

2/4/5/2/3

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 5
JUDICIARY AND LEGAL
SYSTEMS**

31st October, 1994

Room M515

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5 JUDICIARY AND LEGAL SYSTEMS

Please note that a meeting of the above Committee will be held as indicated below:

Date : 31st October 1994
Time : 10h00 - 12h00
Venue : Room M515 (Marks Building)

AGENDA

1. Opening and Welcome
2. Minutes of previous meeting
3. Matters arising
4. Core Group Report
 - (a) Work Programme
 - (b) Technical Experts
 - (c) Time of Theme Committee Meetings
5. General

Ebrahim H
Executive Director
Constitutional Assembly

Enquiries: Noel Taft, Room CS213 (Tel: 403-2278)
Eunice van Eck, Room CS213 (Tel: 403-2294)

CONSTITUTIONAL ASSEMBLY
MINUTES OF
THEME COMMITTEE 5
JUDICIARY AND LEGAL SYSTEMS
MONDAY 24TH OCTOBER 1994 (AT 11H30)

PRESENT: (Ngwane L, Chairperson)

Dalling DJ	Matthews VJG
De Lange J	Mgidi JS
De Ville R	Moeti SE
Fisher SD	Mogale MPE
Gandhi E	Moosa MWE
Gibson DHM	Nel AC
Groenewald RH	Ngcuka B
Grove SP	Ntsizi TC (Alternate)
Hofmeyr WA	Saloojee RAM
Jana DP	Schutte DPA
Jassat EE	Van Heerden F
Matthee PA	

Noel Taft and Eunice van Eck were in attendance.

APOLOGIES:

Ebrahim AG
Van der Merwe J

1. OPENING AND WELCOME

- 1.1 The meeting was opened by Ms L Ngwane who chaired the meeting.
- 1.2 The agenda was adopted.

2. MINUTES

The minutes of the previous meeting were adopted subject to the following correction:

Point 3 of the minutes should read:

It was agreed that the matter be dealt with by the Core Group and ratified by the Theme Committee

3. MATTERS ARISING

- 3.1 The Election of the Rotating Chairpersons which had been dealt with by the Core Group was adopted and ratified by the Theme Committee.

Rotating Chairpersons:

1. Ngwane L
2. Schutte DPA
3. Van der Merwe J

- 3.2 The meeting was advised that the Management Committee had decided to issue joint press statements on behalf of all Theme Committees regarding their formation and process.
- 3.3 The meeting was also advised that Community and Media Liaison Departments had been set up by the C.A. administration to facilitate the work of the Theme Committees.

4. SUBMISSIONS

- 4.1 The meeting was advised that all submissions received to date dealt with procedure and had been processed by the Management Committee.

5. INPUTS ON WORK PROGRAMME

- 5.1 The Core Group members submitted their parties reports on the work programme.
- 5.2 Mr. D. Schutte (NP) submitted a written draft proposal and handed copies to all members. See copy attached.
- 5.3 Mr. Gibson (DP) endorsed the proposals by Mr. Schutte and added the following:
- a) The Theme Committee must decide whether all aspects dealt with in Theme Committee deliberations needed to be included in the Constitution.
 - b) Access to the Courts needed to be investigated and suggested that a commission be appointed in this regard.
 - c) The Legal Aid system was unsatisfactory and needed investigation.

- d) A value judgement on the Constitutional Court was premature as it had not yet had time to operate.
- e) The Jurisdiction of the Constitutional Court must be examined to ensure that it is not overloaded with matters.
- f) The feasibility of Supreme Courts in each of the Provinces needed to be investigated with particular regard to -
 - a) infrastructure
 - b) the legal profession in the area concerned
 - c) the cost of establishing the Provincial division of the Supreme Court.
- g) Deliberations and submissions at Kempton Park pertaining to Theme Committee 5 be retrieved.

5.4 Mr. R. de Ville (FF) submitted a written draft proposal and copies were handed to members. See copy attached.

5.5 Mr. J. de Lange (ANC) gave an oral input. See summary of report attached.

5.6 The Chairperson's oral report on procedure was as follows:

- a) It was not possible at this stage to say how many reports are to be issued or what the deadlines for these submissions are.
- b) A list of role players submitted by the Justice Department was handed to members for consideration. It was noted that the list was not comprehensive and members were invited to add names to the list.
- c) The C.A. had set up Community and Media Liaison Departments to facilitate the work of Theme Committees.
- d) Each party should submit the names of 3 technical experts for consideration by the Theme Committee.

5.7 DISCUSSION ON DRAFT PROPOSALS

5.7.1 It was proposed that -

- a) the Core Group liaise with other Theme Committees to identify areas of overlap in order to avoid duplication of work.

