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30 Augustus 1993

Mev Zencbia du Toit  
World Trade Centre

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Ongeveer twee jaar gelede het die VPO â\200\231n memorandum aan die  
Suid-Afrikaanse Regskammissie voorged oor hoe â\200\230n nuwe regsbedeling moet  
lyk onder â\200\231â\200\230n nuwe konstitusie. â\200\230n Afskrif van daardie memoranchm g  
aan  
hierby saam. U wil dit moontlik gebruik.

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DIREKTEUR : PROFESSIONELE SAKE

Aanhangsel: 6 bladsye

Direkicur-generaal; ALJ van Vuuren Â« Direktcur Professionele Sake: JJA Botha Â« Redakteur  
De Rebus: PJ van der Merwe  
Direkieur Kommunikasie: M Ferrcira Direktcur Voortgesctte Regsopleiding: R de Klerk Â« Dir  
ekteur Praktiese Regmplelding:\_ N Swan

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SUBMISSIONS BY THE ASSOCIATION OF LAW SOCIETIES  
OF THE REPUBLIC OF SOUTH AFRICA TO  
THE SOUTH AFRICAN LAW COMMISSION ON A NEW  
LEGAL DISPENSATION AS PART OF A NEW CONSTITUTIONAL MODEL

BACKGROUND

1 This memorandum was prepared on the basis of contributions made during a â\200\234"think tank". held by leaders. of the attorneysâ\200\231 profession in the Transvaal on 8-9 June 1990. It was subsequently accepted by the Executive Committee of the Association of Law Societies of the Republic of South Africa.

The "think-tank" was attended by twelve council members of the Law Society of the Transvaal, by two representatives of each of the fourteen attorneysâ\200\231 associations ("circles"â\200\235) in the Transvaal and by seven members of the secretariat. Although absolute unanimity on all points could not be achieved, this memorandum contains the views of the vast majority.

2 The Association of Law Societies does not wish to comment on models for a new South African Constitution, in so far as such models relate to the legislative and

executive arms of Government. These are political issues and different members of the profession hold different political views. The Association of Law

Societies does, however, wish to comment on the legal dispensation under a new constitution and this memorandum contains its suggestions.

STRUCTURE OF THE COURTS

3 It is suggested that the courts in the Republic of South Africa be structured as follows : :

3.1 Appeal Court

The Appeal Court will hear appeals on

- constitutional and human rights matters; .and
- other matters restricted to points of law only.

3.2 Supreme Courts

The Supreme Courts will

- hear appeals from the High Courts; and

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= act as courts of first instance on constitutional and human rights matters.

status of the Supreme Courts must be high and these

Courts should draw their members from the Dbest available candidates.

3.3

High Courts

The High Courts will be courts of first instance in all matters not dealt with by either the Supreme Courts (constitutional and human rights matters) or by the Lower Courts and will also act as Courts of Appeal in appeals from the Lower Courts. They will have a number of specialist

divisions to handle matters such as

- family law;
- commercial matters;
- taxation;
- immaterial property;;
- insolvency; â\200\230 4
- industrial relations;
- liquor;'
- property (including water, expropriation and town planning);
- ~ personal injury ; and . 5 =
- cÂçriminal matters.

There should be established, within the High Courts, circuit courts for criminal as well as civil matters.

3.4

Lower Courts

The Lower Courts will consist.of

- Magistratesâ\200\231 Courts, for smaller criminal and - civil matters;
- Courts under "Justices of the Peace", to handle petty matters (including less serious traffic offences), which should be decriminalized;
- a special court for customary or indigenous law (if required by the population group concerned); and



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- small claims courts.

& The procedural rules for all the courts should be simplified and should, as far as practicable, be identical.

5 The office of the Registrars of the Courts should be upgraded, and Registrars of the High Courts should be authorized to hear interlocutory matters and to preside at pre-trial conferences. The Registrars should assume a similar function to that of the "Queen's Bench Masters" in England

6 There should be a right of appeal from the Magistrates' Courts and the High Courts to the Supreme Court, Further appeals should be on points of law only and with - leave of the Supreme Court or of the Appeal Court.

- Where the Supreme Court acts as a court of first instance, there should be a right of appeal to the Appeal Court.

