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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: **CC Sub-committee members who attended consultation on chapter *Courts and the Administration of Justice***

FROM: **CC Subcommittee Secretariat**

DATE: **5 February 1996**

SUBJECT: **DRAFT REPORT OF CONSULTATION ON COURTS AND ADMINISTRATION OF JUSTICE OF 1 FEBRUARY**

Herewith please find a copy of the draft report (11 pages) of the above meeting.

The Secretariat awaits your guidance as to whether you will be presenting a verbal report only to the Sub-committee on Monday 12 February or whether you wish to include the attached draft report with the documentation of the meeting.

Kindly liaise with us through the chairperson of that meeting, Sen BT Ngcuka, whether we must include the report in the documentation for the CC Sub-committee meeting of 12 February.

H EBRAHIM
EXECUTIVE DIRECTOR

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CONSTITUTIONAL ASSEMBLY

DRAFT REPORT

SUB-COMMITTEE CONSULTATION ON COURTS AND THE ADMINISTRATION OF JUSTICE

THURSDAY 1 FEBRUARY 1996

1. OPENING

1. Mr Ramaphosa welcomed the representatives from the legal profession and the members of the Sub-committee to the meeting. He said that the Sub-committee had requested this consultation to share views with stakeholders and that further written submissions would also be valued.

2. It was noted this was a consultation and that the meeting was not in a position to take binding decisions, but would report back to the CC Sub-committee.

2. DISCUSSION

1. The discussions were chaired by Mr Ngcuka.

2. Discussion was based on **Chapter 6: Courts and the Administration of Justice** of the *Third Edition of the Refined Working Draft*.

3. The following documents were also tabled:

   updated draft-in-progress of Chapter 6
   memoranda from the Independent Panel of Experts:
   Memorandum on the Need for Automatic Referral Procedures
   Survey: Appointment of Judges
   Memorandum on Abstract Review
   Supplementary Information on Prosecutorial Authority

4. The following submissions were distributed:

   Submission of the Association of Law Societies on this chapter
   Submission of the National Association of Democratic Lawyers on this chapter

5. It was agreed that discussion take place section-by-section, but due to time constraints discussion on the last few sections concentrated by agreement on the identified issues.

2.4 Section 94: Judicial Authority

1. Regarding Subsection (1), a view was expressed that if the intention had been to create a centralised system of courts, instead of using the proposition "of" in "The judicial authority of the Republic, use of "in" or "of and in" may be considered.

2. Regarding Subsection (2), it was agreed that the word "judiciary" used in the Interim Constitution may be interpreted more narrowly than the word "courts". It was also noted that the intention of the CA had been to use the last mentioned broader term in order to extend and not limit the independence. A view was expressed that the word "courts" was wide enough to include both structure and personnel.

3. Regarding Subsection (4), it was agreed to introduce to the list which ended with "effectiveness" of the courts, the word "accessibility". It was noted that this proposal was motivated by the past experiences of inaccessibility and supported by the findings of the Milne Commission.

4. Regarding Subsection (5), further written submissions were requested and it was agreed the technical experts take this under review.

5. It was noted that the intention had been to entrench the *stare decisis* rule, especially regarding the new Constitutional Court, but a view was expressed that it was not clear whether the subsection also referred to *res judicata*.

6. It was noted that views were expressed that the term "decision of a court.." may be too narrow, but that the intention had been to capture both orders and interpretations of the courts. It was noted that the refinement into plain language may have lost what was intended in the subsection.

7. It was noted that decisions of the Constitutional Court may be binding on everyone, whereas the decisions of other courts not necessarily so. A view was also expressed that use of the word "decision" may be wide enough to leave its further interpretation to the Constitutional Court.

2.5 Section 95: Judicial system

1. A view was expressed that it may be redundant to still speak of divisions of the High Court. However, it was noted that in Gauteng the two busy divisions functioned separately but under one Judge

President, and the need would still remain to accommodate more than one seat of Court in a province.

