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CONSTITUTIONAL COURT

I cannot remember exactly when the idea of a Constitutional Court first cropped up in our discussions. I think by the time the augmented Constitutional Committee met in South Africa it was on the agenda. I recall that in the middle of 1990 we began planning for a conference on the subject and, if I recall correctly, the first planning colloquium was held at a hotel in Johannesburg in January 1991. It was the second such gathering which had been a highly successful get-together on constitutional systems which was held at the Wilgespruit Fellowship Centre in November 1990. The format of the workshops was quite important. The idea was to have a core of ANC constitutional specialists, together with ANC cadres from the movement as a whole, together with non-aligned legal specialists, persons from legal professional bodies and individuals from other political formations whom we felt were interested in honest debate.

The conference on the Constitutional Court was highly successful with funding guaranteed, I think by the US and possibly by Canada, we got Supreme Court judges (some retired) from Zimbabwe, Ghana, Nigeria, the Caribbean and Portugal as well as senior judges from the US, Canada and Germany, a senior law officer from Sweden and the Secretary to the President of the French Constitutional Council. It was at this conference that I first heard Arthur Chaskalson present a paper. It was a masterful analysis of the different models of constitutional courts ranging from the well-known US Supreme Court model, where the Court stood at the head of an integrated judiciary, to the lesser known Austrian constitutional court model, where the court was completely apart from the rest of the judiciary. We learnt that the German and Portuguese models were hybrid in that they took from both the US and the Austrian prototypes to create something new. Pius Langa also gave an influential paper on the projected character and composition of a South African Constitutional Court. One of the main points he made was that given the unrepresentative character of the South African legal profession and judiciary, it could not be expected that in its first years the Constitutional Court would be fully representative of the whole South African population. What mattered, he said, was that the process of selection be legitimate - that was more important than the actual complexion of those selected. The other point that he made and that was strongly endorsed by most of the

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participants, was that the Constitutional Court should not be merely a branch of the existing Appelate Division. It had to be a totally new body that came into existence with the new Constitution and that was not seen as merely an extension of the judiciary created under apartheid to serve apartheid. At the same time the participants accepted that members of the existing judiciary could well constitute an important element of the new Constitutional Court.

It is important to stress that the discussion at this conference was open , that there were no fixed positions caucussed for or adopted in advance. We were all feeling our way. If I remember correctly Jules Browde was there from the Bar and Dr Berthus De Villiers from the Human Science Research Council Centre for Constitutional Studies (one of the younger generation of intelligent and forward-looking NP members) was also there. Both of them expressed delight at the openness and vigour of the discussions. I think both were amazed to see persons well-known as ANC supporters vigorously disagreeing with each other in public. The success of the conference lay not only in the value of having good participation from international judges, and from having well researched papers presented by South African lawyers, it came from a new style of debate in which people saw that the ANC was less monolithic and more open to new ideas than they had suspected. I think it would be fair to say that all the basic themes of a new Constitutional Court were worked out at that conference. Possibly, at the time Arthur might have realised that this would be an area of special concern for himself, but for the rest of us it was just another piece in a large constitutional mosaic. I don't think that any of us specifically considered that he or she might one day be on that Court. When Arthur presented his paper, he did so in his personal capacity as a lawyer concerned with the evolution of the justice system in South Africa. It was not specifically ANC-oriented. His objective was to present the different options for South Africa so that we would understand the implications of each.

The issue remained in abeyance for some time and only cropped up indirectly at CODESA 2 early in 1992. This was in Working Group 2 where the question was how to achieve confidence in the Constitutional Assembly. The ANC wanted wanted the final constitution of South Africa to be drafted by the CA. The SAG wanted the Constitution to be negotiated at CODESA and ratified by referendum. In the interview I gave to Padraig O'Malley after the breakdown of CODESA 2, I dealt at some length with all the issues. In any event, part of the ANC proposal was that Constitutional Principles be agreed on at the negotiating phase which would be binding

on the CA. The question now was who would verify that these principles had been complied with. Our proposal was that a special, independent judicial body be created to verify that the new Constitution contained all the principles agreed on in advance and did not violate any of them. I think we proposed that that judicial body consist of between 7 and 9 members.

