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**SOUTH AFRICAN GOVERNMENT OFFICE
- WORLD TRADE CENTRE -**

6 September 1993


Head of the Administration
Multi-Party Negotiating Process
World Trade Centre

Dear Dr Eloff

**SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT FOR THE
ATTENTION OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL
MATTERS**

1. Attached is a submission by the South African Government entitled **MEMORANDUM ON THE DRAFT CHAPTERS ON THE ADMINISTRATION OF JUSTICE IN THE INTERIM CONSTITUTION AS PROPOSED BY THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS.**
2. Kindly transmit the document for immediate attention to the Technical Committee.

Yours sincerely


GOVERNMENT OFFICE: WORLD TRADE CENTRE

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MINISTERIE
VAN JUSTISIE



MINISTRY
OF JUSTICE

REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

The Planning Committee
P O Box 307
ISANDO
1600

Privaatsak/Private Bag X276
Pretoria 0001
☎ (012) 323-8581/2

Verwysing/Reference

6 September 1993

Dear Mr Van der Merwe

**MEMORANDUM ON THE DRAFT CHAPTERS ON THE ADMINISTRATION OF JUSTICE
IN THE INTERIM CONSTITUTION AS PROPOSED BY THE TECHNICAL COMMITTEE
ON FUNDAMENTAL RIGHTS**

I enclose herewith a copy of the Government's proposals on the draft chapters on the Administration of Justice in the Interim Constitution as proposed by the Technical Committee on Fundamental Rights, for submission to the Technical Committee on Constitutional Matters, please.

With kind regards

HEAD: MINISTERIAL SERVICES

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MEMORANDUM BY THE DEPARTMENT OF JUSTICE ON THE DRAFT CHAPTERS ON THE ADMINISTRATION OF JUSTICE IN THE INTERIM CONSTITUTION AS PROPOSED BY THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS

1. The above-mentioned Technical Committee has submitted two options on the above Chapter to the Technical Committee on Constitutional Matters for consideration and inclusion in the proposed Interim Constitution. The principal difference between these options, is that -

- (a) option 1 provides for a separate Constitutional Court, whereas option 2 provides for a Constitutional Chamber forming part of the Appellate Division of the Supreme Court; and
- (b) the Council of Justice (CJ) provided for in option 1, is much larger than the CJ proposed in option 2.

2. OPTION 1 vis-à-vis OPTION 2

2.1 Constitutional Court/Chamber

- (a) We have serious reservations about the merit-worthiness as well as the practicability of establishing a separate Constitutional Court as envisaged in option 1. Bearing in mind the need for maximum legitimacy of such court, we are of the opinion that only judges of appeal and senior judges of the Supreme Court, who have a proven record of excellence in the adjudication of matters of law, should constitute the bench

1527

of such Court. In this regard one should bear in mind that the task of these constitutional judges is not to determine policy but to interpret the Constitution and the provisions regarding fundamental rights. We are of the opinion that no one is better equipped for this task than professional judges who are dealing with such cases everyday.

- (b) The institution of a separate Constitutional Court would also have major financial implications. In terms of clause 8(2)(Option 1), a bench of such court shall consist of at least five judges. (Up to 15 judges may be appointed for such court). A conservative estimation of the costs involved in appointing ten such judges indicates an amount well in excess of R12 million, not including the costs of providing accommodation for the members and staff of such Court.
- (c) We submit that Option 2, which provides for a Constitutional Chamber forming part of the Appellate Division, should prove to be a much more viable option. The appointment, by the Chief Justice (on recommendation of the CJ), of additional members to the bench of such court, should serve to enhance the legitimacy thereof.

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2.2 The composition of the Council of Justice (CJ), Judicial Service Commission (JSC) and the Magisterial Service Commission (MSC)

- (a) In terms of both options the CJ will consist of both the JSC and the MSC. We are generally in agreement regarding the need for the institution of such bodies and anticipate that these would probably fulfil a major role in the future administration of justice. We are, however, concerned that the CJ as envisaged in Option 1 would consist of so many members that it could prove to be very difficult, if not impracticable, to convene all the members thereof for a meeting. Though the CJ would need to be convened only once a year, the JSC and the MSC would definitely need to convene more frequently and the legitimacy of the decisions of these bodies may be jeopardised, should the majority of the members not attend such meetings. In this regard it should be born in mind that all decisions taken by these bodies would not necessarily be unanimous. Furthermore we cannot understand why it is necessary to constitute such a large body if it is envisaged that it will only be for a maximum period of five years.
- (b) In terms of Option 1, ten members of the National Assembly would also serve on the CJ (five members on JSC and five members on the MSC). We question the desirability of appointing politicians to such bodies. In our opinion one of the primary objects of the CJ would be to ensure the independence

