IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Ex parte: **THE CONSTITUTIONAL ASSEMBLY**

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

SUPPLEMENTARY WRITTEN ARGUMENT BY THE ASSOCIATION OF LAW SOCIETIES OF THE REPUBLIC OF SOUTH AFRICA ("THE ALS") IN TERMS OF THE PRESIDENT OF THE CONSTITUTIONAL COURT'S DIRECTIONS OF 4 JUNE 1996

This argument is submitted in terms of the invitation given by the Constitutional Court to the ALS to file succinct written argument to supplement its objections to the certification of the new constitutional text ("the text"). It elaborates upon, and should be read with those objections (hereafter, "the ALS objections"). The ALS respectfully requests an opportunity to elaborate on these objections in oral argument before the Constitutional Court.

1. THE CONSTITUTIONAL PRINCIPLES

1.1 In the "Submissions on Behalf of the Constitutional Assembly", the Constitutional Assembly contends that if the Constitutional Principles are read "purposively", the Constitutional Principles confer upon the Constitutional Assembly a margin of appreciation, i.e. "some scope for political judgment by the Constitutional Assembly".

Submissions on *behalf of the Constitutional Assembly,* paras 7, and 10

1.2 The Constitutional Assembly also contends, however, that the specificity . or generality of the Constitutional Principles "varies along a continuum". Three broad categories of Constitutional Principles can be identified: (a) an "outer circle" (e.g. Constitutional Principles I to XVI) which leaves "a broad range of choice to the Constitutional Assembly"; (b) a "middle circle of more directive principles" (e.g. Constitutional Principle XVII); and (c) an "inner circle" (e.g. Constitutional Principles XXIX and XXX) "with more specific instructions that must be followed" which leaves "a narrower range of choice to the Constitutional Assembly".

Submissions on behalf of the Constitutional Assembly, para 10

1.3 Finally, the Constitutional Assembly avers that certain provisions of the Constitution of the Republic of South Africa, 1993 ("the interim Constitution") may be "illustrative of how the principles may be implemented."

Submissions on Behalf of the Constitutional Assembly, para 14

1.4

1.4.1 The ALS does not accept the Constitutional Assembly's claim that some of the Constitutional Principles leave a "broad range of choice to the Constitutional Assembly". We submit that the Constitutional Assembly must comply strictly with the wording of the Constitutional Principles. As explained in the Preamble to the interim Constitution, the Constitutional Principles are a "solemn pact" in accordance with which the Constitutional Assembly, the representatives of all the people of South Africa, have been mandated to adopt a new constitution. In the words of Chaskalson P, the Constitutional Principles:

> "represent principles which were agreed upon by the multiparty negotiating process to provide *definitive guidelines* for the drafting of the final Constitution."
>
> *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others,* 1995 (4) SA 877 (CC) at para 29

1.4.2 Moreover, in the same case, this court held:

> "Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order to establish respect for the principle that the Constitution is supreme... Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the Constitution."
>
> *Executive Council of the Western Cape Legislature v President of the Republic of South Africa, op cit,* at 918 H-J (para 100)
>
> See also:
> *Shabalala v Attorney-General,* Transvaal 1996 (1) SA 725 (CC) at para 26

1.5 Section 73A of the interim Constitution, which was inserted by section 2 of Act 26 of 1996, provides that if the Constitutional Court finds that the draft text of the new Constitution does not comply with the Constitutional Principles, it must refer the text back to the Constitutional Assembly together with the reasons for its finding.

1.6 Subject to what is said in the preceding paragraphs, the ALS agrees that Constitutional Principles XXIX and XXX contain specific instructions that must be followed - i.e. that they leave a narrow range of choice to the Constitutional Assembly - and that the interim Constitution may be illustrative of how the Constitutional Principles can most appropriately be implemented.

2. JUDICIAL SERVICE COMMISSION

2.1 Constitutional Principle VII provides:

> "The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights."

2.2 Constitutional Principle VI provides:

> "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

2.3 The Judicial Service Commission ("the JSC") has a pivotal role under the text in the appointment of the senior judiciary. The judges of the Constitutional Court (apart from the President and the Deputy President) can only be appointed from a list approved by the JSC (section 174(4)). All other judges must be appointed on the advice of the JSC (section 174(6)). The JSC similarly has a crucial role in the removal. and suspension of judges (section 177).

