

2/4/5/1/3

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEM

5

1 FEBRUARY 1995

WORK PROGRAMME

**CORE GROUP REPORT
ON
REVISED WORK PROGRAMME**

**THEME COMMITTEE 5
THE JUDICIARY AND LEGAL SYSTEMS**

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| BLOCK 1 TO 4 | <p>1. The Structure of the Court System</p> <p>2. The Relationship between the different levels of Courts</p> <p>3. The Composition and appointment of Judicial Officers</p> <p>4. Access to the Courts including lay participation.</p> <p><u>Relevant Constitutional Principles:</u> II, IV, V, VI, VII <u>Relevant sections of Interim Constitution:</u> Chapter 7 and sections 241 and 242</p> <p><u>Relevant constitutional principles:</u> II, VII <u>Relevant sections of Interim Constitution:</u> 96, 97, 101, 102, 241 and 242</p> <p><u>Relevant Constitutional Principles:</u> II, IV, VII <u>Relevant sections of Interim Constitution:</u> 96, 97, 98, 99, 100</p> <p><u>Relevant sections of Interim Constitution:</u> Section 101(3) to (6)</p> <p><u>See</u> CP VII and section 103</p> <p><u>See</u> CP VII and section 104, 105 and 109</p> |
| BLOCK 5 | <p>5. Traditional Authorities & Customary Law</p> <p><u>See</u> CP XIII(1) and section 103</p> |
| BLOCK 6 | <p>6. Attorneys-General and other judicial appointments</p> <p><u>See</u> section 108</p> |
| BLOCK 7 | <p>7. General</p> <p><u>See</u> sections 35, 107, 231 and 232</p> |

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| BLOCK 8 | 8. Legal Education and Legal Profession |
| BLOCK 9 | 9. Transitional Arrangements <u>See Chapter 15</u> |

Please find attached the relevant Constitutional Principles relevant to Theme Committee 5.

PS BLOCK 10 - Correctional Services - added later in the process to the Work Programme.

SCHEDULE 4

Constitutional Principles

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI

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

VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV

Amendments to the Constitution shall require special procedures involving special majorities.

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.
2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.
3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.
4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.
5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

[Principle XVIII substituted by sec 13(a) of Act 2 of 1994.]

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia —

(a) for the purposes of provincial planning and development and the rendering of services; and

(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions

XXX

1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.

2. Every member of the public service shall be entitled to a fair pension.

XXXI

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII

The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

XXXIV

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new

PREAMBLE

In humble submission to Almighty God,
We, the people of South Africa, declare that -

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their—
fundamental rights and freedoms;

AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

AND WHEREAS it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution;

- (d) any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to subsection (9);
- (e) any dispute of a constitutional nature between organs of state at any level of government;
- (f) the determination of questions whether any matter falls within its jurisdiction; and
- (g) the determination of any other matters as may be entrusted to it by this Constitution or any other law.

(3) — The Constitutional Court shall be the only court having jurisdiction over a matter referred to in subsection (2), save where otherwise provided in sections 101(3) and (6) and 103(1) and in an Act of Parliament.

[Sub (3) substituted by sec 3 of Act 13 of 1994]

(4) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.

(5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.

(6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof —

- (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
- (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.

(7) In the event of the Constitutional Court declaring an executive or administrative act or conduct or threatened executive or administrative act or conduct of an organ of state to be unconstitutional, it may order the relevant organ of state to refrain from such act or conduct, or, subject to such conditions and within such time as may be specified by it, to correct such act or conduct in accordance with this Constitution.

(8) The Constitutional Court may in respect of the proceedings before it make such order as to costs as it may deem just and

(b) If the appointing authorities decide not to accept any or some of such recommendations, the Judicial Service Commission shall be informed thereof and be furnished with the reasons therefor.

(c) After having been informed in terms of paragraph (b), the Judicial Service Commission shall, in accordance with paragraph (a), submit further recommendations, whereafter the appointing authorities shall make the appointment or appointments from the recommendations as supplemented in terms of this paragraph.

(d) In submitting its recommendations to the appointing authorities in terms of paragraphs (a) and (c) the Judicial Service Commission shall have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender.

(6) Subsection (5) shall not apply to the first appointment after the commencement of this Constitution of the President of the Constitutional Court under section 97(2).

(7) Vacancies in the Constitutional Court shall be filled —

- (a) in the case of a vacancy in the office of a judge appointed under subsection (3), in accordance with that subsection; and
- (b) in the case of a vacancy in the office of a judge appointed under subsection (4), in accordance with that subsection.