2. Regarding Subsection (c), a view was expressed that it may be advisable to set out the hierarchy of the courts. In response it was noted that it was intended to address the hierarchy of the courts by using the terminology "High Court", and that it had even been contemplated to use the word "hierarchy", but that the difficulty had in the end translated into one of style. It was noted that suggestions to deal with this be sought.

2.6 Section 96: Constitutional Court

1. Regarding Subsection (1), a view was expressed that the Constitutional Court was given status, but that it did not really vest jurisdiction, and therefore does not say to what standing is related.

2. It was noted that there had been broad agreement to include a definition of a constitutional matter, and that the Court should have no inherent jurisdiction. It was also noted there was general agreement that the Constitution should include the type of order the Court could make. It was noted that a separate clause may be required to deal with jurisdiction, and that a similar problem was experienced regarding the Supreme Court of Appeal.

3. Regarding Subsection (3), after some discussion it was agreed to note that there was little difference of substance, but of nuance. A view had been expressed that the President should not be protected from review other than by the Constitutional Court as this would make litigation more expensive and exclude the possibility of approaching another court such as in the famous Harris case.

4. However, after further discussion it was noted that a higher court should not be excluded from inquiring into the constitutitionality of Acts of Parliament, a Provincial Act, and any conduct of the President, but equally that it may create delays if such matters were to peculate through all courts. It was noted that the concerns may be adequately covered by Section 99 which had been overlooked; by the possibility of referring to the Constitutional Court and declaration pending the decision of the Constitutional Court. Furthermore, it was noted that such a matter would have the benefit of distillation when unconstitutionality is patent, or the government does not dispute it, by allowing the ordinary courts to first deal with the matter.

5. An explanation was given of the development of the thinking behind this issue. It was noted that the schema set up in Sections 98 and

99(2) clearly state that these courts could inquire into validity, but that the actual declaration of invalidity only be done by the Constitutional Court. This was fundamentally the same situation as in the Interim Constitution, with the exception of leapfrogging in 2 situations which would expedite matters.

6. Further regarding jurisdiction in Section 96, a view was expressed that the internal structure of Section 96 seemed imbalanced. It was suggested that it may assist to add words in Section (6(2) emphasising the rule of law and that the Constitutional Court was the upper guardian of the Constitution, to provide absolute clarity. It was noted that there would also be a definition section, but there seemed general agreement to incorporate the suggestions.

7. However, it was noted that the order provisions in Section 99(1) had been overlooked. It was also noted that Section 99(2) allows for such matters to be heard before courts other than the Constitutional Court and for those courts to make findings but "may not declare the Act or conduct invalid; but, the court may grant a temporary interdict or other temporary relief to a party.

8. Regarding the use of "any conduct of the President" in Section 99(3)(b), a view was expressed that from an administrative law perspective, the phrase may be too wide, and aspects such as executive acts of the President or the President acting on his own be excluded. It was noted that this matter be further investigated.

9. Regarding Section 96 3(c), it was noted that the reference to dealing with bills was still under discussion as indicated in the sidebar note. It was noted that what seemed to be in dispute amongst political parties was the question whether a minority party of Parliament should be able to use abstract review, and if so under what conditions, and at what stage.

10. Although views for or against the inclusion of a form of abstract review were generally not expressed, various views were expressed on the basis of such a clause hypothetically included. It was noted that practical matters need to be addressed if abstract review were encountered; it would take a few months to get a decision: then parties would be given an opportunity to prepare written presentations, there was a problem with amicus curiae, and it was unlikely that the matter could be set down earlier than 3 months and it then also depended on the Court roll; although urgent matters could conceivably be expedited.