During the latter stages of negotiations at Kempton Park in late 1993 the issue of a Constitutional Court in direct form. It was decided that instead of having separate bodies to verify compliance with the Constitutional Principles on the one hand, and serve as a Constitutional Court on the other, that a single Constitutional Court be created with both functions. By this time, the idea of a substantial Bill of Rights in the interim Constitution had also been accepted. So the new Constitutional Court would have three basic functions: to verify compliance by the CA with the Constitutional Principles, to test the constitutionality of laws and to uphold the fundamental rights of all. I think that the ANC position had been to postpone the creation of a fully fledged Constitutional Court until the issue had been fully debated by the Constitutional Assembly and integrated into the overall new constitutional dispensation. This was consistent with the ANC approach of seeing the Constitutional Assembly as the principal author of new institutions in South Africa and ensuring that the Interim Constitution only created transitional bodies whose primary function was to see that a new Constitution was elaborated. To the extent that a fully fledged Constitutional Court was created in terms of the Interim Constitution, it could be said a major concession was made to those who wished the Constitution substantially developed in negotiations at Kempton Park. This concession, however, did not involve a departure from the basic objectives of achieving non-racial democracy in South Africa. It was also accepted as a major confidence building measure which would facilitate the holding of general elections and the creation of new and legitimate institutions of government.

The question now was how the Court should be established. I was not directly involved in this matter. Dullah Omar was the key ANC negotiator on questions touching the Judiciary. From time to time he would report to the Constitutiona Committee on the state of play. If I remember correctly, my tasks at that stage related to the Preamble and the language clauses. I was also asked at the last minute to touch on the question of the environment. So my contact with the battle over the Constitutional Court was peripheral. If I recall correctly, the broad ANC position was that the

European system of broadly based parliamentary committees coupled with high majorities should be used for purposes of selecting the judges. It was understood that if the judges were selected on block, subject to at least a two thirds majority, possibly even higher, there would have to be considerable give and take to achieve the necessary consensus. In other words, appropriate balance would be secured by the requirement of a high majority. It was also accepted that the legal profession could play a certain role in vetting candidates, but that it should not be the profession choosing from its own ranks that decided the composition of the Court. Dullah informed us at a certain stage that Kobie Coetzee was absolutely insistent that the Government rather than Parliament should make the selection. He coupled this with a proposal that four of the judges be selected from existing Supreme Court judges on the advice of the Chief Justice. We were not happy with the proposal since past experience had shown that selection by the Government - in fact it had been by the Minister of Justice - had not given rise to public confidence. At the same time, we were convinced that the Government would behave honourably and try to secure a balanced Court of high competence. We had stalemated with the Government on about ten major issues. It was necessary to find compromise solutions wherever possible so that the negotiating process could come to a conclusion. Accordingly, we agreed in broad outline to Kobie Coetzee's proposals, which, we understood, he had worked out after consultation with the Chief Justice. We were given to believe that the AD were perturbed by the course of events. They had been pushing for a separate panel of AD judges to function in Bloemfontein with the special purpose of dealing with constitutional matters. They accepted that there could be new appointments to give the Court appropriate balance, but they wished to see it functioning as part of a single Appeal Court. The Constitutional Committee was dead against this. It felt that the elements of judicial experience and legal continuity could be maintained by transferring Supreme Court judges to the new Court. Yet the Court had to be new, independent and manifestly different from the old courts. It should not sit in the same building, or even in the same city, nor should it be subject to the same overall control.

As is well known, the Democratic Party raised strong objections to the agreement reached between Kobie Coetzee and the ANC, which the Technical Committee had converted into legal formulations and placed before the Negotiation Council. I sat in on the debate. It was extremely emotional. Tony Leon fired his salvos with typical ascerbity. This was clearly not just a matter of his own