- b) the Core Group compile all proposals on the Work Programme into one report and submit it to the next meeting of the Theme Committee for consideration and ratification.
- c) a holistic approach be adopted and that the Theme Committee interface with other departments such as Safety and Security and Correctional Services in order to consider areas broader than the formal Judiciary.
- d) Childrens' Courts, Customary Courts, Community Courts be studied and investigated.

5.8 The Technical Experts need not be recognised Constitutional experts but experts in the field relating to a particular Theme Committee.

5.9 Parties were requested to submit names of technical experts to the Core Group for consideration.

5.10 The names processed by the Core Group would be submitted to the Theme Committee for consideration and ratification.

6 GENERAL

6.1 Verbatim recording of minutes not required due to the nature of Theme Committee meetings.

6.2 No technical assistance for recording of minutes required.

7. CLOSURE

The meeting rose at 12h50

TO: The Management Committee
FROM: Theme Committee 5

REPORT

(a) Constitutional issues which need to be attended to by Theme Committee 5

I The Constitutional Court:

- (i) Independence and impartiality of Judiciary. (Principle VI and VII)
- (ii) Justiciability of Bill of Fundamental Rights. (Principle II and IV)
- (iii) Equitable legal process. (Principle V)
- (iv) Appointment of President of the Constitutional Court and term of office. [Section 97 (2) (a) and (b)]
- (v) Constitutional Court and its Jurisdiction. [Section 98 (1) to (9)]
- (vi) Competency of Constitutional court decisions and the effect of such decisions.
- (vii) Criteria for appointment of Constitutional Court Judges.
- (viii) Composition of Constitutional Court and the appointment and review/removal of judges of the Constitutional Court. [Section 99 (1) to (6)]
- (ix) Remuneration of Constitutional Court Judges.
- (x) Engaging the Constitutional Court. [Section 100 (1) and (2)]
- (xi) Jurisdiction. [Section 102]
- (xii) Appeals to Constitutional Court.
- (xiii) Seat of Constitutional Court. [Section 106]

II Criminal and Civil Courts

- (i) Independence of Judiciary. [Principle VI and VII]
- (ii) Supreme Court and appeal Court. [Section 101]
- (iii) Jurisdiction of Supreme Court and Procedural matters. [Section 102 (1) - (17)]

- (iv) **Seats of Supreme Court.**
- (v) **Lower Courts. [Section 103 (1) – (4)]**
- (vi) **Criteria for appointment of Judges/Magistrates.**
- (vii) **Appointment, removal from office and remuneration of judges.**
The question of a single or split judiciary. [Section 104 (1) – (5)]
- (viii) **Judicial Service Commission. [Section 105]**
- (ix) **Seat of Appellate Division. [Section 106]**
- (x) **Attorneys-General. [Section 108]**
- (xi) **Magistrates Commission and qualification of Magistrates.**
[Section 109]
- (xii) **Special Courts – Family/Matrimonial Courts, Labour Courts,**
Administrative Courts, Fiscal Courts, Social Courts, Juvenile
Courts, Water Courts, Community Courts and Children's Courts.
- (xiii) **Alternative Dispute Resolution Mechanisms.**

III Other Judicial and Legal Aspects

- (i) **Court Languages. [Section 107]**
- (ii) **Continuation of Existing Law. [Section 229]**
- (iii) **Repeal of Laws. [Section 230]**
- (iv) **International Law and Continuation of international agreements.**
[Section 231]
- (v) **Transitional Arrangements: Judiciary. [Section 241 (1) – (10)]**
- (vi) **Rationalization of Court Structures. [Section 242 (1) – (3)]**
- (vii) **Interpretation of Laws and definitions. [Section 232 and 233]**
- (viii) **Amnesty in respect of offences associated with political acts in**
conflict of the past – Postamble.
- (ix) **Legal Education.**
- (x) **The Legal Professions.**
- (xi) **Accessibility to the Courts.**
- (xii) **Equality of all before the Law. [Principle 5]**
- (xiii) **State Attorney.**

IV Traditional Authorities, Institutions, status and role of Traditional Leadership and Indigenous Law

- (i) The Recognition and protection of traditional leadership and of a traditional monarch. [Principle XIII]
- (ii) Recognition of indigenous law. [Section 181]
- (iii) Traditional Authorities and Indigenous Law. [Section 182]
- (iv) Provincial House of Traditional Leaders. [Section 183 (1) and (2)]
- (v) Council of Traditional Leaders. [Section 184 (1) – (5)]
- (vi) Customary Courts.
- (vii) Provision for Traditional Monarchy in Provincial Constitutions. [Section 160 (3) (b)]

NB: Please note the interpretation to be placed on this subject matter if the proposal in paragraph (c) is implemented

It is emphasized that the issues indicated above are provisional issues. It is understood that there can be further additions to the list and issues can also be removed from the list at a later stage.