2.4 The composition of the JSC is dominated by the party (or parties) which controls the National Assembly and (since the President is elected by the National Assembly (section 86(1)) the Presidency. The President is head of the national executive (section 83(a)), and in him is vested the executive power of the Republic (section 85(1)). It follows from this that the party ("the governing party" or "the ruling Party") controlling both the executive and the premier legislative body, the National Assembly, dominates the composition of the JSC.

2.5 This it does by exercising control over the appointment of the following members of the JSC (section 178(1)):

2.5.1 the President appoints the Chief Justice and the President of the Constitutional Court (section 174(3)). It is true that the President, before making these appointments, must first consult various persons (including, in the case of the Chief Justice, the JSC), but he or she is not bound by their advice, and the decision is the President's alone;

2.5.2 the President appoints the Cabinet member responsible for the administration of justice (section 91(2));

2.5.3 the President has the power to appoint the two advocates to represent the advocates' profession and the two attorneys to represent the attorneys' profession. It is true that this power devolves upon the President only if the number of nominees from within the professions exceeds the number of vacancies (section 178(2)), but in the ordinary course, it Is to be expected that the nominees will indeed exceed the vacancies, and the effective choice will consequently be the President's;

2.5.4 three of the representatives designated by the National Assembly are within the gift of the governing party (section 178(1)(h));

2.5.5 the President designates four additional members of the JSC, constrained only by the need for prior consultation with the leaders of all parties represented in the National Assembly (section 17A(1)(j)).

2.6 It follows from this that the governing party controls appointment to 14 of the 23 members that comprise the JSC in the ordinary case, or at least 14 of the 24 members that comprise the JSC when it considers matters "specifically relating to a provincial or local division of the High Court", within the meaning of section 178(1)(k). In either event, the governing party controls a majority of the positions on the JSC - the decisions of which must likewise be supported by a majority of its members (section 178(6)).

2.7 Furthermore, the method of electing members of the National Council of Provinces and its four representatives on the JSC conduces to governing party control of the appointment of further members of the JSC (sections 60, 61 and 178(1)(i)). For example, under the transitional arrangements envisaged in item 7 of Schedule 6, the governing party will control the appointment of all four representatives of the National Council of Provinces on the JSC. The effect of this is to bring the governing party's control of the JSC up to 18 of the 23 members that the JSC ordinarily comprises.

2.8 In our submission, the text leads to the result that the JSC will be dominated by the party which controls the executive and the National Assembly, and, indeed, except where the governing party does not control the National Council of Provinces, Parliament as a whole. This raises problems under both Constitutional Principle VII and Constitutional Principle VI.

2.9 **Constitutional Principle VII** requires the judiciary to be appropriately qualified, *independent* and impartial. Independence must at least mean independence from those over whom the courts exercise jurisdiction. The courts, especially the Constitutional Court, frequently exercise jurisdiction over the national executive.

And since it is for the courts, and especially the Constitutional Court, ultimately to decide on the validity of Acts of Parliament, the national legislature, too, is (in a broader sense) subject to the jurisdiction of the courts. That means that the courts are required by Constitutional Principle VII to be independent of the executive and the legislature. This principle is reflected in a number of international instruments of recent origin:

2.9.1 Article 2:20 of the *Montreal Universal Declaration on* the Independence *of Justice, 1*983, provides:

> "The judiciary shall be independent of the Executive and Legislature."

2.9.2 Article 2(2) of the *Siracusa Draft Principles on the Independence of the Judiciary,* 1981, defines the independence of the judiciary as follows:

> "Independence of the judiciary means... that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature."

2.10 The dominance of the governing party (which controls the executive, the National Assembly, and ordinarily Parliament itself) in the JSC gives it control over Judicial appointments, including those to the Constitutional Court. This violates Constitutional Principle VII. As the International Bar Association has stated:

> "Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence *provided that* appointments and promotions of judges are vested in a judicial body in which members of the judiciary and the legal profession form a majority."
>
> Article 3(a) of the *International Bar Association's Minimum Standards of Judicial Independence,* 1982

2.11

2.11.1 There is of course nothing in Constitutional Principle VII which requires the Constitutional Assembly to choose any *particular* method of assuring judicial independence. The method chosen is within the discretion of the Constitutional Assembly. In the United States, for example, judicial independence is fostered by dividing control over the appointment of federal judges between the executive (which, through the President, nominates candidates) and the legislature (which, through the Senate, must approve such nomination).

