFRICAN NATIONAL CONGRESS ON THE CHAPTER ON THE
JUDICIAL POWER AND THE ADMINISTRATION OF JUSTICE**

Enclosed herewith for the consideration of your Committee is the Democratic Party's preliminary draft response to the draft agreement of the ANC and SA Government concerning the Constitutional Court and related matters. These amendments do not address each and every issue canvassed under the heads of agreement reached between your two parties, but they do constitute the initial response of the DP to the most significant issues ventilated therein.

These relate to -

- (1) the appointment method proposed for the selection of members for the Constitutional Court, particularly the decisive role accorded to the Cabinet/Executive in the selection

process and therefore the overt politicisation of the method of appointment of the Judges of the most important court ever established in the history of the country; and

- (2) the exclusivity of the jurisdiction of the Constitutional Court in all matters of constitutional significance and adjudication, to the exclusion of the Supreme Court, including the Appellate Division of South Africa.

For the sake of convenience, we have followed the numbering of the paragraphs in the proposals under discussion.

1. **Ad paragraph 1**

Heads of Supreme Court and Constitutional Court to be amended to read -

1.1. Insert the following clause 87 :

- "87 (i) There shall be a Chief Justice of the Supreme Court of South Africa who shall be appointed by the State President on the recommendation of the Judicial Services Commission and after consultation with the Cabinet.

- (ii) There shall be a President of the Constitutional Court of South Africa who shall, subject to the provisions of section 89, be appointed by the State President on the advice of the Judicial Services Commission."

2. **Ad paragraph 2**

Jurisdiction of the Constitutional Court

"2.1 The Constitutional Court shall have concurrent jurisdiction with the Supreme Court of South Africa (including the Appellate Division) in the following constitutional matters :

2.1.1 Compliance with the general constitution principles

2.1.2 The constitutionality of an Act of Parliament.

2.1.3 Disputes of a constitutional nature between organs of -

(a) the Central Government

(b) the Central Government and all other levels of Government

(c) the SPR's.

2.1.4 The question whether any matters falls within its jurisdiction.

2.1.5 Any other matter provided for in the Constitution.

2.1.6 The violation or anticipated violation by Central Government or any organ or agent thereof of any fundamental right (an organ or agent of

the Central Government shall not include any other level of government or an organ or agent thereof).

- 2.1.7 The Constitutional Court shall be entitled to hear final appeals brought by any aggrieved party from a judgment of the Appellate Division solely on a point of constitutional law in dispute.

Explanatory note :

We reiterate our submissions made in our response to the 12th Report of the Technical Committee on Constitutional Issues (4 October 1993).

In paragraph 3 thereof we stated and we repeat here :

"It is of the utmost importance that every judge should be part of the cultural justification. It is essential that the values in the Bill of Rights permeate every corner of our law, and that every judge feel responsible for defending the Constitution against any threat.

We are consequently opposed to any systematic attempt to exclude the ordinary courts from constitutional jurisdiction. We are not insensitive, however, to the need to bring unheard and underheard perspectives - especially unheard and underheard racial and sexual perspectives into the Judiciary. That must be done fast, especially in that part of the legal system responsible for protecting our fundamental rights.

... We propose that a Constitutional Court should have a similar identity (to the United States Supreme Court and the House of Lords in England): that it should be a court of constitutional principle. The Supreme Court, including the Appellate Division, should retain the ordinary jurisdiction and acquire full constitutional jurisdiction ...".

- 2.1.8 The Constitutional Court shall have exclusive jurisdiction in the following constitutional matters :

On the question of anticipatory review - review for constitutionality of a Bill of Parliament prior to enactment by Parliament. The right to apply for such review shall be given to any Party commanding 10% of the seats in either House of Parliament and to any SPR Government which believes its rights or competence to be threatened by a Bill before Parliament. The anticipatory review will not preclude a post-enactment challenge by an individual affected by the legislation approved by the Constitutional Court.

3. **Ad paragraph 3**

Jurisdiction of the other courts

3.1. -

- 3.1.5 We have no objection, in principle or in practice, to the provisions herein, provided that a final appeal shall lie to the Constitutional Court

on an issue of constitutional principle adjudicated upon by any of the other courts, including the Appellate Division.

4. **Ad paragraph 4**

Constitutional-related matters coming to other courts

In our view the provisions of paragraph 4 will fall away if the proposals referred to herein above are accepted.