Engaging the Constitutional Court

100. (1) The conditions upon which the Constitutional Court may be seized of any matter within its jurisdiction, and all matters relating to the proceedings of and before the Court, shall be regulated by rules prescribed by the President of the Constitutional Court in consultation with the Chief Justice, which rules shall be published in the Gazette.

(2) The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction.

Supreme Court

101. (3) Subject to this Constitution, a provincial or local division of the Supreme Court shall, within its area of jurisdiction, have jurisdiction in respect of the following additional matters, namely —

- (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
- (b) any dispute over the constitutionality of any

terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.

(3) If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction.

(4) An appeal shall lie to the Appellate Division against a decision of a provincial or local division in terms of subsection (3).

(5) If the Appellate Division is able to dispose of an appeal brought in terms of subsection (4), without dealing with any constitutional issue that has been raised, it shall do so.

(6) If it is necessary for the purposes of disposing of the said appeal for the constitutional issue to be decided, the Appellate Division shall refer such issue to the Constitutional Court for its decision.

(7) The Chief Justice and the President of the Constitutional Court shall jointly make rules to facilitate the procedure for dealing with appeals in which there are both constitutional and other issues, which may provide for the constitutional issues to be referred to the Constitutional Court before or after any such appeal has been heard by the Appellate Division.

(8) If any division of the Supreme Court disposes of a matter in which a constitutional issue has been raised and such court is of the opinion that the constitutional issue is of such public importance that a ruling should be given thereon, it may, notwithstanding the fact that the matter has been disposed of, refer such issue to the Constitutional Court for a decision.

(9) When a constitutional issue has been referred to the Constitutional Court by a division of the Supreme Court in terms of subsection (8), the Minister responsible for the administration of justice shall, at the request of the President of the Constitutional Court, appoint counsel to argue such constitutional issue.

(10) If the validity of a law is in dispute in any matter, and a relevant government is not a party to the proceedings, it shall be entitled to intervene as a party before the court in question, or shall be entitled to submit written argument to the said court.

(11) Appeals to the Appellate Division and the Constitutional Court shall be regulated by law, including the rules of such courts, which may provide that leave of the court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal.

application referred to in subsection (3), is of the opinion that a decision regarding the validity of the law or provision is material to the adjudication of the matter before the court referred to in subsection (1), and that there is a reasonable prospect that the relevant law or provision will be held to be invalid, and that it is in the interest of justice to do so, the provincial or local division shall —

- (a) if the issue raised is within its jurisdiction, deal with such issue itself, and if it is in the exclusive jurisdiction of the Constitutional Court, refer it to the Constitutional Court for its decision after making a finding on any evidence which may be relevant to such issue; and
- (b) suspend the proceedings before the court referred to in subsection (1) pending the decision of the provincial or local division or the Constitutional Court, as the case may be.

[Sec 103 amended by sec 5 of Act 13 of 1994]

Appointment, removal from office and remuneration of judges

104. (1) Judges of the Supreme Court shall be fit and proper persons appointed by the President acting on the advice of the Judicial Service Commission: Provided that the appointment of acting judges shall be as may be provided for in an Act of Parliament.

[Provide to sub (1) added by sec 6 of Act 13 of 1994]

(2) Judges of the Constitutional Court and the Supreme Court shall receive such remuneration as may be prescribed by or under law, and their remuneration shall not be reduced during their continuation in office.

(3) Any judge shall, before commencing to perform the functions of his or her office, make and subscribe an oath or solemn affirmation in the terms set out in Schedule 3 before any other judge.

(4) A judge may only be removed from office by the President on the grounds of misbehaviour, incapacity or incompetence established by the Judicial Service Commission and upon receipt of an address from both the National Assembly and the Senate praying for such removal.

(5) A judge who is the subject of an investigation by the Judicial Service Commission in terms of subsection (4) may be suspended by the President pending such investigation.

Judicial Service Commission

105. (1) There shall be a Judicial Service Commission, which shall, subject to subsection (3), consist of —

- (a) the Chief Justice, who shall preside at meetings of the Commission;

Seats of Constitutional Court and Appellate Division

106. (1) The seat of the Constitutional Court shall be Johannesburg.

(2) The seat of the Appellate Division of the Supreme Court shall be Bloemfontein.

