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SUBMISSION TO TECHNICAL COMMITTEE FOR CONSTITUTIONAL ISSUES

From:

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BLACK LAWYERS ASSOCIATION

SUBMISSIONS TO THE MULTIPARTY NEGOTIATING PROCESS, TECHNICAL COMMITTEE FOR CONSTITUTIONAL ISSUES

The submissions made herein are under the direction of the Black Lawyers Association. In formulating the submissions we acknowledge that constitution making is inherently the product of a political process and that it invariably embodies political choices. Nonetheless, we have sought to base our submissions on considerations which bear upon the administration of justice and more particularly on the judiciary with specific emphasis on the establishment of the Constitutional Court.

1. It is universally acknowledged that in a democracy the trident of State appari comprise of the legislature, the executive and the judiciary. We have noted that in the Multiparty Negotiating Process the debates have principally centred on the restructuring of the legislature and to some extent the executive but there has been minimal discussion concerning the restructuring of the judicial system and the administration of justice as a whole for a future democratic dispensation.
2. In a modern constitutional democracy, the judiciary and particularly the Constitutional Court have a pivotal role in ensuring that the Constitution is *suprema lex* by vigilantly keeping a proverbial eye upon the ever increasing bureaucratization of the body politic and the concomitant proliferation of the terrain of administrative actions and decisions whereby the executive governs by delegated authority through an array

of decrees, proclamations, regulations or otherwise. To ignore the sweeping exercise of executive powers and administrative actions which are necessary in a modern state is to turn a proverbial blind eye to the inherent risk which may adversely impinge from time to time upon the fundamental rights of the citizens.

3. First and foremost the judiciary must be structured in such a manner so that it will constantly guard against unwarranted executive intervention and administrative tampering with the rights of the governed. The judiciary is required to maintain a proper and delicate balance between the exercise of executive powers and administrative actions on the one side and the rights of the governed on the other side.

4. Having regard to the peculiar and pervasive history of the absence of a human rights culture in this country, we consider that the Constitutional Court will indeed be a formidable dynamo in developing a human rights ethos and thereby enhancing the legitimacy of the judicial system and administration of justice. But this will depend upon the composition of the Constitutional Court. If the appointments to the Constitutional Court is to be confined to the ranks of senior advocates and judges presently available then we are of the considered view that it will be by and large white bench with one or two Blacks. This composition will certainly undermine the image of the Constitutional Court.

5. Further, or without overlooking the historically ingrained perceptions, more particularly by the majority of blacks, of the prevailing legal system which has been instilled by brutal encounters and bitter experiences with "the law" which including the courts have been inimical to black interests and aspirations. Hence, the envisaged Constitutional Court will have to ensure the justiciability of the Constitutional principles, will have to cultivate a rights culture and will have to inculcate the meaningful acceptance of the Constitution by all, which will demand a balance composition. Thereby, the Constitutional Court will give legitimacy to the judicial system and administration of justice.
6. The Constitutional Court will have to be astutely independent with the fundamental responsibility of maintaining the scales of justice in proper and even balance and constantly striving to avoid the castigation of '*executive mindedness*'. In its pivotal role the Constitutional Court will be the flagship:

"...[with] a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion."

(Per Mahomed A J, as he then was, in S v Acheson 1991 (2) SA 805 (NmHC) at 813B).

7. The legitimacy and credibility of the Constitutional Court, we emphasise, will be contingent upon the appointment of judges from a larger pool of existing judges, advocates, attorneys and legal academics. A possible consideration is to appoint constitutional experts, for example political scientists (and even to consider the appointment of non-lawyers if need be to enhance the image of the legal system. But this is a matter for in depth consideration).
8. Indeed there is an ongoing need to restore credibility to the judiciary we suggest that the pros and cons of appointing persons having a human rights track record in their practices be favourably considered in spite of their lack of experience. At the very outset of establishing the Constitution Court, its very credibility must be established to mirror the composition of a non-racial democratic State.
9. The Technical Committee *thinks* "that consideration should be given to creating an independent and entirely separate Constitutional Court, to serve as the court of final instance in all constitutional issues" (paragraph 3.6, page 5). The Committee has also provided examples of models for a Constitutional Court.
10. In this regard, we support the creation of an independent and separate Constitutional Court as the final arbiter in all matters pertaining to

constitutional issues but we favour direct access to the Constitutional Court by the litigants themselves. At this juncture we strongly advocate that the Constitutional Court must be independent from the Appellate Division of the Supreme Court and constituted of judges who are totally independent of the *ordinary* judges of the Supreme Court. In this regard we add that there should be no secondment of ordinary judges on *ad hoc* basis from the Supreme Court to the Constitutional Court.