5. **Ad composition of Constitutional Court and appointment of Judges to the Constitutional Court**

5.1. **Ad paragraph 2 (section 89)**

"89(i) There shall be a President and 10 Judges of the Constitutional Court, appointed for a single term of office of 10 years each.

(ii) No person shall be qualified to be appointed President or Judge of Constitutional Court unless -

(a) he or she is a fit and proper person to be a Judge of the Constitutional Court; and

(b) is a Judge of the Supreme Court of South Africa or is qualified to be admitted as an advocate or attorney and has, for an accumulated period of at least 10 years after having so qualified -

(i) practised as an advocate or attorney; or

(ii) lectured in law at a university.

Explanatory Note

We have omitted the requirement that the judge be required to be a South African citizen since in order to reach out to all the available talent it seems inconsistent to exclude non-South African citizens. Our neighbours, Zimbabwe and Namibia, have gained immensely during their own transitions to democracy by appointing non-citizens to their highest courts. The possibility of appointing a non-citizen may be an invaluable way of ensuring that under-heard perspective as articulated on the Constitutional Court through a judge of international distinction.

Further explanatory note

We have also omitted the possibility (contained in paragraph 89(2)(d) of the Draft Proposal) that non-lawyers may be appointed to the Constitutional Court. We do not understand the qualifications contained in the aforementioned paragraph since it would seem that the person has to be an expert in constitutional law but necessarily a lawyer per se. A court of constitutional principle must be staffed by the persons best qualified to decide questions of constitutional principle.

Since only lawyers are professionally trained to decide such questions, we very much doubt the wisdom of appointing non-lawyers to the Constitutional Court.

(iii) The judges of the Constitutional Court shall be appointed, in terms of the abovementioned criteria contained in sub-paragraph (ii) by the State President acting on the recommendations of the Senate which shall ratify or reject, by no less than a 75% majority, the judges proposed for nomination by a Judicial Service Commission.

(iv) The Senate shall either approve, or reject, the nominees for the Constitutional Court *en bloc* in the case of the initial appointments and individually thereafter, but the Senate shall have no power to substitute its own nominees for those of the Judicial Service Commission. In the event of the Senate failing to approve of nominees for recommendation to the State President, the Senate shall be obliged to refer the matter back to the Judicial Service Commission for further nominations.

Explanatory Note

If the Constitutional Court is to be a court of constitutional principle, its members must be capable of deciding cases or questions of principle, not as merely political choices as envisaged in the current proposal agreed to by the ANC and Government. This entails rejecting any system of political horsetrading as a means of choosing the constitutional Judges. We furthermore cannot see any good reason why the method of choosing constitutional Judges should differ fundamentally from that for choosing ordinary judges, as also envisaged by the draft proposals of the ANC and Government. We therefore have suggested,

above, that the constitutional Judges be nominated by a Judicial Service Commission (modelled on that suggested by the Technical Committee in its 12th Report in respect of the selection of ordinary judges).

To meet the objection that the legal profession is presently dominated by white males and the perspectives of white males will be therefore represented disproportionately on the Judicial Service Commission, we have proposed, in terms of the suggested amendment above, that the Commission's nominees should be submitted for approval or rejection (but, in the interests of an independent judiciary, not substitution) to the Senate. To prevent political chicanery and horsetrading we have also added the requirement that the Senate approve en bloc the initial slate of nominees by 75% majority.

The remaining fundamental issue which has not been specifically canvassed in our previous representations is the question of the Judicial Service Commission as contained in the re-numbered 93:

Judicial Service Commission

*93(i) There shall be a Judicial Service Commission which shall, subject to the provisions of sub-section (iii), consist of

(a) the Chief Justice, who shall preside at meetings of the Commission;

(b) the Minister of Justice

(c) the Director General of Justice

- (d) an advocate, designated by the General Council of the Bar of South Africa
- (e) one practising attorney designated by The South African Association of Law Societies
- (f) one Professor of Law designated by the Deans of all the Law Faculties at South African universities
- (g) 5 members of the Parliamentary Standing Committee on Justice designated by the Senate *en bloc* by a 75% majority.

Explanatory Note

We do not agree, nor do we understand, why in addition to the Parliamentary component on the Committee, the ANC and the South African Government have proposed in (f) that all persons "who are not members of Parliament, an SPR or local authority, but who are practising advocates and attorneys may be designated by the State President in consultation with the Cabinet for service on the Commission". This would seem to increase the powers of political interference in the appointment process to an unwarranted and unnecessary extent.