OBJECTION TO THE CERTIFICATION OF THE NEW CONSTITUTIONAL TEXT IN TERMS OF PARAGRAPH 4 OF THE DIRECTIONS GIVEN BY THE PRESIDENT OF THE CONSTITUTIONAL COURT IN TERMS OF RULE 15

1, Ronald Ewald Laue am a senior magistrate of the office of the Magistrate Durban, and submit as follows in objection to the certification of the new Constitutional text:

1. PARTICULAR OMISSION FROM THE CONSTITUTION TO WHICH OBJECTION IS TAKEN

   The objection is based on the submission that, with reference to magistrates, there is no provision in Chapter 8 of the new Constitution which protects their independence to the same extent that it does in respect of judges of the superior courts.

2. GROUNDS FOR OBJECTION

2.1 Pivotal to the notion of a separation of powers is the concept of an independent judiciary. In order to give effect to this concept section 165(3) of the new Constitution prohibits interference with the functioning of the courts. Section 165(4) of the new Constitution moreover, enjoins organs of state to ensure their independence by legislative and other measures.

2.2 The fundamental structural basis for these objectives, as far as the superior courts are concerned, is the additional provision for security of tenure and also financial security. This is entrenched in sections 176 and 177 of the new Constitution and is in keeping with international trends and domestic law (cf Minister of the Interior and Another v Harris and Others 1952(4) SA 769(A) at 789 A-B; Valente v The Queen (l 985) 24 DLR (4th) 161 at 176; CRM Diamini, Human Rights In Africa, Which Way South Africa? Pages 38, 98-101, 133, 136; Paul Sieghart, The International Law of Human Rights at 284; Jolowicz "Fundamental Guarantees in Civil Litigation : England" in Cappelletti and Tallon 130 et seq; Stalev "Fundamental Guarantees of Litigants in Civil Proceedings; A Survey of the Laws of the European People's Democracies" in Cappelletti and Tallon 377 et seq; Smith 'Constitutional Guarantees in Civil Litigation in the United States of America" in Cappelletti and Tallon 445 et seq; Watson "Fundamental Guarantees of Litigants in Civil Proceedings in Canada" in Cappelletti and Tallon 195 et seq; Hahlo and Kahn The South African Legal System and its Background [1968] 326; Labuschagne "Regswetenskap, Regspleging en Regsakademie; Enkele Opmerkings" 1982 De Jurel.

2.3 Now that for the first time in history the magistrates courts are ostensibly independent, the same principles ought to apply. Yet section 174(7) of the new Constitution, in contrast with sections 176(1), 176(2) and 177 does not expressly stipulate that the dismissal from service of magistrates must actually or necessarily take place in terms of an Act of

Parliament. This is left for national legislation which may be amended at any time (see section 180(b) of the new Constitution). Neither is there any provision that the salaries, allowances and benefits of magistrates may not be reduced (cf section 176(3) of the new Constitution and section 12(6) of the Magistrates Act, No 90 of 1993). There is furthermore, a different salary determination mechanism in existence for magistrates, which links them to the vicissitudes of public sector requirements (cf section 12(1)(a) and 12(3) of the Magistrates Act, 19931. This, coupled with a lack of constitutional entrenchment against salary reduction, renders their independence precarious.

2.4 It is submitted that security of tenure and financial security, as far as magistrates are concerned, are not only "essential conditions of independence" (in the sense alluded to in Valente v The queen, supra), but essentially indistinguishable from those pertaining to the superior courts' judiciary.

3. RELEVANT CONSTITUTIONAL PRINCIPLES NOT COMPLIED WITH

3.1 It submitted that, based on the aforegoing, Constitutional Principles VI and VII have not been complied with. With regard to the magistrates in the judicial hierarchy, there is inadequate provision for the separation of powers and protection of their independence. Considering the fact that magistrates deal initially with the majority of cases and are also bound by judicial precedent, it is imperative that they will have the "confidence to administer justice impartially, fearlessly and free from outside pressure, governmental or otherwise." (see Beinart, "The Rule of Law" 1962 Acta Juridica, 99 at 111). A strong judiciary depends on the executive for the enforcement of its decisions; a weak judiciary is equally dependent on it for the enforcement of its decisions. If security of tenure and financial security are essential conditions of independence for judges, why should it be any different for magistrates?

R E LAUE
Magistrate
1996.05.15

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

OBJECTION TO THE CERTIFICATION OF THE NEW CONSTITUTION

1. This is an objection to the certification of the new Constitution by the Constitutional Court, and is lodged in terms of para 5 of the Press Statement published by the President of the Constitutional Court on 19 May 1996.

2. The objector is the Cape Town office of the Legal Resources Centre, a non-profit, public-interest law firm (henceforth "the LRC"). All communications in this regard may be directed to the Legal Resources Centre, 5th Floor, Greenmarket Place, 54 Shortmarket Street, Cape Town 8001 (ref A Andrews).

3 The LRC's objection is directed at the provisions in the new Constitution dealing with the right of access to information, and/or the omission from the new Constitution of provisions dealing adequately with the right of access to information. It is the LRC's contention that the text of the new Constitution fails to comply with Constitutional Principle IX, read together with Constitutional Principle II and VI. The grounds for this objection are stated below.