> *United States Constitution (1*789), Article 11, Section 2
> *Buckley v Valeo* 424 US 1 (1975) at 121

2.11.2 The co-operation that the US system requires between two branches of government, each elected by a different electorate and therefore independently accountable, conduces to the selection of independent judges.

> "The (US) Constitution proceeds to construct an elaborate system of checks and balances designed to enable control and influence to be exercised by each branch upon the others."
>
> E C S Wade and A W Bradley, *Constitutional and Administrative Law (*1985) at 52

2.11.3 In Germany, for much the same reason, the choice of judges on the Federal Constitutional Court requires super-majority decision-making, which requires at least two parties to concur on the choice of a judge.

> Donald P Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany (1*989) 24-26

This, too, conduces to judicial independence.

2.12 The new constitutional text chooses a third method of guaranteeing judicial independence - a JSC, representative of a wide variety of perspectives in government, the judiciary and the profession. In principle there is nothing objectionable about this method, provided it is implemented *genuinely.*

2.12.1 Article 11 of the *Siracusa Draft Principles,* in fact, requires that:

> "An independent commission composed entirely or in its majority of judges should be established with responsibility for deciding upon promotions or for recommending candidates for promotion to the appropriate authority."
>
> *Siracusa Draft Principles, op cit*

2.13 The predominance given to the governing party in the composition of the JSC subverts the Commission's capacity to act as a counterweight to government influence in the appointment of judges, and destroys its value as a guarantor of judicial independence.

2.13.1 Article 4(a) of the *International Bar Association's Minimum Standards* provides:

> "The power to discipline or remove a judge must be vested in an institution which is independent of the Executive."

IBA Minimum Standards, op cit

2.13.2 Thus, Article 26(b) of the *Singhvi Draft Universal Declaration on the Independence of Justice, 1* 985, provides that:

> "The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board."

2.14 One of the striking features of the JSC in the text is the method chosen for appointing representatives of the attorneys' and advocates' profession to it. The presence of such representatives on the JSC is obviously intended to foster both judicial independence and the choice of "appropriately qualified" judges within the meaning of Constitutional Principle VII. Indeed, on the face of it, the JSC is broadly representative of a wide range of relevant perspectives. But the power given to the President to choose the representatives of the attorneys and advocates (section 178(1)(e) and (f) and (2)) negates the capacity of these representatives to perform these functions. It makes it more likely that they will bring to bear the perspective of the President, or the national executive, or the governing party, than the perspectives of the professions they purport to represent. In short, there is a real risk that the attorneys' and advocates' representatives will simply augment government numbers on the Commission.

2.15 To sum up: There is nothing in Constitutional Principle VII which requires the Constitutional Assembly to choose any *particular* method of assuring judicial independence. The method chosen is within the discretion of the Constitutional Assembly. Having chosen a particular method, the Constitutional Assembly must implement it *seriously and genuinely*. On the face of it, the method chosen by the Constitutional Assembly is to require the approval, for judicial appointments and removals, of a JSC broadly representative of a wide range of relevant perspectives. The control given to the governing party means that this method has not been implemented properly.

2.16 Constitutional Principle VI requires "a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness". The separation of powers is a notoriously ambiguous concept, meaning different and contradictory things to different people.

2.17

2.17.1 One version of the separation of powers, for instance, holds that each of the three branches of government (legislature, executive and judiciary) is

competent only to perform the function which it is assigned - only the legislature should make laws; only the executive should enforce them; only the judiciary should adjudicate.

> Montesquieu, *L'espirit* des *Lois (1*748)
> M J C Vile, *Constitutionalism and the Separation* of *Powers* (1967)
> J D van der Vyver "*The Separation* of Powers" 1993 SA Public Law 177

2.17.2 This version of the doctrine makes no sense in the modern administrative state, where the executive, by way of regulation, can and must legislate extensively, and by way of administrative tribunals, adjudicates routinely. "[W]e should stop pretending", says Peter Strauss, "that all our government (as distinct from its highest levels) can be allocated into three neat parts".