rather abrasive personal debating style. It was one of the issues which deeply concerned a number of DP members. For them, the Constitutional Court was a guarantee what they would have regarded as timeless principles would be applied during the turbulent period of transition. They clearly had in mind a group of liberal-minded judges presiding over the whole transitional process. They were almost impervious to the notion that unless such a Court was broadly representative, it would be seen by the majority of South Africans as protecting the interests of the white minority. In any event, Dullah Omar responded in vigorous and polemical terms. I think Tony touched a nerve in Dullah who had experienced decades of racism within the legal profession and who spoke scathingly not allowing what he called the law barons to determine the composition of the Court. Joe Slovo spoke after Dullah. Until then Joe had been almost invariably the voice of balance who was always willing to see points of merit in arguments from the other side. But he too exploded and became even more emotional than Dullah had been. Perhaps suppressed memories of his own were also unleashed. The treatment by the profession of colleagues such as Duma Nokwe and Bram Fischer. I am sure that sheer exhaustion played a big role. Tony Leon was fresh because at that stage of proceedings the DP was hardly involved in the process in an active way. Dullah and Joe had been writing, arguing, debating, travelling, reviewing deep into the night, day in and day out, for weeks and months on end. I felt at the time that it was good that Dullah and Joe argued with honest and spontaneous emotion but that from a presentation point of view, they might have done better to concede some of the points that Tony was making, but to emphasise the balance built into the compromise proposal before the Council.

The text was adopted. The DP organised a press conference in which they denounced the formulation. My name must have cropped up because two journalists came up to me afterwards and said they had heard that even Albie Sachs had not resisted the idea that the Government should make the appointments. I explained to them that I had had very little to do with the whole question since I had been negotiating on the language question but that I had been led to understand that it was Kobie Coetzee who had made the proposal against our wishes and that for the sake of moving matters forward, we had agreed to it. At a certain stage Dullah mentioned in passing to me that he thought the DP had presented their case in a very clumsy way. "If they had pushed for broadening the basis of the Judicial Service Commission and made it the crucial selection body, we would have been in a really difficult position." At some stage

Etienne Mureinik spoke to me and asked if there was no way I could persuade the ANC to change its position on the Constitutional Court. Etienne, who was Dean of the Wits Law Faculty, was acting as an advisor to the DP. I had a high opinion of him them and still think that he is an extremely good legal thinker with a major contribution to make to the constitutional debate in South Africa. I don't think he had any idea about how decisions were made in the ANC. We all had our chance at various stages to feed in our arguments and make our views known. My influence in relation to the language question was pronounced, since I had worked on this for some years and had fairly definite views which people would listen to. On the question of the Constitutional Court, however, I was just one of a large number of people. I also understood the importance of compromise. The issues that the DP was raising could always be brought up again at the Constitutional Assembly where the final Constitution would be drafted. In fact, I had little doubt that the rather cumbersome compromise worked out between Kobie Coetzee and the ANC Negotiations Commission as represented by Dullah would be replaced by something more coherent at the Constitutional Assembly stage. I was also aware as Etienne was not, that this was just one of about ten crucial issues on which we had been deadlocked with the Government. There were hard questions relating to the army, the police force, local government, and many more, all of which had great importance for the country. I could see that Etienne was disappointed that I had not made a personal stand. I did mention to him, however, what Dullah had said to me: That the DP, instead of attacking the proposals on the basis that the legal profession should be the sole arbiters, should have argued for broadening out the composition of the Judicial Service Commission.

The next day, I think it was, I received a message that Colin Eglin had come to the ANC office and wanted to see me. I slipped out of the meeting I was attending and spoke to Colin. I had enjoyed working with him in the early days of CODESA. He could be sharp, even abrasive, but was always well-focused and to the point. At times he was quite brilliant. Perhaps being a non-lawyer was an advantage. He would argue matters with a logic and freshness that we lawyers lacked, since we would always slip into a formula mode. Valli Moosa on the ANC side had this same capacity, and he was also normally a little more diplomatic than Colin as well. Another thing I liked about Colin was that he never seemed to be preening himself, saying things to look clever or to make a political opponent look stupid. It turned out that Colin was with Zac de Beer and they were hoping for an urgent meeting with Cyril. Colin on this occasion was very

diplomatic. He said he realised how busy Cyril was and did not wish to intrude. I told him that Cyril would appreciate that Colin would not present himself unless the matter was really important and that on that basis I was sure Cyril would be more than happy to meet him. I popped into the gathering where Cyril was and sure enough Cyril made arrangements immediately to speak to Zac and Colin.