4 Constitutional Principle IX stipulates that "[p]rovision shall be made for freedom of information so that there can be open and accountable administration at all levels of government". This injunction is mandatory, and it is clear from ss 71(1) and (2) of the interim Constitution that such provision is required to exist in the constitutional text itself The rider to CP IX ("so that there can be open and accountable administration at all levels of government"), when read together with CP VI ("there shall be ... appropriate checks and balances to ensure accountability, responsiveness and openness") provides a testing criterion against which the adequacy of the provisions in the new Constitution dealing with access to information can be tested.

5. The provisions in the new Constitution which ostensibly deal with the right of access to information are contained in ss 32(1) and (2). These provisions must be read together with the transitional measures contained is s23 of Schedule 6.

6 The LRC's objection is directed at the inter-relationship between s32(1) and (2), and centres on the injunction in s32(2) that national legislation must be enacted "to give effect to" the right contained in s32(1). It should be noted at the outset that this formulation differs crucially from the various expressions which have been employed in other sections of the bill of rights in order to express the relationship between a constitutional right and legislation. In the nature of things there can be no objection to a provision in the bill of rights which stipulates that the relevant section "does not prevent legislation" of a certain type (see for example s15(3) and s23(5)) or which requires the state to take legislative measures to achieve the [illegible word] realisation of a right (see for example s25(5),s26(2), s27(2) and s29(1) [illegible] However it is only, in s32(2) and s33(3) that the new Constitution has adopted a formulation which stipulates that legislation must be enacted "to give effect to" the anterior right. A contextual interpretation therefore requires that the italicised words should be interpreted in a manner which takes full account of this marked difference in wording.

7. Within this context, the LRC's concern is that a possibility exists that at some future stage a literal-minded Court might construe the inter-relationship between ss32(1) and (2) in such a way as to hold that the right of access to information (as formulated in s32(1)) does not exist unless and until it has been "given effect to" by national legislation (as envisaged by

s32(2)). The plausibility of such an interpretation may be considered in two distinct scenarios:-

7.1 First: the fact that legislation "must be enacted to give effect to" the right may plausibly lead one to conclude that, until such time as legislation is enacted, a person will be unable to claim information on the basis of the right contained in s32(1). That this is the correct interpretation of the interrelationship between ss32(1) and (2) is supported by s23(2)(a) of Schedule 6, which contains a deeming provision providing that s32(1) "must be regarded to read" differently until such time as the legislation envisaged by s32(2) has been enacted. (The formulation contained in s23(2)(a) of Schedule 6 will be referred to below as "the deemed provision"). It is difficult to see what else this convoluted arrangement could mean other than that, pending the enactment of legislation to "give effect" to the constitutional right in s32(1), the right as formulated in s32(1) cannot exist.

7.2 Secondly: if national legislation is enacted in the manner envisaged by s32(2) and such legislation is eventually held to be unconstitutional (on the basis that it fails to comply with the internal limitations clause in s32(2) and/or the general limitations clause in s36(2)), then a possibility exists that a Court right hold that a person has no right of access to information until such time as Parliament enacts new legislation so as to "give effect to" the right contained in s32(1). In other words, there is a possibility that a Court might hold that the striking down of the legislation would produce a 'constitutional gap', inasmuch as no right of access to information would exist pending the enactment of new legislation to "give effect to" s32(1).

8. In the scenario described in para 7.1 above the gap which exists pending the enactment of the legislation envisaged by s32(2) is plugged by the existence of the deemed provision. The situation is however very different in the second scenario as described in para 7.2 above, for here there seems to be no obvious provision to fill the constitutional gap which will be left by the striking down of national legislation envisaged by s32(2). It is submitted that the scenario depicted in para 7.2 above would produce a violation of CP IX since, on the basis of the various assumptions described in that paragraph, there would be a period of time for which no "provision has been made for freedom of information" in the manner required by CP IX.

9. A further objection of the LRC is directed at the scenario which will present itself if legislation is not passed in terms of s32(2) within the required period of three years. It is clear that in this event s32(2) will "lapse" (see s23(3) of Schedule 6), but what is not clear is whether such a lapse will also serve to activate s32(1). Since s23(2) of Schedule 6 provides that the deemed provision exists "until the legislation envisaged in s32(2) ... is enacted", and since (ex hypothesis) the legislation envisaged in s32(2) has not been enacted, it is submitted that there is a possibility that a Court might hold that the consequence of a failure to enact legislation within the three year period would be to perpetuate permanently the existence of the deemed provision. It is submitted further that the perpetuated existence of the deemed provision in this manner would violate CP IX, which contains a testing criterion inasmuch as it requires that provision shall be made for freedom of information "so that there can be

open and accountable administration at all levels of government" (see further para 4 above). It is submitted that the deemed provision fails to comply with the testing criterion in CP IX for the reason that it contains a rider to the effect that the right of access to information only applies - in so far as that information is required for the exercise or protection of (the claimants) right" The italicised rider has the effected that the deemed provision functions as an extended discovery mechanism rather than as a means of ensuring 'open and accountable administration" in the manner required by CP IX. This submission is bolstered by the fact that the rider to the deemed provision is noticeably absent from the formulation which has been employed in s32(1)(a).

10. For these reasons, it is submitted that. the text of the new Constitution fails to make adequate provision for freedom of information in the manner required by CP IX.

LEGAL RESOURCES CENTRE
CAPE TOWN