1529

of the judiciary. To appoint politicians to the CJ would probably be in conflict with the *trias politica* principle which underlies the concept of the constitutional state ("rechtstaat"). Such an appointment will also politicise our judicial system.

- (c) With regard to the larger CJ envisaged by Option 1 the practical question of the financial burden such Council would bring about, once again comes to the fore. In our opinion it is not clear why such a large Council is deemed necessary and the remuneration/allowances of so many members would undoubtedly prove to be prohibitively costly.
- (d) In view of the above the Department supports in principle the CJ as contemplated in Option 2.

3. NEW LEGISLATION WITH REGARD TO MAGISTRATES AND THE MAGISTRATES' COURTS

3.1 The Magistrates Act, 1993 (Act 90 of 1993) and the Magistrates' Courts Amendment Act, 1993 (Act 120 of 1993) (which have not been put into operation yet) were recently adopted by Parliament.

3.2 The principal aim of the Magistrates Act, 1993, is to ensure the independence of the magistracy. Not only are their remuneration, appointment, dismissal and conditions of service put on a different footing to the civil service, but an independent Magi-

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strates Commission is established, with wide-ranging powers regarding the foregoing issues. The Magisterial Services Commission proposed in the draft Chapter (clause 20), however, differs from the proposed Commission in Option 1 and 2, both in the composition and the powers thereof.

3.3 The draft Chapter also provides that officials in the service of the State shall be appointed as magistrates (clauses 15(3) and 16(2)), which constitutes a major deviation in principle from the above Act. It may well be argued that after appointment (in terms of the Chapter) as a magistrate, such magistrate should not be regarded as a civil servant. However, in lieu of any provisions to this effect, the magistracy will still form part and parcel of the civil service. It is suggested that the words "officials in the service of the State" be deleted and substituted for "judicial officers".

3.4 In our opinion the Chapter does not take sufficient cognizance of the revised lower courts' structure as contemplated in the Magistrates' Courts Amendment Act, 1993. In terms of this Act the lower courts will consist of magistrate's courts (criminal jurisdiction), regional courts (criminal jurisdiction), civil courts (civil jurisdiction), civil divisional courts (civil jurisdiction) and family courts (divorce jurisdiction).

3.5 In order to promote the compatibility of the Chapter (Option 2) with the above-mentioned Acts, we submit that the following amendments should be made:

1531

- * Ad clause 4: Conditions of service of judges- a similar provision should be inserted regarding magistrates.

- * Ad clauses 14 and 15: Provision should be made for the establishment of civil divisional and family courts similar to the provisions regarding regional courts.

- * Ad clause 16: (a) Civil Divisional and Family Courts should be inserted in subclause (1).

(b) "Officials in service of the State" should be substituted for "judicial officers employed by the State".

- * Ad clause 20: (a) An official responsible for the practise-orientated training of magistrates should also serve on the Commission.

(b) In subclause (3), after "functions" to insert "and powers"; and to insert the following paragraph:

"(g) as prescribed further by or under any law."

- * Ad clause 21: Provision should be made for the specification, by the CJ, of the required level of competence for appointment as senior civil magistrate or family magistrate.

4. The Department has, in the Annexure hereto, indicated its proposals for the amendment of the draft Chapter (Option 2). For

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reasons of convenience our insertions are underlined, and any proposed deletions are indicated in square brackets ([]).

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.
_____ Words underlined with a solid line indicate insertions in existing enactments.

B I L L

CHAPTER 7

ADMINISTRATION OF JUSTICE

Judicial Authority

1. The judicial authority of the Republic shall vest in a supreme court referred to in section 4, to be known as the Supreme Court of South Africa.

Head of Judicial Authority

2. At the head of the judicial authority of the Republic shall be a chief justice to be known as the Chief Justice of South Africa who shall, subject to sections 18 and 19, be appointed by the State President.