11. It was noted that some of disadvantages were that there was only

one court decision, of the Constitutional Court, and the views of other courts were not heard, bringing the Constitutional Court into the political process. It was noted that a mechanism guarding against abuse of this process would be required. It was also noted that an advantage of such a process of abstract review could be certainty. A view was also expressed that from an administrative justice point of view, it would be an advantage for the judicial system to know that if such a bill was passed, whether it was constitutionally valid, and reference was made to difficulties experienced with the decision that the death penalty was unconstitutional and hundreds of people at various stages of the system, while awaiting suitable legislation from Parliament.

12. Regarding mechanisms to prevent abuse of the process, other views expressed were that the legislative process not become captive to a small minority. A view was expressed that if this were included in the Constitution, the appropriate place for its inclusion would be in Section 96. A view was also expressed that it should then relate to the period after a bill had been passed, but before its promulgation. A view was also expressed that the CA could decide on appropriate majorities required in this regard. A question was also raised as to the effect such a referral would have on a bill, whether it would make it untouchable, whether the Court would only rule on certain clauses of it, and this was noted for further investigation.

13. It was noted that a number of cases of abstract review were already before the Constitutional Court.

14. Regarding Section 96(4), a suggestion was made that the wording be changed to provide for leapfrogging, and empowering the rules of the Constitutional Court to do so. It was suggested this put beyond doubt the power of appeals from lower courts could be directly to the Constitutional Court.

15. A view was noted that there may be a problem with saying the Constitutional Court has no jurisdiction other than that provided for by the Constitution, for this may exclude jurisdiction provided for in legislation such as provided for in recent legislation regarding claims before the Land Claims Court.

16. It was noted that the draft, because of the importance of the Constitutional Court, had aimed at giving the Court's entire jurisdiction in the Constitution. It was noted that the Sub-committee was open to improvements in the way this was phrased, but that parties may have a problem with adding to or reducing the jurisdiction by way of legislation. A view in response to this was noted that if

jurisdiction may be taken away in this manner it may be inconsistent with the Constitution, but perhaps the Court of Appeal could be dealt with on a different basis.

2.7 Section 97: Supreme Court of Appeal

1. Regarding Subsection (1) it was agreed it may be neater if it dealt purely with composition, whereas another subsection concentrated on the question of jurisdiction.

2. It was suggested that the determination of the number of judges of appeal required for decisions not be determined restrictively and prescriptively. It was further suggested that the definition of "constitutional matters" be avoided, because cases may contain constitutional and non-constitutional matters. A further concern was that "appeal" may not be broad enough to include for example matters not strictly classified as appeal, such as matters of review.

3. Regarding Subsection (3), it was agreed it be refined to take account of what was said, and that the intention would be to rather extend the jurisdiction of the Supreme Court of Appeal, but not to diminish it.

4. A question was raised regarding the applicability of inherent jurisdiction in this context, and whether common law was also included here. It was noted that it was still hazy what was meant by inherent jurisdiction, and that the approach had been to rather say in the Constitution what it is. It was noted that a reformulation o this was available but the experts had not had an opportunity to reflect on it.

5. A view was expressed that in recent years the Appellate Division had managed to extend the meaning of inherent jurisdiction, and that it amy perhaps be dangerous to formulate what is meant by it. A view was also expressed that it may be uncertain whether matters relating to the Water Board or the Income Tax Act falls under the jurisdiction contemplated in Subsection (3).

2.8 Section 98: Other courts

1. A question was raised as to what is included in the words "any legislation" and whether it included courts of inferior status such as chiefs' courts.

2. It was noted that although it was clear that magistrates' courts are given the jurisdiction to invalidate by-laws, there may be a divergence

of views as to the extent of this jurisdiction. It was noted that it may be clear regarding the application of the bill of rights, but that there was at this stage no wider view that Magistrates strike down laws on the basis of unconstitutionality. A concern was raised that in metro areas local government legislation affects millions of people, and that there was a sense that Magistrate hunting for Magistrates prepared to strike down certain laws may become a problem.