Some time later it emerged that the DP were proposing amendments to the clause dealing with the selection of members of the Constitutional Court. As I understand the position, the amendment was accepted by the ANC and the Government as part of the total package to get the greatest possibly support for the Constitution as a whole. I know at the time there was also considerable pressure to have two ballots on Election Day instead of one. In debate, I had argued in favour of this proposal. At one stage some of us had even pushed for two separate election days, first national elections and then provincial elections. In any event the ANC was holding firm on one day one vote and I gather that Colin Eglin reluctantly agreed to this if the DP proposals for the Constitutional Court would be accepted.

At this stage none of us on the Constitutional Committee had indicated what sort of work we would like to be doing after the elections. The negotiations consumed us totally. We were in a state of near exhaustion. Some weeks later, however, I can recall a few of us having breakfast at the Garden Court Hotel in the centre of Johannesburg and Zola just popping the question: If you could choose what you would like to do after the elections what would your preference be? I can't recall the order in which we answered but I think I was the first and it came out quite spontaneously. I said I would like to be on the Constitutional Court and I would like to make movies. They laughed and said you can't do both together. I couldn't see why. The others - I think it was Kader, Dullah, maybe Bulelani and Zola were a little more coy, but I got the impression that all were thinking about Parliament and possibly the Government.

In late November or early December, the issue of what was called deployment cropped up at an NEC meeting. I remember it was a hot day at the Lutheran Centre outside Johannesburg and there was considerable excitement as the NEC members discussed the possibilities. Someone gave a report which indicated that NEC members could go into one of three categories. Some would be needed to keep the organisation going and to make sure that the ANC did not become an adjunct of Parliament and Government. Others would go into

Parliament and the third group would be deployed at a senior level in the civil service. There was much discussion about the criteria to be adopted. It soon became clear, however, that the overwhelming majority were interested in Parliament.

At a certain stage in the debate Kader got up and said: There is an important are that has to be considered, namely the Judiciary and especially the Constitutional Court. He wanted the comrades to know that he Kader was not interested in a position on that Court because he did not want to be a political eunuch. I put up my hand and said I wished to reply to what he had just said. I told the NEC that Kader had got it wrong, what we wanted was a non-sexist Court not a non-sexual one. I added that this was the one area where it would be completely wrong for the NEC to take a position since the Court would be independent and it would be quite inappropriate for the NEC to be nominating someone to be on it. It seems that my intervention was accepted since, as far as I know, the issue was never raised again, certainly not at NEC level.

By then I had more or less made up my mind that I did not want to be a parliamentary candidate with the possibility of Government office. I did not enjoy the jostling that was taking place. At the 1991 Congress where the NEC was chosen I allowed my name to go forward but more or less froze up and didn't do a single thing to promote my candidacy. I didn't speak at the plenary, I didn't shake hands, I wasn't specially nice to anybody. By the end of 1993 it was clear to me that my interests lay much more in the sphere of ideas and writing than in hard politics. When the ANC branch to which I belong said they wished to nominate for the parliamentary list, I went along with their proposal and indicated my willingness to be nominated. By the time the final parliamentary list was being worked out at a special Congress in Johannesburg, I think it was early in January, I was quite decided. I sensed that my colleagues on the Constitutional Committee were not averse to my pulling my name off the parliamentary list so as to be considered for the Constitutional Court. If they had hopes of getting senior Government positions, one less member of the Constitutional Committee would make it just that little bit easier for them. I never encountered any direct competitiveness of their part at this stage, but if they were hoping for ministerial positions clearly it would have been easier for them if I was not also in the race.

At the Elections List Conference, the names of the potential candidates were presented in alphabetical order. I had

received quite strong backing - I think I was in the 50's or the 60's - after some of the names of people like Walter Sisulu had been withdrawn I probably would have ended up round about 30 or 40. I was aware that the decision I had to make was truly a momentous one for me. We were in an airless Hillbrow hotel crammed with delegates from all over the country. I had flown up that morning and felt quite tired. I was afraid that I would drift off to sleep at the moment when my name was called and wake up an MP. I can recall gripping the table several times to keep awake and when my name was called out I stood up and said: Please take my name off the list. Six words which directly affected my destiny. I did not give any reason but when people asked me I told them that my interest was not really in Parliament as such. Now we have got the vote and I could concentrate on other things, I hoped I would be considered for the Constitutional Court.