1534

Seat of Judicial Authority

3. Bloemfontein shall be the main seat of the judicial authority of the Republic.

Supreme Court

4. (1) The Supreme Court of South Africa shall consist of -

- (a) an appellate division with the Republic as its area of jurisdiction;
- (b) a division for each of the SPR's with the SPR area as its area of jurisdiction; and
- (c) any local division that may be established by or under any law with a defined portion of a SPR area as its area of jurisdiction.

(2) A SPR division shall exercise concurrent jurisdiction in the area of jurisdiction of a local division within its area.

(3) The conditions of service, dismissal, disciplining and retirement of judges of the Supreme Court shall, subject to sections 18 and 19, be as prescribed by or under any law.

Appellate Division

5. (1) The Appellate Division shall have a General Chamber and a Constitutional Chamber.

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(2) The Appellate Division shall consist of the Chief Justice and so many judges of appeal, appointed by the State President subject to sections 18 and 19, as are necessary to deal with the work of the Appellate division.

Jurisdiction of General Chamber of Appellate Division

6. (1) The General Chamber of the Appellate Division shall have jurisdiction to hear and determine as a court of final instance appeals from any other division of the Supreme Court in all matters, proceedings and causes.

(2) For the determination of an appeal under subsection (1) the General Chamber shall be constituted by the Chief Justice from among the number of the Appellate Division.

Jurisdiction of Constitutional Chamber of Appellate Division

7. (1) The Constitutional Chamber of the Appellate Division shall have jurisdiction to hear and determine -

- (a) as a court of first and final instance, any questions referred to it in terms of section 10, 11 or 12 and any applications filed with it in terms of section 13; and
- (b) as a court of final instance, any appeals contemplated in section 6(1) which has been referred by the Chief Justice or the General Chamber of the Appellate Division to the Constitutional Chamber on the grounds that any such appeal is of such constitutional importance that it should be determined by the Constitutional Chamber.

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(2) For the performance of its functions in terms of subsection (1) the Constitutional Chamber shall consist of -

- (a) the Chief Justice or the senior available judge of appeal;
- (b) at least four other judges of appeal designated by the Chief Justice; and
- (c) if it appears to the Chief Justice to be expedient because of the nature of the matter, one or two additional persons designated by him from a list of names compiled under subsection (3).

(3) The [National Assembly] Council of Justice may for the purpose of subsection (2)(c) compile a list of names of persons who are in terms of a law regulating the admission of advocates in the Republic academically qualified to practise as an advocate, and who, after having become so qualified, were involved in the administration or teaching of the law for at least ten years.

SPR and Local Divisions of Supreme Court

8. (1) A SPR or local division of the Supreme Court shall consist of so many judges, appointed by the State President subject to sections 18 and 19, as are necessary to deal with the work of such division.

(2) In respect of each SPR division one of the judges attached to that division shall, subject to sections 18 and 19, be appointed by the State President as Judge President.

(3) The SPR and local divisions of the Supreme Court shall, subject to section 9, have with regard to their respective areas of jurisdiction unlimited original jurisdiction -

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- (a) to hear and determine all matters, proceedings and causes;
- (b) to hear and determine appeals from a court of lower rank;
- (c) to review the proceedings of lower courts; and
- (d) to hear and determine any other matter determined by law.

(4) A SPR or local division of the Supreme Court shall have such additional jurisdiction as may be prescribed by law.

Validity of Laws

9. (1) Save as is provided in this Constitution, no court of law shall be competent to inquire into or to pronounce upon the validity of any law.

(2) In this section "law" shall mean -

- (a) an Act of Parliament;
- (b) any law made by a SPR legislature;
- (c) any by-law made by a local authority and which relates to a matter over which such authority has exclusive legislative jurisdiction under this Constitution; or [if there are to be such exclusive legislative powers at local level]
- (d) an Act of Parliament, a provincial ordinance or a law of a parliament or legislative assembly of any previously independent or self-governing territory, which is in force at the commencement of this Chapter;
- (e) any regulations made in terms of Parliamentary legislation.

(3) Nothing in this section shall limit the original jurisdiction of a division of the Supreme Court to review the validity of any law other than a law as defined in subsection (2).