11. We submit there ought to be a system of referral from the ordinary courts whenever in any case the constitutional validity of any action is put in issue or disputed by one of the parties or *mero muto* raised by the ordinary court. In such circumstances the proceedings in the ordinary court which would also include the Appellate Division must be stayed or stopped and the issue or dispute proceed for adjudication by the Constitutional Court.
12. We also submit that in any discussion a provision similar to Section 131A of the Constitution of India must be considered and we have adapted the said section for present purposes to read:

Exclusive jurisdiction of the Constitutional Court in regard to questions as to constitutional validity of central laws.

- (1) *Notwithstanding anything contained in any other provisions of the Constitution, the Constitutional Court shall, to the exclusion of any other court, have jurisdiction to determine all questions relating to the constitutional validity of any national law.*
- (2) *Where a Supreme Court is satisfied -*
- (a) *that a case pending before it or before a court subordinate to it involves questions as to the constitutional validity of any national law or, as the case may be, of both national and regional laws; and*
- (b) *that the determination of such questions is necessary for the disposal of the case, the Supreme Court shall refer the question for the decision of the Constitutional Court.*
- (3) *Without prejudice to the provisions of clause (2), where an application made by any Attorney-General, the Constitutional Court is satisfied,*
- (a) *that a case pending before a Supreme Court or before a court subordinate to a Supreme Court involves questions as to the constitutional validity of any national law, or, as the case may be, of both national and regional laws; and*
- (b) *that a determination of such questions is necessary for the disposal of the case, the Constitutional Court may require the Supreme Court to refer the questions to it for its decision.*
- (4) *When a reference is made under clause (2) or clause (3), the Supreme Court shall stay all proceedings in respect of the case until the Constitutional Court decides the questions so referred.*

(5) *The Constitutional Court shall, after giving the parties an opportunity of being heard, decide the question so referred, and may -*

(a) *either dispose of the case itself; or*

(b) *return the case to the Supreme Court together with a copy of its judgment on such questions for disposal of the case in conformity with such judgment by the Supreme Court, or, as the case may be, the court subordinate to it.*

13. We are of the view that in the process of constitution making some very serious consideration ought to be given to the totality of the restructuring of the judicial system and administration of justice for the future dispensation.
14. We propose that a special technical committee or a commission be established to consider the restructuring of the entire South African judicial system and administration of justice and fashioning a *draft* judicature bill. The establishment of a Constitutional Court must be considered in the context of the proposed restructuring in a holistic form.
15. Therefore, this proposed special committee or commission ought to examine the existing structures and statutes, namely, the Magistrates' Court Act 32 of 1944, Supreme Court Act No. 59 of 1959 and Small Claims Courts Act 61 of 1984 as well as other legislations currently

dealing with specialist courts such as the Industrial Court, Water Court, Income Tax Court, etc. including those of the TBVC states. Such a committee or commission will then be in a position to identify with a tremendous degree of precision and greater insight in defining the precise roles of the Constitutional Court and the ordinary courts and the *modus* for the restructuring of the existing Supreme Court in the light of the creation of SPRs.

16. Furthermore, the creation of the Constitutional Court as an independent and separate entity without the consideration of any referral mechanisms from the ordinary courts may result in hampering the role and task of the Constitutional Court.
17. In the future democratic dispensation the appointment and removal of judges should rest with the newly elected Parliament upon the recommendation and advice of a Judicial Service Commission.
18. The Commission as it is suggested by the Technical Committee should be composed in a balanced manner of representatives of the judiciary, the executive, the legislature and the legal profession.
19. But, before any debate regarding the appointment and removal of judges takes place there has to be a vigorous debate concerning the

appointment of a Judicial Service Commission itself in view of the fact that there is a great risk that it will be composed of almost all white male elite which will certainly detract from the legitimacy of the intended independent judicial system.

