

ASSOCIATION OF LAW SOCIETIES

THE APPLICATION BY THE CONSTITUTIONAL ASSEMBLY TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF SOUTH AFRICA, 1993

NOTICE BY THE ASSOCIATION OF LAW SOCIETIES OF THE REPUBLIC OF SOUTH AFRICA ("THE ASSOCIATION OF LAW SOCIETIES") IN TERMS OF RULE 15(3) AND DIRECTION 4 OF THE DIRECTIONS ISSUED BY THE PRESIDENT OF THE CONSTITUTIONAL COURT ON 13 MAY 1996 AS AMENDED BY THE PRESIDENT'S NOTICE OF 19 MAY 1996

TAKE NOTICE THAT the **ASSOCIATION OF LAW SOCIETIES** objects to the certification of the constitutional text adopted by the Constitutional Assembly on 8 May 1996 ("the text") on the following grounds :

1. **Judicial Service Commission ("the Commission")**

- 1.1 The failure of the text in section 178 to provide for an independent Commission, alternatively the ability of the party which controls the National Executive, whether directly or indirectly, to control the majority of appointments to the Commission contravenes Constitutional Principle VII ("CP VII"). The judiciary must be appropriately qualified, independent and impartial.
- 1.2 The failure of the text in section 178 to provide for a separation of powers, alternatively the ability of the party which controls the National Executive to control the appointment of the majority of the members of the Commission contravenes CP VI. There must be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
- 1.3 In the alternative to paragraph 1.2, the provision in section 178, which provides for the designation of ten members of Parliament as members of the Commission, contravenes CP VI.
- 1.4 The provision in section 178 (1)(e) and (f) that two practising advocates and two practising attorneys, nominated from within their respective professions, be appointed by the President to the Commission in the event of a multiplicity of nominations by the legal profession, contravenes CP VII. The risk exists that in such essentially political appointees might not ensure that candidates for judicial appointment are appropriately qualified, independent and impartial.

- 1.5 In the alternative to paragraphs 1,1 to 1.4, the provision in section 178(1) for the majority of the members of the Commission to be appointed either by the President, or designated by the majority party in Parliament contravenes CP VII.

2. The entrenchment of the Bill of Rights

- 2.1 The failure of the text in section 74(1) to provide for the special entrenchment of the Bill of Rights contravenes CP II read with CP XV. CP XV requires *special procedures involving special majorities* for amendments to the Constitution. CP II requires that fundamental rights, freedoms and civil liberties must be provided for and protected by *entrenched* and justiciable provisions in the Constitution. Read together, these principles require *special entrenchment for* the Bill of Rights.
- 2.2 The failure of the text in section 74 to entrench the constitutional principles contained in Schedule IV of the Constitution of the Republic of South Africa, 1993 ("the interim Constitution") contravenes Schedule IV as a whole, read with sections 71 and 74 alternatively with Chapter 5 of the interim Constitution. It would be subversive of the scheme established by Chapter 5 and Schedule IV were the new Constitution capable of amendment immediately after promulgation in a manner not consistent with the Constitutional Principles contained in Schedule IV.
- 2.3 The failure of the text to provide a method of entrenching the Bill of Rights, stronger than that of a two-thirds majority in the National Assembly contravenes CP II. Universally accepted fundamental rights, freedoms and civil liberties must be protected by entrenched and justiciable provisions. The interim Constitution, which contains similar provisions, in section 72(1), for the amendment of the chapter on fundamental rights, has been amended on no less than ten occasions since its enactment.

3. The Public Protector, Auditor-General, Public Service Commission and the South African Reserve Bank

- 3.1 The failure of sections 181(2), 193(4) and (5) and 194 adequately to provide for and safeguard the independence and impartiality of the Public Protector and the Auditor-General contravenes CPs VI and XXIX. The text allows a simple majority of a committee of the National Assembly to nominate and a simple majority of the National Assembly to designate and dismiss the Public Protector and the Auditor-General. In relation to CP VI, the section fails to provide appropriate checks and balances to ensure the accountability, responsiveness and openness between the legislature and the executive. In relation to CP XXIX, the section fails to provide for and safeguard the independence and impartiality of the Auditor-General and the Public Protector in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

- 3.2 The failure of the text to make such provision for the appointment of the Public Service Commission as protects its independence and impartiality, contravenes CP XXIX. Section 196 fails to safeguard the independence and impartiality of the Public Service Commission in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.
- 3.3 Sections 224 and 225, by limiting the functional independence of the Reserve Bank to its primary object and in failing to provide any mechanism for the appointment of the Governor and Board of the Bank which ensures the Bank's independence, contravenes CP XXIX. The independence and impartiality of the Reserve Bank must be provided for and safeguarded in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

4. The constitutional jurisdiction of the Magistrates' Courts

- 4.1 Section 170 excludes from the jurisdiction of the Magistrates' Courts the power to enquire into or rule on the constitutionality of any legislation or any conduct of the President. This contravenes CP VII, read with CPs II and V. CP VII requires that the judiciary have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights. CP 11 requires that fundamental rights, freedoms and civil liberties be entrenched and justiciable under the Constitution. CP V requires that the legal system ensures the equality of all before the law and an equitable legal process.
- 4.2 By preventing the Magistrates' Courts from enquiring into or ruling on the constitutionality of any legislation, however subordinate, in the course of criminal or civil proceedings otherwise within their jurisdiction, the text precludes the majority of South Africa's courts from safeguarding and enforcing the Constitution and all fundamental rights where legislation of any kind or the conduct of the President is under scrutiny. Where these factors are present, the text renders the Constitution's fundamental rights, freedoms and civil liberties non-justiciable and unenforceable in the majority of our courts. The text, therefore, makes it exceedingly and unnecessarily difficult for litigants and accused persons in the Magistrates' Courts to invoke and rely upon the Constitution.

TAKE NOTICE FURTHER THAT THE ASSOCIATION OF LAW SOCIETIES will accept notice and service of all documents in these proceedings at the offices of The Association of Law Societies of the Republic of South Africa, 304 Brooks Street, Menlo Park, Pretoria, 0102.