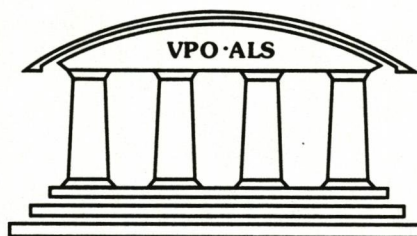


The Association of Law Societies of the RSA



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[165]

Our reference: C185

October 14, 1993

Dr T Eloff
Head of Administration
Multi-Party Negotiating Process
World Trade Centre
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Dear Dr Eloff

COMMENT ON THE 12TH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

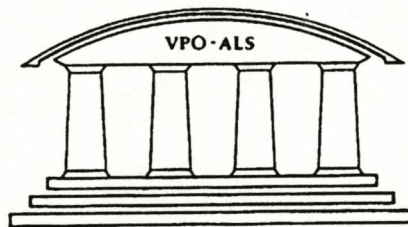
As discussed, we hand you herewith our association's comment. We shall be grateful if you could place it before the relevant committees, for which we thank you.

Yours faithfully

**A L J VAN VUUREN
DIRECTOR-GENERAL**

encl

The Association of Law Societies of the RSA



Comment on the Twelfth Report of the Technical Committee on Constitutional Issues

THE ASSOCIATION OF LAW SOCIETIES OF THE REPUBLIC OF SOUTH AFRICA

COMMENT ON THE TWELFTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

1 INTRODUCTION

These submissions are made by The Association of Law Societies of the Republic of South Africa (ALS) which represents the more than 11 300 practising and candidate attorneys of South Africa. As such, the ALS represents the overwhelming majority of legal practitioners in the country.

The ALS has a legitimate concern over the structure and functions of the courts, in particular the proposed Constitutional Court, as

- 1.1 its constituents will have to practice in these courts; and
- 1.2 it will be the duty of attorneys, in the first instance, to ensure that all the people of South Africa's constitutional rights are protected and where necessary, enforced.

2 PRINCIPLES

The ALS did not attempt to draft legislation or rules, but has taken decisions on a number of principles. The ALS urges the Negotiating Council to consider these, which are:

- 2.1 these comments relate specifically to the transition period;
- 2.2 the Constitutional Court should be a proper court and not a forum of sorts;

- 2.3 the Constitutional Court should be separate from the Appellate Division, but parallel in status;
- 2.4 the Constitutional Court should be the ultimate court to rule on constitutional issues;
- 2.5 every lower court shall be competent to rule on the constitutional rights of an accused or litigant, but not on the constitutional validity of an act of parliament. On the latter, only the Constitutional Court shall be allowed to rule;
- 2.6 every party against whom a court has ruled on a constitutional issue, shall be entitled to appeal to either a higher court or directly to the Constitutional Court;
- 2.7 it is envisaged that the Constitutional Court will in the main be a court of appeal, but may also be a court of the first instance (see 2.8 below);
- 2.8 any party who has a dispute on a constitutional matter may approach the Constitutional Court directly after having petitioned a panel consisting of the Chief Justice and the President of the Constitutional Court for leave to do so; and
- 2.9 irrespective of whether attorneys are granted rights of audience in the existing supreme courts, it will be of cardinal importance that they be allowed to appear before the Constitutional Court for the same reasons as set out in the introduction hereto.

3 The ALS has taken notice of the addendum to the 12th report (constitutional issues) and would like to comment as follows:

3.1 **Section 88**

We suggest that it be amended to read:

Composition of the Constitutional Court and appointment of Judges of the Constitutional Court

3.1.1 The President and Judges of the Constitutional Court shall be appointed by the President in accordance with the provisions of subsection 3.

3.1.2 No person shall be qualified to be appointed President or Judge of the Constitutional Court unless he or she -

- (a) is a South African citizen; and
- (b) is a fit and proper person to be a Judge of the Constitutional Court; and
- (c) is a Judge of the Supreme Court of South Africa or has for a cumulative period of at least 10 years after having so qualified:
 - (i) practised as an advocate or an attorney in the Republic of South Africa, or
 - (ii) lectured in law at a university in the Republic of South Africa.

3.1.3 A joint standing committee of parliament, composed of one member of every political party represented in the National Assembly and the Senate shall, subject to subsection 4, within 30 days of the first sitting of the senate and after having interviewed in public all candidates that are nominated or who make themselves available -

- (a) unanimously nominate a person to be appointed as the President of the Constitutional Court; and

- (b) unanimously nominate 10 persons to be appointed as Judges of the Constitutional Court

and the nominees, if their nomination is approved *en bloc* by resolution adopted by 75% of the members present at a joint sitting of the National Assembly and the Senate, shall be appointed as such by the President under his or her hand and the Seal of the Republic of South Africa.

3.1.4 If the joint standing committee referred to in subsection 3 is unable to reach unanimity on the nomination of the President and Judges of the Constitutional Court, the President and eight Judges of the Constitutional Court may be nominated by a majority of 75% of the members of the said committee, and the two remaining Judges may be nominated by the majority of the remaining 25% of the members of said committee.

3.1.5 If the nominations are not approved at the joint sitting as contemplated in subsection 3, the matter shall be referred back to the joint standing committee for reconsideration according to subsections 3 and 4.

3.1.6 Vacancies on the bench of the Constitutional Court shall be filled in accordance with the procedure prescribed in subsection 3.

[Comment:

- 1 From the above, it will be noted that Section 88(2)(d) has been deleted, as the ALS is concerned that unfit people may be appointed.
- 2 The ALS is of the opinion that the interviews should be held in public, so that the candidates can be properly scrutinized.
- 3 There shall be a proper debate on the resolutions.]

3.2 Section 89(1)

We suggest that it be amended to read:

- (1) The conditions upon which the Constitutional Court may be siezed of any matter in terms of this Constitution or any other law, and all matters relating to the conduct of proceedings before the Court, shall be regulated subject to the provisions of this Constitution by rules prescribed by the President of the Constitutional Court after consultation with the Chief Justice published in the *Government Gazette*.

3.3 Section 91

As regards the establishment, jurisdiction, composition and functioning of the courts, the ALS submits very strongly that these be uniform in all the envisaged different regions.

3.4 Section 93 ad subpara 1(e) thereof

In view of the number of practitioners that the ALS represents, it should have three members on the judicial service commission. Also note that the correct designation is : The Association of Law Societies of the Republic of South Africa.

3.5 Oath of Office of Judges

We suggest that a similar oath be prescribed for magistrates.

4 The ALS is in agreement with the following sections:

Section 86

Section 87

Section 90

Section 92

Section 94

Section 95

Section 96

Section 97

Section 98

These are the written submissions of the ALS, but we are quite willing to appear before either the Technical Committee or the Negotiating Council to elaborate hereon, or to give further evidence.