20. We submit that an enlarged Judicial Services Commission which will accelerate the process of democratisation and empowerment, hence, in addition to the representatives of the judiciary, the executive and the legislature, there should be two advocates (irrespective of their seniority) nominated by the General Council of the Bar, one of whom shall be a black man or a woman advocate and similarly there should be two attorneys (not necessarily of senior rank) nominated by the Association of Law Societies, one of whom shall be a black man or a woman attorney. The first and foremost step will be to ensure that there is a reasonable balance in the composition of the Judicial Service Commission.
21. We have also considered the possibility of inviting grassroots representation such as lay persons from popular organisations as part of the Judicial Service Commission. But we view the introduction of such representation on the Commission with a degree of caution and circumspection as well as problematic.

22. However, we submit that the Black Lawyers Association, National Association of Democratic Lawyers, NICRO and the Association of Law Teachers of South Africa should have one representative each on the Judicial Services Commission. This Commission will also be responsible for the appointment of judges to the ordinary courts.
23. We consider that the first appointments to the Constitutional Court in the interim phase should be by a *Special Judicial Committee* comprising of the Joint Judicial Committees of Parliament and the Judicial Services Commission. The first appointments shall be an *en bloc* election by two-thirds majority of the Special Judicial Committee.
24. Since the Constitutional Court is envisaged to play a pivotal role and having regard to the Technical Committee's suggestion that the Executive or head of State may approach the Constitutional Court for an opinion on a bill passed by Parliament in the event of doubt as to its constitutionality, then we also suggest that the Constitutional Court may also be approached by the Executive or head of State for advice on a proposed bill in the draft form as to its constitutionality prior to the bill being debated in Parliament.
25. The suggestion we make will certainly impinge upon the time of judges of the Constitutional Court and there will be the risk of burdening them,

hence, with a view to ameliorating the risk we suggest that some consideration be given for the *ad hoc* appointment of additional judges who will be appointed by the head of the Executive in consultation with the President of the Constitutional Court.

26. These *ad hoc* additional judges may be appointed from the ranks of lawyers and constitutional experts and if need be to include lay persons to prepare opinions and advice to be handed down by the Constitutional Court acting in its advisory capacity. Further these additional judges may also be considered to perform extra curial functions such as heading commissions and enquiries which touch upon constitutional and human rights issues.
27. The purpose behind the idea of *ad hoc* additional judges is to create a pool of readily available and trained persons who will be potential candidates for future judicial appointments to the Bench at large. These persons coming via the Constitutional Court will certainly have gained experience in constitutional and human rights issues which will be of benefit even in the ordinary courts.
28. We reiterate that any debate concerning the establishment and structuring of a Constitutional Court will be meaningless if such a debate is independent and separate from the debate concerning the role

of the ordinary courts within the totality of the judicial system and the administration of justice. In any debate it will have to be resolved whether judicial review of administrative action ought to be within the jurisdiction of the Constitution Court or the ordinary courts or both or only if such administrative action impinges upon constitutional validity then the Constitutional Court will have jurisdiction thereat.

29. In the report of the Technical Committee the expression "constitutional issues" is not defined or elucidated or elaborated upon.
30. In our opinion the expression simply means disputes between different organs of the State or matters arising out of unconstitutional legislation and action. The crisp question is should it also include litigation arising out of a dispute between private persons, for example where a landlord attempts to evict a tenant and the latter pleads that the attempted eviction constitutes a violation of the fundamental rights of privacy and an interference with his or her right of decent family life which would include his or her home. This may, at first blush seem a frivolous example but a similar proposition was considered by the European Court of Human Rights. A further example is that in a bail application before the ordinary criminal court the question will be whether the State should bear the *onus* in view of the fact that in a constitutional dispensation an accused has a right to liberty. The question arises whether the

accused, as a corollary to that right, has a right to bail. If the answer is in the affirmative then the State will have to bear the *onus* which is different from the present position where the accused bears the *onus*.