Languages

107. (1) A party to litigation, an accused person and a witness may, during the proceedings of a court, use the South African language of his or her choice, and may require such proceedings of a court in which he or she is involved to be interpreted in a language understood by him or her.

(2) The record of the proceedings of a court shall, subject to section 3, be kept in any official language: Provided that the relevant rights relating to language and the status of languages in this regard existing at the commencement of this Constitution shall not be diminished.

Attorneys-General

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

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

(3) No person shall be appointed as an attorney-general unless he or she is appropriately qualified in terms of a law regulating the appointment of attorneys-general in the Republic.

Magistrates Commission

109. There shall be a Magistrates Commission established by law to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates, take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and properly, and to ensure that no victimization or improper influencing of magistrates occurs.

- national territory,
- (b) a provincial or local division of the said Supreme Court of South Africa, and any other supreme court or general division thereof, shall have the same jurisdiction as that which is vested in terms of this Constitution in a provincial or local division contemplated in section 101(1), and shall exercise such jurisdiction in respect of the area of jurisdiction for which it was established; and
 - (c) any other court shall, in addition to the jurisdiction vested in it immediately before the commencement of this Constitution, have the same jurisdiction as that which is vested in terms of section 103 in a court of similar status contemplated therein, and shall exercise such jurisdiction in respect of the area of jurisdiction for which it was established.

(1B) For the purposes of the application of this Constitution while the existing court structures referred to in subsection (1) continue, any reference in this Constitution to any of the court structures contemplated in Chapter 7 shall, unless inconsistent with the context or clearly inappropriate, be deemed to be a reference to the corresponding existing court structure, and in such application a reference to a provincial division shall be construed also to refer to any of the other supreme courts, or general division of any such court, referred to in subsection (1A)(b).";

[Sub (1A) and sub (1B) inserted by sec 15(b) of Act 13 of 1994]

(2) The Chief Justice of South Africa, the judges-president and deputy judges-president of the various divisions of the Supreme Court of South Africa, the judges of appeal of the Appellate Division of the said Supreme Court, and the other judges of the said Supreme Court, holding office immediately before the commencement of this Constitution, shall be deemed to have been duly appointed to the corresponding positions in terms of Chapter 7 and shall continue to hold office in accordance with the applicable laws.

(2A) The chief justice of a supreme court referred to in the proviso to subsection (1) who in terms of that proviso continues in office as the Judge President of such supreme court, and the other judges of such supreme court, including the judges of any other supreme court which did not have an appellate division, holding office immediately before the commencement of this Constitution, shall be deemed to have been duly appointed to the corresponding positions in terms of Chapter 7 and shall continue in office in accordance with the applicable laws.

[Sub (2A) inserted by sec 15(c) of Act 13 of 1994]

(3) All other judicial officers holding office immediately before the commencement of this Constitution in terms of a law, shall continue to hold such office in accordance with such law.

be continued by or against the relevant government, authority or
functionary which superseded the said government, authority or
functionary.

152(A) CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

(10) The laws and other measures which immediately before the commencement of this Constitution regulated the jurisdiction of courts of law, court procedures, the power and authority of judicial officers and all other matters pertaining to the establishment and functioning of courts of law, shall continue in force subject to any amendment or repeal thereof by a competent authority.

Rationalisation of court structures

242. (1) All jurisdictional areas and court structures appropriate thereto existing immediately before the commencement of this Constitution, shall as soon as possible after such commencement be rationalised in accordance with an Act of Parliament with a view to establishing the jurisdictional areas and court structures contemplated in Chapter 7.

(2) The rationalisation of the jurisdictional areas and court structures referred to in subsection (1) shall be the responsibility of the national government after consultation with the Judicial Service Commission.

[Sub (2) amended in Afrikaans text by sec 16 of Act 13 of 1994]

(3) The rationalisation contemplated in subsection (1) includes -

- (a) the amendment, repeal or replacement of any law regulating the establishment, functions, jurisdiction and other matters relating to a court referred to in section 241(1), or of any law referred to in section 241(2), or of any law which deals with any of the foregoing matters in a consequential manner: Provided that if a law referred to in section 241(2) is repealed, provision shall be made for the application of any law of general application regulating the service of judicial officers or any class of judicial officers, to the judicial officers or class of judicial officers affected by such repeal; and
- (b) measures relating to the transfer or secondment of judicial officers, or the allocation of property, including court and administrative records, in order to establish the said jurisdictional areas or court structures.