> Peter Strauss " *The Place of Agencies in Government: Separation of Powers and the Fourth Branch"* 84 Colum L Rev 573 (1984)

The United States Supreme Court has described the rationale for the institutional arrangements in the United States Constitution thus:

> "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."

Buckley v Valeo, loc cit

2.18 A more persuasive version of the doctrine of separation of powers argues that its ultimate rationale is a diffusion of power, so as to avoid an over-concentration of power in one branch of government, and thus to avert tyranny. This version of the separation of powers often attempts to divide power between the different branches of government, so that each has to persuade the other of the wisdom of its proposed course of action in order to succeed in implementing its program. Thus in the United States, the executive has to persuade the Senate of the wisdom of appointing a candidate to the federal bench, or else its nomination will not be confirmed. Another example is the division of legislative power between the US Congress (which passes bills) and the President (who can veto them, but can in turn be overridden by a two-thirds majority in Congress).

United States Constitution, Article 1, section 7

As the United States Supreme Court has remarked:

"By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority."

United Public Workers v Mitchell 330 US 75 (1947) at 91

The effect is to make the different branches of government accountable to each other. This version of the separation of powers is also known as ' "checks and balances" - one branch of government acts as a check on the over-concentration of power in another.

2.19 It is sometimes said that such a conception of the separation of powers fosters "constitutional conversations" between the different branches of government. Thus, in the United States, Congress has to adduce arguments to the President to persuade him not to veto its legislation, while the President has to make arguments to Congress to persuade it not to override his veto. These arguments are necessarily public, and they constitute public conversations which make it easier for the citizen to understand such Constitution issues and to participate in them. These constitutional conversations therefore make government more open and responsive to the citizenry.

2.20 Constitutional Principle VI makes it clear that it is this latter conception of the separation of powers that it envisages. It requires not simply any separation of powers, but a separation of powers between the legislature, executive and judiciary, *"with appropriate checks and balances to ensure accountability, responsiveness and openness"*. The concern is explicitly with the kind of separation of powers that allows one branch of government to act as a check on another; in other words a diffusion of power. The ultimate goal is "accountability, responsiveness and openness". These ideals are best achieved by a division of power which fosters public constitutional conversations among the different branches of government.

2.21 In our submission, the text violates this conception of the separation of powers by vesting control over the JSC - the premier organ under the Constitution responsible for the appointment and removal of judges - in the governing party. This frustrates the division of power among the branches of government that the Constitutional Principle VI requires. It over-concentrates power in the hands of the executive and the legislature (which under the text would necessarily be controlled by the same party) at the expense of the independence of judiciary, and weakens the capacity of the judiciary to act as a check on them.

3. ENTRENCHMENT

Constitutional Principles

3.1 *In Shabalala v Attorney-General, Transvaal,* Mahomed DP, speaking for the Constitutional Court, stated that the interim Constitution:

> "is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment".
>
> *Shabalala v Attorney-General, Transvaal, 1* 996 (1) SA 725 (CC) at para 26

3.2 A central manifestation of the "culture of accountability" on which the interim Constitution is premised is the present certification process: that the Constitutional Assembly itself is accountable, under the Constitutional Principles, to the Constitutional Court. It makes little sense for that process of accounting to take place just once, leaving Parliament free the following day (by a mere two-thirds majority) to amend the new Constitution in a way which violates the Constitutional Principles.

Text, section 74

This would frustrate the design of the interim Constitution, which envisages a new constitutional order informed and constrained by the values of the Constitutional Principles.

Interim Constitution, section 71

3.3 The Constitutional Assembly may well have a discretion as to . how the governance of the Constitutional Principles is to endure after the adoption of the text; there may, in other words, be more than one permissible way of ensuring that the new Constitution does not immediately depart from the values in the Constitutional Principles. The text, however, embodies no meaningful safeguards at all. It therefore violates section 71 of the interim Constitution, alternatively the scheme envisaged by Chapter 5 of the interim Constitution.