7 All the courts should be independent from the executive arm of the Government.

8 The Presiding Officers of the courts should be as follows: s

8.1 The Lower Courts should be presided over by Magistrates, to be drawn from the ranks of civil servants (prosecutors) and private practitioners (advocates, attorneys or academics).

8.2 The High Courts should be presided over by Judges, to be drawn from the ranks of attorneys, advocates or magistrates.

8.3 Judges for the Supreme Courts will be drawn from Judges of the High Courts.

8.4 Judges for the Appeal Court will be drawn from the ranks of Judges of the Supreme Court.

9 All appointments of Judges and Magistrates should be made by an independent body, on which will be represented

- the bench;
- the bar councils;
- the law societies; and
- the Government.

10 Right of appearance in all courts will, in the first instance, be determined by academic qualifications, together with membership of a recognized profession body. Practitioners with equal academic qualifications should have equal right of appearance.

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## STRUCTURE OF THE LEGAL PROFESSION

11 The independent legal profession should consist of judges, advocates, attorneys, magistrates and law agents (described in 14 below).

12 The Bar should remain as it at present exists, but should give up its exclusive right of appearance in the superior courts, It should be allowed to take instructions directly from members of the public, if it chooses, provided appropriate provision is made for the maintenance of trust accounts.

13 Admission requirements should remain as at present, provided that special provision should, however, be made for admitting persons who have acquired suitable training outside South Africa to be attorneys inside South Africa. Attorneys with LLBs should have right of appearance in the Appeal Court and in the Supreme Court, All attorneys should have right of appearance in the High Courts and in the Lower Courts.

14 It is suggested that provision be made for the training and admission of a lower-qualified legal practitioner to appear in the Lower Courts in criminal matters only. Such practitioner will, for want of a better name, be

referred to in this Memorandum as a "law agentâ\200\235. He could receive a training of, say, two years at a technical college. Should a law agent wish to improve

his qualifications and become an attorney, he should get full credit for all courses passed at the technical college.

The reasons for admitting law agents are the following:

14.1 It will allow a large number of practitioners to qualify.

14.2 At present, many accused in the Lower Courts are unrepresented. Law agents will be in a position to represent these people. Their charges should be lower than the amounts presently charged by attorneys.

14.3 It is difficult for many people to support themselves during the period of academic study required for qualification as an attorney, and thereafter to find suitable articles. By first becoming law agents, many prospective attorneys will find entrance to the legal profession much easier.

All law agents must come under the jurisdiction of the Law Society.

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~15 Much more emphasis should be placed on the practical training of practitioners. The establishment of a practical law school, not only for attorneys, but also for public prosecutors, magistrates and advocates is envisaged. Such a school could include the present training facilities of the Department of Justice.

Articles of clerkship may no longer be suitable for the practical training of practitioners, and should be supplemented.

#### ACCESSIBILITY AND CREDIBILITY OF THE COURTS

16 The accessibility and credibility of the courts are detrimentally affected by the following:

- Geographical constraints : litigants sometimes have to travel long distances to the Supreme Courts.
- Financial constraints : sufficient funds should be made available for the training of staff, the functioning of a sufficient number of courts and for legal aid, where necessary.
- Manpower constraints : - more people should receive training.
- Negative perception of the public : street-law projects should be encouraged to make the public aware of the law and of the protection it affords; the courts should be kept out of politics and should operate independently; participation by black practitioners should be encouraged and black practitioners should as soon as possible be appointed as judicial officers.

17 The accessibility, and also the credibility of the courts (especially the Lower Courts) in the eyes of the entire population, must be improved. This can be achieved by the following:

17.1 Legal aid should be extended and privatized.

17.2 Law agents must be established, which will enable a larger section of the community to be represented legally.

17.3 Court procedure should be simplified.

17.4 Attorneys should receive the right of audience in Superior Courts.

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The inquisitorial procedure should be extended, as an alternative to the adversarial system during trials in the Lower Courts, and also to pre-trial procedures before Registrars.

The office of magistrate and the office of public prosecutor should be entirely separate from each other. Magistrates should not be civil servants and should (together with other judicial officials) function independently.

Consideration was given to the institution of the office of "public defender" for the defence of unrepresented accused. This is not considered a feasible way of providing legal representation to indigent persons because the system will be difficult to administer and because it will be seen as part of Government. Increased legal aid, together with the institution of law agents, should go a long way towards solving the problem.