3. Regarding the use of the words "court of appeal", it was questioned whether this adequately covered the example of constitutional matters arising in a labour court. In response, it was noted that this example may be covered by Subsection 98(3), but that in general the scheme was that courts of appeal not be by-passed, and that the legislator could not set up another court parallel to the Supreme Court of Appeal.

4. A suggestion was also made that High Courts in Subsection (1) and other courts in Subsection (2) be split up in the conceptual framework.

2.9 Section 99: Powers of courts in constitutional matters

1. Regarding Subsection (1), a concern was raised that the impression was created that any court other than the Constitutional Court must declare invalid the inconsistent law or conduct, but what was actually intended was only the Constitutional Court. It was noted that this may be phrased more clearly.

2. A concern was noted that the intention be not to limit the arsenal of choices, but then there seems to be internal contradictions in the rest o the section. It was noted that the word "retrospectivity" may have a certain jurisprudential meaning important to the application of this clause, and that legalise often came about in order to create certainty.

3. In response it was noted that Subsection (1) is in line with the argument that laws struck down are void from the moment of being passed, and that the next subclause sets the effective date, for example one could way it has effect from the moment the new Constitution, or with limited retrospectivity, etc,. It was noted that the last mentioned subsection clearly gives jurisdiction to the Court to decide whether to make it retrospective in application or not.

4. Another concern was that the response to legislation was not always to strike it down, and that sometimes legislation could fore example be cured of undue narrowness of law. A suggestion was noted that Section 98 of the Interim Constitution, Subsections (5), (6), and (7),

were clear and well nuanced and had worked well in practice.

5. In response it was noted that this question had been considered and the suggestions were noted. It was also noted that a question of the appropriate evidential burden regarding persons sentenced unconstitutionally was still under consideration.

6. Regarding Subsection (2), it was agreed to consider a view was expressed that there was an inconsistency that the High Court cannot declare invalid, but can give an interdict which had the practical effect of a binding decision.

2.10 Section 100: Appointment of judicial officers

Regarding the issue whether it be constitutionalised that judges be citizens or not.

1. A view was expressed that the judges of the Constitutional Court should be South African citizens or have permanent residence, because they make decisions of profound socioeconomic impact. A view was expressed that judges should stay sufficiently long in a society, and must therefore "buy" into the system.

2. Contrary views were also expressed, namely that the best incumbents serve in these positions, and that a qualification of citizenship may unnecessarily keep out a suitable person. A further view was that this was not a matter to be prescribed by the Constitution, but rather by the Judicial Service Commission. A further view was to note that for the Constitutional Court citizenship was a statutory requirement, but this speaker was against the view that there be a policy confining appointments to South African citizenship.

Regarding the appointment of judges, appointment by Parliament, or by the President on the advice of the Judicial Service Commission.

4. Different views were expressed on the mechanism for the appointment of judges. A view expressed was that option 1 was preferred, but as much power was in the hands of the Judicial Services Commission itself, did not agree that the President still had a power of veto, only a residual power if the 3 names were not enough.

5. Another view expressed was a preference for a combination of option 1 and option 2. It was said that the JSC was at present too large, and that a list should be circulated of all prospective judges, with a residual possibility of a majority of Parliament deciding; therefore a hybrid proposal applying to all judges from High Court level.

6. Other views were expressed that the participation of lay persons in the JSC be increased, and that this was in line with the trend explained in the document from the Independent Panel of Experts.

7. Another view was expressed in favour of option 1, but with at leat 4 person coming from the judiciary, although doubt was expressed whether these details be in the constitution

2.11 Section 101: Acting Judges

Regarding the view that if they serve longer than 6 months their service has to be confirmed by the Judicial Service Commission

1. A view was expressed that there was no reason why the JSC was removed from this process and that actin Judges be appointed for no more than 3 months without approval of the JSC.