Bill of Rights

3.4 Constitutional Principle XV requires amendments to the Constitution to require special procedures involving special majorities". Constitutional Principle II requires everyone to enjoy all universally accepted fundamental rights, freedoms and civil liberties, and it requires them to be "protected by *entrenched* and justiciable provisions in the Constitution". Constitutional Principle XV already requires the entrenchment of the whole of the Constitution. Constitutional Principle 11, by specifically requiring the entrenchment of the Bill of Rights, discloses a higher degree of concern for the entrenchment of the Bill of Rights. It is a requirement

over and above the requirement that the Constitution itself be entrenched by special majorities and special procedures (Constitutional Principle XV).

3.5 We therefore submit that the Constitutional Principles require that the Bill of Rights enjoy a higher level of protection against change than the rest of the Constitution. The Bill of Rights embodies the core values of the new constitutional order. It is implicit in the Constitutional Principles that it should not be as easily susceptible to change as the routine details of the Constitution. Nothing in the text protects the Bill of Rights in this way.

Cf. the protection afforded section 1 of the text by section 74(2)

3.6 The Bill of Rights can be altered by a mere two-thirds majority in the National Assembly (section 74(1)). This is a threshold within striking distance of one party, and would be easily exceeded by two. It is submitted that such tenuous protection does not fall within the compass of the expression "protected by entrenched and justiciable provisions in the Constitution" in Constitutional Principle II.

3.7 This meagre protection contrasts sharply with that provided in respected Constitutions abroad. In the United States, which boasts the world's most durable Bill of Rights, a two-thirds majority in Congress is only the beginning of the amendment procedure, not the end. An amendment proposed by a two-thirds majority in each house of Congress has to be ratified by three-quarters of the states to become law.

United States Constitution, Article V

3.8 In Canada, the basic procedure for amending the Constitution requires the assent of the legislatures of two-thirds of provinces containing at least half the national population (section 38 of the Constitution Act, 1982). In Australia, an amendment must have the support of one house of Parliament, the electorates of a majority of the states, together with a majority of the national electorate.

Section 38 of the *Constitution* Act, 1982
Section 128 of *Constitution of the Commonwealth of Australia,* 1900

3.9 Countries with weaker amendment procedures commonly identify especially important portions of their Constitution for special protection. In neighbouring Namibia, for instance, no amendment is permitted which "diminishes or detracts" from the' rights entrenched in the Bill of Rights.

Section 131 of the *Constitution* of *Namibia,* 1990

3.10 A more restricted version of that idea is developing in several countries. It is the belief that certain rights are "maternal" rights - rights foundational to the entire

constitutional scheme - and altogether beyond repeal. Some argue that freedom of speech and religion enjoy that status in the United States, and that the First Amendment, which guarantees those freedoms, cannot validly be repealed, even with the required super-majorities.

> *Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1*995 (4) SA 877 (CC) at para 204 *(per* Sachs J)
>
> *Premier, KwaZulu-Natal v President of the Republic of South Africa* 1996 (1) SA 769 (CC) at para 47

Germany has adopted this idea explicitly: there the protection of human dignity is put altogether beyond the reach of constitutional amendment.

> Article 79(3) of the *German Basic Law,* 1949

3.11 In the light of these comparisons, it is submitted that:

3.11.1 the text fails to keep faith with the concern disclosed by the Constitutional Principles that the Bill of Rights be given a higher degree of protection than the less central parts of the Constitution, a concern disclosed by the contrast between Constitutional Principle XV and Constitutional Principle II;

3.11.2 the malleability of the Bill of Rights in the text fails outside the compass of the requirement, under Constitutional Principle II, that the Bill of Rights be "protected by entrenched and justiciable provisions in the Constitution".

4. THE PUBLIC SERVICE COMMISSION, SOUTH AFRICAN RESERVE BANK, AUDITOR-GENERAL AND THE PUBLIC PROTECTOR

4.1 Constitutional Principle XXIX requires that the independence and impartiality of the Public Service Commission, the Reserve Bank, the Auditor-General and the Public Protector (collectively, "the constitutional institutions") be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service. As explained above, Constitutional Principle VI, in addition to requiring a formal separation of powers between the legislature, executive and judiciary, requires that there are appropriate checks and balances between these organs of state *so as to ensure accountability, responsiveness and openness.*

4.2 Both the interim Constitution and the new Constitution mark the transformation from a system based on parliamentary sovereignty to one founded on parliamentary democracy in a constitutional state.