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Disputes in Supreme Court Regarding Validity of Laws

10. (1) If in any criminal or civil proceedings before any division of the Supreme Court, it is alleged that a law, as defined in section 9(2), or any provision of such a law, is invalid on the grounds of inconsistency with any provision of this Constitution and a decision regarding the validity of the law or provision in question is decisive for the determination of the matter before the court the court shall, subject to subsection

(2) -

(a) refer the question of the validity of the law or provision by way of a stated case to the Constitutional Chamber of the Appellate Division to deal therewith according to this section; and

(b) suspend the proceedings before it pending the decision of the Constitutional Chamber.

(2) (a) A court shall in the circumstances mentioned in subsection (1) refer the question regarding the validity of the law or provision to the constitutional Chamber unless the court concerned is satisfied that there is no reasonable prospect of a finding by the Constitutional Chamber that such law or provision is inconsistent with a provision of this Constitution.

(b) A decision by a court other than the General Chamber of the Appellate Division that there is no such reasonable prospect, shall be appealable, but only after the proceedings before the court that gave the decision have been disposed of.

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(3) Proceedings suspended in terms of subsection (1) shall, unless the proceedings before the Constitutional Chamber are for any reason not proceeded with, not be resumed until the Constitutional Chamber has made a finding regarding the matter referred to it.

(4) The parties to proceedings referred to in subsection (1) shall be the parties to the proceedings before the Constitutional Chamber: Provided that if the State or a functionary of the State is not a party to the aforesaid proceedings, the State shall be entitled to be joined as a party in the proceedings before the Constitutional Chamber or to submit written representations to it.

(5) If the Constitutional Chamber finds that any law or any provision thereof is inconsistent with a provision of this Constitution, it shall declare such law or provision invalid to the extent to which it is so inconsistent.

(6) The Constitutional Chamber may, if it deems it expedient, postpone the coming into effect of any declaration of invalidity in terms of subsection (5) for a period not exceeding nine months: Provided that if it is proved to the satisfaction of the Constitutional Chamber that any such declaration of invalidity will have a seriously disruptive effect on State revenue, the public administration or the interests of the public or a section of the public and that it is not feasible to remedy such disruptive effect within the said period of nine months, the Constitutional Chamber may postpone the coming into effect of such declaration, subject to such conditions as it may impose, for a period not exceeding three years.

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(7) Unless the Constitutional Chamber orders otherwise, and save to the extent it orders otherwise, the declaration of invalidity of a law -

- (a) existing at the commencement of this Constitution, or a provision of such a law, shall not invalidate anything done in terms of that law or provision before the coming into effect of such declaration of invalidity; or
- (b) enacted after the commencement of this Constitution, or a provision of such a law, shall invalidate anything done in terms of that law or provision before the coming into effect of such declaration of invalidity.

(8) The Constitutional Chamber may in respect of the proceedings before it make such order as to costs as it may deem just and equitable in the circumstances: Provided that if the Constitutional Chamber considers it necessary in the public interest, it may order that the State pay the costs, or part thereof, in connection with the proceedings before it, whether the State was a party to such proceedings or not.

Disputes in Magistrates' Courts Regarding Validity of Laws

11. (1) If in any criminal or civil proceedings before a magistrates' court it is alleged that a law as defined in section 9(2), or any provision of such a law, is invalid on the ground of inconsistency with any provision of this Constitution, the court hearing the matter shall, subject to the other provisions of this section, decide the matter on the assumption that the law or provision is valid.

154

(2) The party alleging such inconsistency may at any time during such proceedings apply to the Supreme Court to have the question regarding the validity of the law or provision referred to the Constitutional Chamber of the Appellate Division by way of a stated case.

(3) If the court hearing the application is of the opinion that a decision regarding the validity of the law or provision is decisive for the determination of the matter before the magistrate -

- (a) the court shall refer the question regarding the validity of the law or provision by way of a stated case to the Constitutional Chamber to deal therewith as if it were a referral in terms of section 10; and
- (b) shall suspend the proceedings before the magistrates' court pending the decision of the Constitutional Chamber.

(4) The provisions of sections 10(2) to (8) shall apply *mutatis mutandis* in respect of an application under subsection (2) of this section, and in any such application a reference in section 10 to subsection (1) of that section shall be construed as a reference to the appropriate provision of this section.