31. Therefore, we consider that the expression "constitutional issues" need to be defined with utmost consideration and debate by probing at the advantages, and disadvantages for a clear definition. Furthermore, whether the "constitutional issues" embraces only issues of law or law and fact for adjudication by the Constitutional Court.
32. We reiterate our suggestion that a special technical committee be established to research and investigate the various facets of the judicial system in its entirety and make recommendations as to the best possible changes that are needed for the restructuring of the judicial system and system of administration of justice as well as the establishment of a Constitutional Court.
33. In our opinion the criminal justice system particularly in the lower courts has no legitimacy whatsoever with the majority of the citizens. It cannot be imported into a democratic dispensation, it needs urgent restructuring and this can only be actioned by means of proper diagnosis.

34. Furthermore, we envisage that the reconstruction of the judicial system and the administration of justice ought to take place during the transitional phase as a matter of urgency. In nurturing a healthy and meaningful reconstruction and development we submit the following for and during the interim phase:

- (a) We acknowledge that the establishment of the *new* Constitutional Court will be preceded by establishing an Interim Constitutional Court during the interim phase ensuring that the judges who will be appointed in the Interim Constitutional Court will be persons who will recognise the pivotal role they will play in developing a constitutional and a human rights ethos during the transition. These judges will have to be persons of tremendous sensitivity and perception. They must have a track record of human rights and public interest experience from their practice as lawyers. They should be drawn from all sections of the people to ameliorate the inequalities of the past.
- (b) The question is how will the judges for the Interim Constitutional Court be appointed. We propose that in the interim phase a *Special Judicial Committee* be established. This *Committee* should be composed of the Judicial Services

Commission and the Joint Judicial Committee of Parliament. This will certainly ensure that the appointment of the judges for the Interim Constitutional Court will not solely rest within the purview of the legal fraternity but will certainly draw in the larger public interest through the Joint Judicial Committee of Parliament which we suggest should be constituted on the basis of proportional representation of party strength in both Houses of Parliament.

- (c) During the interim phase we suggest that there should be as a matter of policy to appoint assessors to the Interim Constitutional Court. We predicate that during the transition phase the Interim Constitutional Court will engage in a process of developing a jurisprudence of its own. It is envisaged that a wide variety of issues will come before the Interim Constitutional Court, for example issues of customary law or matters pertinent to religious rites and practices for example Islamic and Hindu customary marriages which are posited on theocratic laws, thus needing the expertise of persons who will assist the court as assessors.
- (d) We strongly suggest that consideration be given as a matter of priority for the need to establish a committee to review the

existing rules of practice of both the Supreme and Magistrates' Courts and to seek if necessary amendments thereto and thereby making the courts far more accessible to the people as well as to enhance and expedite proceedings before the ordinary courts and Interim Constitutional Court. Such will occur if the rules are amended in such a manner that they interact between the different fori in the whole of the judicial system.

- (e) Furthermore, having regard to the fact that there is a poorly developed legal aid system in this country, we also suggest that as a matter of priority consideration be given that the funding of constitutional and human rights litigation ought to be from State treasury during the interim phase. In this regard we submit that a special fund be established to assist litigants who may not be able to afford access to the Interim Constitutional Court simply because they do not have the funds.
- (f) If it is intended that the legal system as a whole should be restructured to be consistent with the dawning of a democratic dispensation and having regard to the fact that the organised legal profession is conservative and will not cause

tremendous changes during the transition stages and beyond, we suggest that consensus be reached by way of consultations with all parties concerned to compile an unbiased and unfavoured list of twenty or more senior/junior black and women advocates to be granted silk upon the installation of the Government of National Unity on 1 May 1994. In this way the Interim Government will be enlarging the pool of senior black and women advocates from which judicial appointments could be made.

- (g) Finally, we submit that the primary and fundamental role of the Constitutional Court both in the transition stages and beyond is to give essence and spirit to a human rights ethos which will concomitantly embrace, from time to time, the political and social values of a society in transition. In this regard we are of the view that there is indeed a case for non-lawyers to be appointed as judges and assessors to the Constitutional Court.

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