Executive Council, Western Cape Legislature v President of the Republic of South Africa, supra, paras 61, 62 and 202

As has been emphasised in relation to the Namibian Constitution, a constitutional state is a composite of different historical practices and philosophical traditions, it is "a government of laws and not of men".

Ex parte Attorney-General, Namibia: in Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General 1995 (8) BCLR 1070 (NmS) at 1078 H - I

4.3 Although the interim Constitution does not (nor was it expected to) fulfill the requirements of Constitutional Principles VI and XXIX, it protects the independence and impartiality of the Public Protector and the Auditor-General by providing a range of checks and balances in relation to their appointment and dismissal.

4.3.1 In this regard, we submit that it is useful to refer to the United States case of the President's purported removal of a member of the US Federal Trade Commission, where the Supreme Court held that:

> "[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

Humphrey's Executor v United States, 295 US 602 (1935) at 629

4.3.2 Similarly, in Namibia, the Supreme ' Court has upheld the independence of the Namibian Prosecutor-General in relation to the Attorney-General's purported control of the prosecutorial process under a pre-independence statute inherited from South Africa, describing this as paving the "way for executive domination and State despotism. It represents a denial of the cardinal values of the Constitution".

Ex Parte, Attorney-General, Namibia, op cit, 1088 F-G

4.4 Section 110(2) of the interim Constitution provides that the Public Protector must be nominated by a joint committee of Parliament composed of one member of each party represented there and that his or her nomination must be approved by a 75% majority in a joint session of National Assembly and the Senate. Section 110(4) sets out the criteria for appointment as Public Protector, while section 1 1 0(6) provides that the remuneration and terms and conditions of employment of the Public Protector may not be reduced or adversely altered during his or her term of office. The Public Protector may only be removed from office on the grounds specified in

section 110(8), as determined by a joint committee of Parliament, following an address from both the National Assembly and the Senate requesting his or her removal.

4.5 The appointment and dismissal of the Auditor-General is dealt with in section 191 of the interim Constitution, in terms substantially similar to those contained in section 110 in relation to the Public Protector. Section 191 (4) states, however, that unless the constitutional text provides otherwise, the Auditor-General shall not be eligible for re-appointment after the expiry of his or her term of office.

4.6 While the interim Constitution makes provision, in section 211(1)(b), for the independence and impartiality of the Public Service Commission in a functional sense, it makes no provision for a process for appointing or dismissing the Public Service Commission so as to ensure its independence - section 211(1)(a) provides only that all members of the Commission are appointed by the President. Likewise, the President may remove members of the Commission from office provided that reasons for such removal are submitted to Parliament within 14 days (section 211 (1)(e)). Section 211(1)(c) of the interim Constitution provides, however, that the remuneration and conditions of service of the members of the Commission may not be altered to their detriment during their term of office. Moreover, section 111(3) of the interim Constitution provides:

> "The composition, appointment, tenure, vacation of office, conditions of service and functioning of the Commission shall be as determined by Act of Parliament, *and such Act shall ensure the independence and impartiality of the Commission* and the efficient and effective exercise and performance of its powers and functions."
>
> (Emphasis supplied).

4.7 Sections 195 to 197 of the interim Constitution deal with the South African Reserve Bank. No provision is made for a process of appointing or dismissing the Board of the Bank. While the functional independence of the Bank is protected by section 196(2), that independence is limited to the protection of the internal and external value of the national currency.

4.8 It is submitted that the cumulative effect of Constitutional Principles VI and XXIX as far the Public Service Commission, South African Reserve Bank, the Auditor-General and the Public Protector are concerned, is as follows:

4.8.1 Constitutional Principle VI requires more than a formal separation I of powers between the legislature, the executive and the judiciary. As indicated above, it requires appropriate checks and balances between these three organs of state and, in particular, on the majority party in the National Assembly to ensure accountability, responsiveness and openness. At the

very least, this means that the mechanisms governing the appointment, security of tenure and dismissal of the members of the Public Service Commission, the Board of the South African Reserve Bank, the Auditor-General and the Public Protector must meet requirements such as those laid down in sections 110 and 191 of the interim Constitution. In other words, the provisions in the text governing these matters must establish a process for appointing, as well as a process for suspending and dismissing, these persons which provides for proper checks on the majority party in the National Assembly, while ensuring that such persons' remuneration and conditions of service may not be altered to their detriment during their term of office.