(b) Issues to be dealt with on a priority basis

The two most important issues which may have to be given priority are the Constitutional Court and the position of traditional authorities and indigenous law. [(a) I and IV above]

(c) Areas of overlap with other Theme Committees

There is a clear overlap between the mandate of Theme Committees 2,5 and 6 with regard to the issue of tribal authorities. Representatives of the three relevant core committees met on the 26th October to discuss this matter. At the meeting it was agreed that the Theme Committees would interpret their mandates as follows to avoid duplication:

Theme Committee 2: Paragraph 2.10 will be interpreted as referring to the representation of traditional leaders in structures of government other than traditional structures.

Theme Committee 5: Paragraphs 5.2 and 5.4 will be interpreted as referring to indigenous law and tribal/customary courts.

Theme Committee 6: Paragraph 6.7 will be interpreted as referring to the representation of tribal leadership in tribal/customary structures.

It was furthermore agreed at the said meeting that, to avoid duplication, a commission or joint committee should be set up consisting of members of all three Theme Committees to take evidence and representations on all three of the above mentioned aspects.

(d) **Issues to be dealt with in Commissions**

The question of traditional authorities and indigenous law is one that can very productively be dealt with per commission. See paragraph (c) above.

(e) **Separate Reports**

If the proposal of a joint committee or a commission for tribal authorities and indigenous law is accepted then it is clear that a separate report will be made on this aspect. It is too early to contemplate other reports.

(f) **Number of Reports required**

Too early to say.

(g) **Structures and People to be consulted**

- (i) All legal professional organizations, legal academics, judges, magistrates, para-legals, civil servants involved in legal process and the public at large.

(ii) All traditional authorities and traditional leaders, academics in the relevant field, relevant monarchs and the public at large.

(h) **Community and media liaison assistance required.**

Administrative assistance to send invitations to interested persons and organizations and to draft and release press statements. As far as traditional authorities are concerned, at least the services of one or more field workers will be required because reliance on written communication may not be sufficient.

(i) **Technical Assistance Required**

Experts in the legal field will be required to assist Theme Committee 5. Experts with regard to traditional authorities and indigenous law will also be required either to assist Theme Committee 5 or the joint committee or commission contemplated in paragraph (c).

CONSTITUTIONAL ASSEMBLY

REPORT OF THEME COMMITTEE AND CORE GROUP 5 THURSDAY 27TH OCTOBER 1994

1. INTRODUCTION

1.1 The Core Group met on the 25 October 1994 at 8.00 am (RM E 216).

1.2 The meeting dealt with;

- a) Work Programme Report
- b) Joint Meeting of Theme Committee 5, 6 & 2 to discuss overlapping of Constitutional issues i.e. Traditional Authorities and Leaders.
- c) Processing of parties' submissions on appointment of technical experts.
- d) Agenda for Theme Committee meeting on 31 October 1994.

1.3 The meeting instructed Mr. D. Schutte and Mr. W. Hofmeyr to consolidate the parties proposals on the work programme into one report.

1.4 The Managing Secretary was instructed to set up a meeting with the Core Groups of Theme Committee 6 and 2.

1.5 The Managing Secretary was instructed to circulate the list of names of constitutional experts submitted to the C.A. administration for consideration as technical experts.

2. The Core Group met with Core Groups 6 and 2 on 26 October 1994 at 8.00am in the C.A. Boardroom.

2.1 The committee consulted the Constitutional Assembly document dated 2nd September 1994 containing the resolutions on the establishment of Theme Committees. The following interpretations were agreed to:-

2.1.1 Theme Committee 2 - Paragraph 2.10 will be interpreted as referring to the representation of traditional leaders in structures of government other than traditional structures.

- 2.1.2 Theme Committee 5 - Paragraphs 5.2 and 5.4 will be interpreted as referring to indigenous law and tribal/customary courts.
- 2.1.3 Theme Committee 6 - Paragraph 6.7 will be interpreted as referring to the representation of tribal leadership in tribal/customary structures.

It was furthermore agreed at the said meeting that, to avoid duplication, a commission or joint committee should be set up consisting of members of all three Theme Committees to take evidence and representations on all three of the above mentioned aspects.

- 3. The Core Group met on Thursday 27th October 1994 at 08h00 (RM E216) to finalise its' tasks and the agenda for 31 October 1994 (Theme Committee 5 Meeting).
 - 3.1 The report on the work programme was completed and will be circulated to all members of Theme Committee 5.
 - 3.2 It is recommended that the Work Programme Report be provisional for Theme Committee 5 in that issues could be added to or removed.
 - 3.3 The matter of Technical Experts to be dealt with at the next Theme Committee meeting.

GENERAL

The Agenda for the next Theme Committee meeting is attached in the documentation for 31 October 1994.