At that stage the only thing people were interested in was the elections. No-one discussed with me the Constitutional Court and I raised it with no-one.

If I wanted to be considered for the Court, the logic of the situation required that I step down as soon as possible from the NEC. I prepared a letter for the S-G setting out my reasons and showed him a draft. I was anxious to make it clear that I was not resigning because of disenchantment and certainly not because my name was not on the parliamentary list, but to indicate that as far as I was concerned the basic mission that I had embarked upon from the age of 17 had been accomplished and that now I could move to other spheres, also related to achieving justice. Cyril said he fully appreciated my decision and that he would place my letter before the National Working Committee. He was of course extremely busy at the time with a multitude of issues bombarding him. We phoned from Cape Town several times to find out if the letter had been received and if the National Working Committe had accepted my resignation. Eventually I was informed by someone on the NWC that they felt only the NEC could decide since I was a member of the NEC. I think I sent the letter to Cyril in February and it was now mid-March. In order not to delay the announcement of my retiring from political office I issued a statement in Cape Town to coincide with my anniversary run from Caledon Square Police Station to Clifton Beach, in which I said I would be stepping down from political office. Still the NEC did not respond.

It was only in the last week before the elections that the NEC formally acknowledged receipt of my letter and accepted

my resignation. Nothing was said about the Constitutional Court and when people asked me I simply told them that I was hoping to be considered for the Court. I gave members of the NEC signed copies of the photograph taken of me on Clifton Beach with the saxophonist Basil Coetzee on the occasion of my run.

It so happened that the last speech I made on the NEC was devoted to urging that the State of Emergency in Natal be lifted. There was also some discussion about a Truth Commission. Kader and Dullah had raised this issue but both were down in Cape Town at this moment because of Dullah being nominated to oppose Allan Boesak as potential Premier in the Cape. I rose on a point of information to say that the Constitution itself provided a framework in terms of which amnesty could be given and that this had a bearing on the possibilities of a Truth Commission. A little while afterwards Mandela asked if he could speak to me for a moment and we went into a little room away from the meeting. He asked me to write out for him what I had said about the Constitution and a Truth Commission, since he was shortly going to discuss the matter with De Klerk. I jotted down some notes relying on the final sections in the Constitution which we called the postamble, and said that the Truth Commission would not be completely at large in terms of an amnesty but would have to function within this constitutional framework. I took advantage of sitting with him to say goodbye. It was quite a moment for me. I told him that I was resigning from the NEC because we had achieved what we had set out to achieve and that I was hoping to be considered for the Constitutional Court. He was tired at the time but shook my hand warmly and wished me luck with my future. He said he appreciated that the Court was an extremely important body but said nothing more.

That was my last NEC meeting. I addressed a meeting of the Cape Town Central Branch and several pre-election house meetings and, by the time the elections came, my days of attending ANC meetings were over.

My resignation was a small item on the NEC agenda and received hardly any publicity. I was being beseiged by friends and members of the public to explain why I was stepping out of public office. Frequently people would ask me at airport lounges or even in the street. They seemed to be disappointed, as though somehow I was reneging at the last minute on my lifelong quest for freedom. I decided to write an explanation for the Weekly Mail underlining the point that I was leaving political life because of the success not the failure of my quest. The article was well

commented on by several people who said they found it unusual and rather moving. What caused a small furore, however, was an interpretation in the press that the article presaged my being appointed President of the Constitutional Court. Commentators started asking if some deal had been done and from then onwards hardly an article on the possible composition of the Court was printed without this question being raised. All I can say now is that if any deal was done, I knew nothing about it and in fact in the months that followed spent many many sleepless nights.