4.8.2 Constitutional Principle XXIX requires that the text must adequately provide for and safeguard the independence and impartiality of the members of the Public Service Commission, the Board of the South African Reserve Bank, 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. In our submission, the text must ensure that the procedure for appointing and dismissing these persons protects and safeguards their independence and impartiality and that their tenure is secure.

4.9 It follows from this that these constitutional institutions must be free from political interference or from any susceptibility to political manipulation.

Humphrey's Executor v United States, loc cit

4.10 Unlike sections 110 and 191 of the interim Constitution, sections 193(4), (5) and 194 of the text fail to provide appropriate checks and balances so as to ensure accountability, responsiveness and openness in the procedures for the appointment and dismissal of the Public Protector and the Auditor-General, as required by Constitutional Principle VI. These sections of the text also do not provide for the independence and impartiality of the Public Protector and the Auditor-General as required by Constitutional Principle XXIX.

4.11 In particular, the text enables 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. This, in effect, enables the majority party in the National Assembly both to appoint and dismiss the Public Protector and the Auditor-General. Not only do these provisions not establish adequate checks and balances, but they compromise the independence and impartiality of the Public Protector and the Auditor-General themselves.

4.12 Moreover, unlike section 110(4) of the interim Constitution, the text imposes no minimum criteria for eligibility for appointment as Public Protector. As a result, it is

possible that a person appointed as Public Protector - in effect by the majority party in the National Assembly - could have no, or very limited, qualifications for appointment to this position.

4.13 Sections 181(2), (3) and (4) of the text purport to ensure the independence and impartiality of the Public Protector and the Auditor-General simply by recording that they are independent, must be impartial and that no person or organ of State may interfere with the functioning of these institutions. The text also provides that the other organs of State must assist and protect them to ensure, *inter alia,* their independence and impartiality. It is submitted that this recordal does not ensure the independence and impartiality of the institutions in question as, for the reasons developed above, both the Public Protector and the Auditor-General may be appointed and dismissed at the pleasure of the majority party in the National Assembly. For similar reasons, the failure of the text to provide any criteria for the appointment of the Public Protector renders the protection apparently contained in section 181 of the text illusory, as totally unqualified persons who are dependent for their office on the support of the majority party could be appointed to these positions.

4.14 Unlike sections 110(6) and 191(6) of the interim Constitution, the text fails to provide that the remuneration and other terms and conditions of employment of the Public Protector and the Auditor-General may not be reduced or adversely affected during such persons' term of office. The failure of the text to do so enables the executive or the legislature (or, perhaps, both), should it so wish, to reduce the salary or alter the conditions of employment of the Public Protector and the Auditor-General during their term of office. As the United States Supreme Court has observed (albeit in relation to the judiciary):

> "for vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial officers, are at liberty to compel a resignation by reducing salaries to a copper."
>
> *O'Donoghue v United States* 289 US 516 (1933) at 533

4.15 Section 196 of the text makes no provision for the appointment, tenure of office or dismissal of the members of the Public Service Commission. The text merely records that the Commission "is independent and must be impartial" and states, in section 196(5), that the Commission is accountable to the National Assembly, without indicating how and on what basis it is so accountable.

4.16 Unlike section 211 of the interim Constitution, the text does not provide that the remuneration and other conditions of service of a member of the Commission may not be altered to such person's detriment during his or her term of office; does not

prohibit a member of the Commission from holding office in any political party; and does not provide any criteria for the appointment of members of the Commission.

4.16 For these reasons, and for the reasons given above, it is submitted that the text does not meet the requirements imposed by Constitutional Principle VI and XXIX.

4.17 It is submitted further that Constitutional Principle XXIX must be read with Constitutional Principle XXX, which requires, *inter alia*, that the public service be efficient, non-partisan and career-orientated and that it function on a basis of fairness to all members of the public in an unbiased and impartial manner. Constitutional Principle XXX may be said to radiate Constitutional Principle XXIX.

> Cf, in the context of the German Basic Law, *Du Plessis and Others v De Klerk and Others* (CCT 8/95: unreported judgment of the Constitutional Court delivered on 15 May 1996) at paras 103 and 104 (Ackermann J)

4.18 Sections 224 and 225 of the text limit the functional independence and impartiality of the South African Reserve Bank to its primary object of protecting the internal and external value of the currency. The text makes no provision for the protection of the Bank's independence and impartiality in relation to its other functions e.g. the supervision of the national banking system. The text accordingly contravenes Constitutional Principle XXIX.

