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THE COURTS AND JUDICIAL REVIEW
COMMENTS ON THE TWELFTH REPORT OF THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL ISSUES

The Constitutional Court

1 Membership of the court and appointment of judges

It is important to have a representative bench of judges on the constitutional court. This is important for the legitimacy of the court, as well as for its ability to make decisions which are able to redress social and economic disadvantage, rather than to entrench privilege (the experience of other jurisdictions). Of course, representivity on race and gender lines will not guarantee the latter, but it will be one of the factors which will make this more likely. It is important to remember that under a bill of rights, power shifts significantly to the judiciary. Women must be there or we are disadvantaged in a crucial arena of struggle.

The method of appointment of judges should be one that facilitates a representative bench. It seems that the choice is executive appointment (by the government of the day which is the present practice); legislative appointment (by the parliament of the day which includes representation from all parties); or a Judicial Service Commission (JSC) made up of representatives of the Judiciary (chief justice), the President, parliament and the executive. As the twelfth report says, no person, party or profession should dominate the selection. The report finds parliament to be the best solution.

Recommendation: It is probably not possible, or even desirable, to entrench quotas in the composition of the constitutional court. It may be better to opt for one of the following (in order of desirability).

- 1.1 The first choice would be to include a constitutional principle which states that in the appointment or election of persons to all public bodies, including the constitutional court, due regard should be had to the race and gender composition

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Constitutional Court

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of the population. Insofar as constitutional principles bind the constitution-making body, this should also apply to acts of this body (such as the selection of the Constitutional Court).

- 1.2 The second choice would be to ensure gender representation on a parliamentary select committee. This is probably unworkable given that the membership is only based on political parties.

2 The Judicial Service Commission

The Judicial Service Commission (JSC) will make recommendations regarding the appointment, dismissal, term of office and tenure of supreme court judges. Given the new power of the judiciary, we need women on the JSC. The present composition of the JSC will ensure that no woman is on it. See section 93 of the draft constitution. It therefore may be appropriate to suggest at least one gender position, described to include the following: "1 person with legal training and specialised knowledge of gender issues".

Furthermore the constitutional principle suggested above should also apply to appointment of persons to the JSC.

3 The jurisdiction of the Constitutional Court

Section 87(2)(c) should clearly state that the Constitutional Court has jurisdiction over common law and customary law. At present it can be inferred, but is not clear. The following formulation would facilitate the inclusion of muslim and hindu law as well.

Formulation: "the constitutionality of any law including the common law and all forms of customary law and an Act of Parliament"

4 Appearance rights

There is nothing on appearance rights. At present only advocates have appearance rights

in the supreme court (of which the Appellate Division and the Constitutional Court are a part). Attorneys, legal academics or persons with foreign law degrees have no appearance rights. Although the rights of practising attorneys are being considered by the Milne Commission, this excludes academics and non-practising attorneys. The question of appearance rights in the Constitutional Court could be determined by the Multi-Party Talks or it could call for a broadening of the mandate of the Milne Commission together with a more representative commission (at present it is headed by one male judge).

There are compelling reasons why both legal academics and attorneys should have appearance rights in the Constitutional Court - those of expertise, cost and those of representivity.

- 4.1 **Expertise:** Much of the present constitutional expertise lies with academics rather than with practitioners. Persons with foreign legal training may also be qualified to appear.
- 4.2 **Cost:** It may be cheaper to use persons with legal training and qualifications who are not practising lawyers, but who work for unions and NGO's. Such persons will also have an intimate knowledge of the issues at stake.
- 4.3 **Representivity:** The advocates' profession is dominated by white males. The attorneys' and academics' professions, as well as other persons with legal training, are more representative on the basis of race and gender.

Recommendation: Attorneys and legal academics be granted rights of appearance in the Constitutional Court and that the following is endorsed by the Negotiating Council for inclusion in the proper place (law or rules of court). These recommendations may

This is probably unusual insofar as it would not necessarily appear in the Constitution but would be included in other legislation.

require more discussion, but should be considered as the present rules exclude many women and blacks from appearing.

"Notwithstanding any other law or rule of court, a party may argue a constitutional point in the Magistrate's Court, Supreme Court or Constitutional Court through any representative who has received legal training" (this is wide and will include foreign legal degrees)

ALTERNATIVELY:

"...through any representative who has been admitted as an attorney or an advocate" (this will cover all those who have been admitted but who now work at universities, in NGOs and Unions. It also covers all LLB graduates who are able to get admitted without practising as an advocate - many academics fall into this category).

The second option is probably more likely to succeed than the first.