2. Contrary views were expressed that the practicalities, means that the JSC does not have to sit regularly and become a laborious process which may have counter-productive effect/

2.12 Section 102: Tenure and Remuneration

Regarding the terms of office, particularly whether the judges presently serving should continue to do so

1. A concern was raised that the term "for up to nine years" may be too imprecise.

2. A view was expressed that extension for four years means that the 4 oldest judges would leave the system, and that there was a conceptual problem with this, because it could mean that the younger judges would return to the Supreme Court,, and give decisions on issues on which they had already made binding decisions.

3. Another view was expressed that regarding the present Constitutional Court members, a period of longer than 7 years was opposed, and that there were particular needs regarding the transition requiring judges to retire; a lottery was suggested, the possibility of an extension of service, and the appointment of additional judges.

4. A view was expressed that the requirement of 9 years was inconsistent with the scarcity of resources, would detract from the independence of the judiciary, and would mean persons would have to find other options after their term.

5. With reference to the barnote that it was under consideration to extend by four years the terms of all but the 5 oldest Constitutional Court judges, a view was expressed indicating concern that such limits be placed on the terms. It was noted that in Germany the limit was 12 years but the view was expressed that this was not reasonable; in the USA the limit was 40 years, on the bench, presumably because it was felt that by that time a person would be out of touch with the development of society. The view was expressed that obviously at the time of transition it was impossible to establish longer terms, but the experience gained in the allotted periods would be important and that the CA was not bound to the earlier limitation on term.

6. Another view was expressed that the present legal judges of the Constitutional Court have been the beneficiaries of apartheid and that the period of 9 years was slightly too long. It was pointed out, however, that in terms of the composition of the Court, this did not necessarily hold true, and that the first Constitutional Court Judges to depart would be the white males.

2.13 Section 103: Removal

1. It was agreed and referred for technical refinement that there may be an internal contradiction between Subsection (1) and Subsection (2), the first mentioned saying a judge "may" be removed, whereas in the last mentioned subsection, the President "must remove" this judge.

2.14 Regarding the question whether there be a national Attorney General, and if so, what his or her role or functions

1. Submissions were invited on this question. It was not discussed because it was agreed the meeting close at the agreed upon time

3. CLOSURE

The meeting closed at 15h30.

ATTENDANCE

Association of Law Societies
- **BURMAN Mr D**
- **LEON Mr**
- **VAN VUUREN Mr A L J**

Black Lawyers Association
- **MOLOTO-MOLAMU Ms P**

Constitutional Committee Sub-committee
- **Chairperson and Deputy Chairperson attended opening:**
  - **RAMAPHOSA Mr C**
  - **WESSELS Mr L**
- **GREEN Mr L M**
- **DE LANGE Mr J**
- **MOOSA Mr M**
- **NGCUKA Mr B T**
- **HOFMEYER Mr W**
- **VAN HEERDEN Mr F J**
- **EGLIN Mr C W**
- **GIBSON Mr D**
- **SCHUTTE Mr DPA**

Constitutional Court
- **ACKERMANN Judge L W H**
- **CHASKALSON Judge (President) A**
- **MOHAMED Judge J**
- **OLIVIER Judge P J J**

General Council of the Bar
- **BLIGNAULT Advocate A P**

Hoexter Commission
- **MARAIS Mr G**
- **O'CONNELL Mr R A**

Independent Panel of Experts
- **KRUGER Mr J**
- **MURRAY Ms C**
- **SEDIBE-NCHOLO Ms P**

Judiciary other than Constitutional Court
- **CORBETT Chief Justice**
- **FRIEDMAN Justice J**

Lawyers for Human Rights
- **SALOJEE Mr R**

Legal Resources Centre
- **TRENGROVE Advocate Wim**

National Association of Democratic Lawyers
- **SALDANHA Mr V**
- **ZINTL Mr S**

University of the Western Cape Community Law Centre
- **STEYTLER Mr N**

University of Cape Town Law Faculty
- **CORDER Mr H**

University of Stellenbosch Law Faculty
- **ERASMUS Mr H J**