5. THE CONSTITUTIONAL JURISDICTION OF THE MAGISTRATES' COURTS

5.1 Section 170 of the text provides that the Magistrates' Courts may "not *enquire into* or rule on the constitutionality of any legislation or any conduct of the President". It is submitted that inasmuch as this precludes magistrates from enquiring into the constitutionality of all legislation, however lowly and however parochial, in the course of deciding matters otherwise within their civil or criminal jurisdiction, this provision is overly broad and, consequently, violates Constitutional Principle VII, read with Constitutional Principles II and V.

5.2 Constitutional Principle VII provides that the judiciary shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights. It is clear from section 166 of the text that the Magistrates' Courts are part of the judiciary. By preventing the Magistrates' Courts from inquiring into or ruling on the constitutionality of, e.g. municipal by-laws, magistrates are deprived of an important incident of the power to safeguard and enforce the Constitution.

5.3 In terms of section 156(2) of the text, read with section 151(4), municipalities have the right to make and administer by-laws for the effective administration of matters assigned to them by the Constitution. Section 156(3) provides that a by-law will be invalid if it conflicts with national or provincial legislation, subject to the right of a municipality in terms of section 151(4) to exercise its powers or perform its

functions in a way which is not compromised or impeded by the national and provincial government. It is obvious that in cases ordinarily within the jurisdiction of the Magistrates' Courts - whether criminal or civil - disputes will arise as to whether a municipal by-law fails within a municipality's exclusive jurisdiction in terms of section 151(4). Such disputes clearly involve the enforcement of the Constitution. Despite this, section 170 of the text precludes a Magistrate's Court from determining whether or not that by-law is *ultra vires* in terms of section 156(3) of the text, or whether it falls within the saving contained in section 151 (4).

5.4

5.4.1 Moreover, Constitutional Principle II provides that fundamental rights, freedoms and civil liberties shall be provided for and protected by entrenched and justiciable provisions in the Constitution. The text, in Chapter 2, contains a charter of such fundamental rights. Section 170 of the text, however, precludes the Magistrates' Courts from enquiring into the compatibility of municipal by-laws with the Bill of Rights. Yet, as courts of law, Magistrates' Courts have a duty to apply the law. They must give effect to lawful measures and action and disregard or enjoin unlawful measures and action.

5.4.2 Upon the commencement of the interim Constitution "constitutionality" became a facet of "legality". We therefore submit that, subject to restrictions of the sort imposed by section 110 of the Magistrates' Courts Act, 1944, magistrates should be entitled to interpret, protect and enforce the Constitution whenever its provisions have a bearing on the rights and obligations of parties to litigation before them. If magistrates are precluded from applying the fundamental rights enshrined in Chapter 3 in a significant number of the cases, the Constitution will seem meaningless to the majority of litigants.

Baxter, Administrative Law, 754-6
Stanton v Johannesburg Municipality 1910 TPD 742 at 757
Majola v lbhayi City Council 1990 (3) SA 540 (E) at 542E-545A
Qozeleni v Minister of Law and Order 1994 (3) SA 625 (E) at 635C-638C

5.5 In effect, section 170 of the text obliges a litigant who challenges the validity of a municipal by-law to incur the expense of proceedings in a division of the High Court and to suffer the practical difficulties attendant on proceedings in what is often a geographically remote forum. It is submitted that this result militates against Constitutional Principle V, which requires that the legal process be equitable both as between the poor (or, perhaps, those who do not qualify for legal aid) and the wealthy and between those who live in rural areas or small towns and those who live close to the seat of a division of the High Court. As the Canadian Supreme Court has observed, albeit in a different context, equality before the law:

> *"is designed to advance the value that all persons be subject to the equal demands of the law and not suffer any greater disability in the substance and application of the law than others."*
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> *R v Turpin [*1989] 1 SCR 1296 at 1329

Dated at JOHANNESBURG on this 11th day of JUNE 1996.

ASSOCIATION OF LAW SOCIETIES OF THE RSA
Pretoria