Disputes Between Constitutional Authorities

12. (1) If a dispute arises between constitutional authorities regarding the question whether or not an act of one of those authorities is consistent with this Constitution, the authority disputing the validity of the act may apply to a judge of the Supreme Court in chambers to refer the question of the

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validity of such act by way of a stated case to the Constitutional Chamber of the Appellate Division.

(2) If the judge hearing the application is of the opinion that a mediated settlement of the dispute is possible, he shall, provided the authorities concerned consent thereto, refer the dispute to the Human Rights Commission to deal with it in accordance with section 26.

(3) If -

- (a) the judge hearing the application is of the opinion that a mediated settlement is not possible;
- (b) the authorities concerned, or one of them, refuses to consent to the dispute being referred to the Human Rights Commission; or
- (c) the efforts of the Human Rights Commission to reach a mediated settlement have not been successful,

the judge shall refer the question of the validity of the act by way of a stated case to the Constitutional Chamber to deal with it in accordance with this section.

(4) (a) The judge hearing the application shall in the circumstances mentioned in subsection (3) refer the question regarding the validity of the act to the Constitutional Chamber unless he is satisfied that there is no reasonable prospect of a finding by the Constitutional Chamber that such act is inconsistent with this Constitution.

(b) A decision by the judge that there is no such reasonable prospect is appealable as if the decision were given in the course of civil proceedings.

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(5) If the Constitutional Chamber finds that the act in question is inconsistent with this Constitution, it shall declare the act invalid.

(6) If the act which is the subject of a referral in terms of this section, is a law as defined in section 9(2), the provisions of section 10(6) and (7) shall apply *mutatis mutandis*.

(7) In this section "constitutional authority" shall mean -

- (a) the Executive Council/Cabinet or a member thereof;
- (b) the National Assembly;
- (c) the Senate;
- (d) the executive authority of a SPR;
- (e) the legislature of a SPR; or
- (f) a local authority.

Petitioning of Constitutional Chamber to Hear and Determine Certain Applications

13. (1) Subject to the provisions of this section any person who claims that any of his fundamental rights or freedoms has unlawfully been infringed, may file a constitutional complaint in the manner prescribed by law with the registrar of the Constitutional Chamber of the Appellate Division.

(2) No filing fee or formal papers shall be required for the filing of a constitutional complaint.

(3) A constitutional complaint shall be examined by a judge designated by the Chief Justice or by a committee of judges

1599

or other persons designated by the Chief Justice, with power to make inquiries, carry out investigations and hear evidence.

(4) If such judge or committee has certified that there appears to be reasonable grounds for the constitutional complaint in question, the complaint shall be referred to the Constitutional Chamber, which may formally hear such complaint or deal with it in such other manner as it deems just.

(5) If such judge or committee has found that there are not reasonable grounds for the constitutional complaint in question, the complainant shall be informed accordingly with an indication of the reasons for such finding.

Magistrates' Courts

14. (1) There shall be -

- (a) (i) at least one regional [magistrates'] court;
- (ii) at least one civil divisional court;
- (iii) at least one family court.

for each of the SPR's with the SPR area or any other area within the SPR defined by or under law as such court's area of jurisdiction;

- (b) a district magistrates' court for each magisterial district.

(2) The area of each SPR shall, for the purposes of subsection (1)(b), be divided into magisterial districts.

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Regional [Magistrates'] Civil Divisional and Family Courts

15. (1) The regional [magistrates'] courts shall have criminal jurisdiction in respect of all offenses, except treason.

(2) Subject to subsection (1) the jurisdiction of regional, [magistrates'] civil divisional and family courts shall be as prescribed by or under any law.

(3) In respect of each [regional magistrates' court] of the courts referred to in subsection (1) such number of judicial officers [officials in the service of] employed by the State shall be appointed as magistrates as are necessary to deal with the work of such court.

(4) In respect of each regional [magistrates'] court division one of the magistrates attached to that court shall hold the office of Regional Court President.

District Magistrates' Courts

16. (1) District magistrates' courts shall have civil and criminal jurisdiction as prescribed by or under any law.

(2) In respect of each district magistrates' court' such number of [officials in the service of] judicial officers employed by the State shall be appointed as magistrates as are necessary to deal with the work of such court.