I had strong hopes of being chosen for the Constitutional Court on the basis of my record as a lawyer and constitutional expert. At the same time, I was concerned that the manner in which the Court was to be chosen could make it difficult for me to be nominated. At that stage it looked as though all four of the Supreme Court judges nominated to the Court would be white men. If Arthur Chaskalson was appointed President of the Court, that would make five white men. If he were not appointed President of the Court then clearly he would be a top candidate for the persons to be nominated by the Judicial Service Commission. This would leave little space for persons of colour and for women. I looked anxiously at the composition of the Judicial Service Commission and wondered whether I would be chosen. I told people that I supported the principle of affirmative action and that if I did not get on to the Court because of it, I would accept the situation with Gandhian joy. To be quite candid however, I would have accepted the situation as justified and appropriate, but not with real joy.

What I was not prepared for was the extent of hostility which was to meet my candidature. Perhaps it was naive of me but I never expected papers like the Weekly Mail and the Sunday Times, who had often asked me to contribute, would become vehicles for very strong critiques against me. It reached the stage where I dreaded opening either paper.

Finally the moment for the interview arrived. The months preceding had been rather lonely and painful. I no longer had the ANC Constitutional Committee to consult. I was not campaigning or doing anything directly or indirectly to further my candidature. I had in fact made a firm decision not to "run for office". The whole point of not going to Parliament was to avoid this form of competitive self-promotion. By the time the interview arrived I was far less buoyant than I had been immediately after the elections. I tried to anticipate questions that would be asked and had a

lovely half hour session with Hugh Corder and Kate O'Regan in which we went over possible ground.

I found the self-promotion required by the interview going very much against the grain. It meant blowing my own trumpet. If anyone's record was known, if anyone had laid his ideas out in books and speeches, it was myself. Yet somehow the basic themes of my legal life did not seem to be an issue. There was also just too much to cover. It had not been an ordinary legal career with a few interesting nuances. I had been a decade at the Bar in Cape Town, a decade as a legal academic in England, a decade involved in the Mozambican Revolution with its many ups and its many downs. Perhaps the most important work I had done had been under Oliver Tambo's tutelage in drafting a Code of Conduct for the ANC in exile. I had worked for years on the Constitutional Committee and been one of the pioneers in the ANC on a Bill of Rights. I had lived and worked in the USA with top constitutional lawyers and spent a week in France as guest of the President of the French Constitutional Council. It was just too much. Lawyers just didn't involve themselves in such a varied set of experiences. And that was leaving out the raids, the detention, the torture, the exile, the statelessness and the bomb.

The people questioning me and I seemed to belong not to different world but to different universes. By the end of an hour, which was the time allotted, I was quite tired but felt that I had responded reasonably well to the questions. When Etienne Mureinik mentioned the Thami Zulu report I was pleased since I had re-read it a day or two earlier and felt that it resonated with a spirit of serious enquiry and justice. Then he sprang the question on me about not having written a separate minority report condemning the length of time that Thami had spent in detention. Two other members of the Commission had copies of the report. They both pounced on me. Clearly this had been pre-arranged. The press feasted on their comments. To this day I feel quite indignant. It was their job to question us but I felt that this was manipulation designed to achieve headlines and totally contrary to the stated objective of the Commission not to look for reasons to keep people off the Court but rather to find the qualities worthy of a member. One of the members of the Commission, Senator Mchunu, asked me after they had finished what I thought about people who had gone on to the Bench during the period of apartheid and applied apartheid laws. What he was really getting at, was how could these people attack me when they had functioned within the apartheid system and I had gone outside to fight it. But I answered that I could never have accepted a judgeship

during the period when racist laws where being passed by a racist Parliament but that when I had been an advocate I had always been pleased when open-minded judges were on the Bench.

The press campaign against my nomination was intense and caused me considerable pain. The Judicial Service Commission included me in the list of ten and the President, acting in Cabinet, finally chose me as one of the six judges on the Court.

Last week I went up to the Court for the first informal meeting of the judges. I enjoyed it enormously and felt a deep sense of satisfaction. At first I was surprised at how much I was moved by being there. Then I realised that I was now being reconnected with my youth as an advocate. Parts of my life had come together in circumstances in which I could now be a lawyer and pursue justice at the same time. I felt proud that as a young advocate I had made choices in favour of justice and there was a sense of deep continuity being on the Bench with others who had also pursued justice in their different ways.