(3) In respect of each area consisting of one or, if the Magisterial Services Commission so decides, more districts contemplated in section 15(1)(b) a magistrate attached to the court of that district or to any of the courts of such districts, as the case may be, shall hold the office of Chief Magistrate.

1546

Conditions of service of magistrates

16A. The conditions of service of magistrates shall, subject to section 20, be as prescribed by or under any law.

Council of Justice

17. (1) There shall be a Council of Justice which shall consist of the Judicial Services Commission and the magisterial Services Commission sitting jointly.

(2) The Council of Justice shall be convened at least annually by the Chief Justice and shall meet under his or her chairpersonship at a place determined by him or her.

(3) The object of the Council of Justice shall be to ensure the maintenance of an independent, objective and effective judicial authority, and for the achievement of this object the Council shall have the power -

- (a) to determine policy for the regulation and co-ordination of the internal affairs of the judicial authority;
- (b) to determine the requirements, including the financial requirements, of the administration of justice, and to take such steps as are necessary to ensure that those requirements are complied with;
- (c) to consider reports of the Judicial Services Commission and the Magisterial Services Commission;
- (d) to make recommendations to any appropriate authority in connection with the achievement of its object; and

1547

(e) to report to Parliament on any matter seriously affecting the administration of justice.

(4) The Council of Justice shall determine its internal procedure, including the procedure to be followed at its meetings and the quorum necessary for a meeting and for a resolution of the Council.

Judicial Services Commission

18. (1) There shall be a Judicial Services Commission which shall consist of -

- (a) the Chief Justice or, if he or she is not available or if the office of Chief Justice is vacant, the senior available judge of appeal;
- (b) two judges of appeal designated by the judges of appeal;
- (c) four judges of the Supreme Court designated by the Judges President; [alternatively all the Judges President with a view to representing the different SPR's]
- (d) a representative of the executive authority designated by the Executive Council/Cabinet;
- (e) a representative of the advocates' profession designated by the professional societies of practising advocates recognized by the Council of Justice for that purpose;
- (f) a representative of the attorney's profession designated by the professional societies of practising attorneys recognized by the Council of Justice for that purpose;
- (g) a representative of teachers of law designated by the professional societies of teachers of law recognized by the Council of Justice for that purpose.

1548

(h) a representative of the officials dealing with criminal prosecutions in the Supreme Court and designated by the attorneys-general.

(2) The Chief Justice or judge of appeal referred to in subsection (1)(a), as the case may be, shall act as the chairperson of the Judicial Services Commission.

(3) The functions of the Judicial Service commission shall be -

- (a) to make recommendations regarding the appointment in a permanent capacity and the disciplining and dismissal of judges of the Supreme Court as contemplated in section 19(1);
- (b) in appropriate circumstances to appoint judges in the Supreme court in an acting capacity, or to authorise the Chief Justice, in respect of the Appellate Division, and a judge president, in respect of the division under his or her control, to make such appointments from a list of names compiled by the Judicial Services Commission;
- (c) to make recommendations and to conduct inquiries or cause inquiries to be conducted regarding the disciplining or dismissal of judges of the Supreme Court, as contemplated in section 19(2);
- (d) for the purposes of sections 5(2) and 8(1), to determine the number of judges of appeal and the number of judges necessary to deal with the work of the Appellate Division and a SPR or local division, respectively; and
- (e) to report to the Council of Justice any improper conduct by any authority impairing or calculated to impair the

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independence, objectivity or effectiveness of the Supreme Court or any judge of the Supreme Court.

(5) The Judicial Services Commission shall determine its internal procedure, including the procedure to be followed at its meetings and the quorums necessary for a meeting and for a resolution of the Commission.

(6) The Judicial Services Commission may appoint one or more committees from among its number and delegate any of its functions to such committee.

Savings Regarding Appointment, Disciplining and Dismissal of Judges

19. (1) No person shall be appointed -

- (a) in a permanent capacity as the Chief Justice, a judge of appeal, a judge president or a judge of any SPR or local division of the Supreme Court unless he or she has been recommended for such appointment by the Judicial Services Commission and found by a joint committee of the National Assembly and the Senate to be a fit and proper person;
- (b) as the Chief Justice or acting Chief Justice or a judge of appeal or acting judge of appeal, unless he or she is or has been a judge of a SPR or local division of the Supreme Court;
- (c) as a judge or acting judge of the Supreme Court, unless he or she is academically qualified in terms of a law regulating the admission of advocates in the Republic to practise as an advocate and, after having become so

1550

qualified, has been involved in the administration or teaching of the law for a period of at least ten years.

(2) Save on the recommendation of and after a proper inquiry by or on behalf of the Judicial Services Commission no judge of the Supreme Court shall be disciplined or be dismissed from office on the ground of misconduct or inability to perform his or her functions.

Magisterial Services Commission

20. (1) There shall be a Magisterial Services Commission which shall consist of -

- (a) a judge of the Supreme Court designated by the Chief Justice;
- (b) a representative of the executive authority designated by the Executive Council/Cabinet;
- (c) two representatives of magistrates attached to regional magistrates' courts designated by the regional court presidents;
- (d) two representatives of magistrates attached to [the district] magistrates' courts designated by the chief magistrates;
- (e) a representative of the advocates' profession designated by the professional societies of practising advocates recognised by the Council of Justice for that purpose;
- (f) a representative of the attorney's profession designated by the professional societies of practising attorneys recognised by the Council of Justice for that purpose;

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- (g) a representative of teachers of law designated by the professional societies of teachers of law recognised by the Council of Justice for that purpose; [and]
- (h) a representative of the officials dealing with criminal prosecutions in magistrates' courts and designated by the attorneys-general;
- (i) the principal of the Justice College.

(2) The judge referred to in subsection (1)(a) shall act as the chairperson of the Magisterial Services Commission.

(3) The objects and functions of the Magisterial Services Commission shall be -

- (a) to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, magistrates takes place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and properly;
- (b) to ensure that no victimization or improper influencing of magistrates occurs;
- (c) for the purposes of paragraph (a) or (b) -
 - (i) to conduct or cause to be conducted any investigation that it deems necessary;
 - (ii) to obtain access to official information or documents;
 - (iii) to hear any person or to summon any person to appear before it and to question such person; or
 - (iv) to take such other steps as in its opinion are justified in the circumstances;

1552

- (d) for the purposes of section 15(3) and 16(2) to determine the number of magistrates necessary to deal with the work of a magistrates' court;
- (e) to report to the Council of Justice any improper conduct by any authority impairing or calculated to impair the independence, objectivity or effectiveness of the magistrates' courts of any magistrate; [and]
- (f) to make recommendations regarding the appointment of regional court presidents and chief magistrates as contemplated in section 21; and
- (g) as prescribed further by or under any law.

(4) [Section 18(5) and (6) shall apply *mutatis mutandis* in respect of meetings of the Magisterial Services Commission.] The internal procedure, including the procedure to be followed at it's meetings and the quorums necessary for a meeting and for a resolution of the Commission, shall be as prescribed by or under any law.

(5) No complaint by or on behalf of any person regarding any matter with which the Magisterial Services Commission has the power to deal, shall be received or considered by the Commission unless the complaint has been found by a committee or regional court presidents or chief magistrates to be justifiable and to be a matter requiring the attention of the Commission.

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Appointment of magistrates

21. No person shall be appointed -
- (a) as a magistrate in a district magistrates' court unless he or she has obtained the minimum legal qualification specified by the Council of Justice;
 - (b) as a magistrate in a regional, [magistrates'] civil divisional or family court unless he or she has attained the level of competence specified by the Council of Justice; or
 - (c) as a regional court president or chief magistrate unless he or she has been recommended for such appointment by the Magisterial Services Commission.

Attorney-General

22. (1) The authority to institute criminal prosecutions on behalf of the State shall vest in attorneys-general.

(2) The area of or other jurisdiction, duties and powers of an attorney-general shall be as prescribed by or under any law.

(3) No person shall be appointed as an attorney-general unless he or she is academically qualified in terms of a law regulating the admission of advocates in the Republic to practise as an advocate and, after having become so qualified, has been involved in the administration or teaching of the law for a period of at least ten years.

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Commission and has instructed the Technical Committee on Fundamental Rights to submit to it recommendations in this regard.].

Transitional arrangements

[Provisions dealing with the transition from the present Constitution, as far as the judiciary is concerned, to the negotiated one will be supplied later.]

1556