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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEMS

1 FEBRUARY 1995

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 : 1st February 1995
Time : 14h00
Venue : Room M515 (Marks Building)

AGENDA

1. Opening
2. Address by Hon. Judges IG Farlam and S Selikowitz
3. Discussion (Clarification and Questions)
4. Address by Prof. H. Corder
5. Discussion (Clarification and Questions)

Theme Committee 5 meeting will follow immediately after the above inputs:

AGENDA

1. Opening
2. Minutes
3. Matters arising

4. Core Group Report

- a) Work Plan and Schedule of meetings (revised)
- b) Technical Assistance
- c) Workshop - Public Participation
- d) Submissions

5. General

6. Closure

The Core Group meeting will follow immediately after TC5 meeting.

Enquiries:

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REPUBLIC OF SOUTH AFRICA

18 JAN 1995

JUDGES' CHAMBERS
SUPREME COURT
CAPE TOWN

21 December 1994

The Secretary - Theme Committee Five
Constitutional Assembly
P O Box 15
Cape Town
8001

Dear Secretary

RE: NEW CONSTITUTION

Enclosed herewith please find a copy of a memorandum containing proposals relating to the structure of the courts under the new constitution which has already been sent to the Department of Justice. We should be happy to give oral evidence in amplification of the views set out therein.

Yours faithfully

JUDGE S SELIKOWITZ

JUDGE I G FARLAM

MEMORANDUM

It is suggested that in the Permanent Constitution, provision should be made for the administration of justice at superior court level by means of a three tiered court system, as follows :

- (1) 9 provincial divisions of the Supreme Court, one for each province, with provision for temporary (circuit) local divisions and, where necessary, permanent local divisions at centres some distance away from the seats of the provincial divisions : the provincial divisions could also hear appeals from inferior courts in the province.

- (2) 3 appellate divisions of the Supreme Court, each having as its area of appellate jurisdiction, a circuit made up of three provinces. It is suggested that the 3 appellate areas could be : (a) the provinces of the Western Cape, the Eastern Cape and Kwazulu/Natal (the First Circuit Court of Appeals or the Coastal Circuit); (b) the Northern Cape, the North West and the Orange Free State (the Second Circuit Court of Appeals or the Central Circuit); and (c) the provinces of Pretoria-Witwatersrand Vereeniging, the Eastern

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Transvaal and the Northern Transvaal (the Third Circuit Court of Appeals or the Northern Circuit). The grouping of the provinces into appellate circuits has partly been dictated by convenience. The three maritime provinces (Western Cape, Eastern Cape and Kwazulu/Natal) are linked by regular and easily accessible airline routes.

- (3) One High Court - the highest Court in the land - which would hear appeals from the Circuit Courts of Appeals, but only in those cases in which it has given leave to appeal to itself. In other words, it would function as does the United States Supreme Court and only hear those cases it chooses to hear. (Possibly provision could be made for appeals as of right to it in cases between Provincial Governments and the Central Government and a Provincial Government and cases where a Circuit Court of Appeals had declared unconstitutional an Act of the central Parliament. If the Permanent Constitution makes provision for advisory opinions to be sought by Parliament on the constitutionality of proposed legislation, then such cases could also be brought before the High Court without its

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leave being first obtained.)

It is considered that judges of all tiers of the Supreme Court should be empowered to deal with constitutional matters and should have the power to declare Acts of Parliament unconstitutional and that provision should not be made for a separate Constitutional Court. The present system with constitutional questions going to the Constitutional Court and other questions going to the Appellate Division, with the consequent delays and other problems associated therewith should not, it is considered, form part of the permanent constitutional arrangements. The factors which we believe led to the present dichotomy between the Constitutional Court and the Appellate Division and the decision to give only the Constitutional Court the power to declare Acts of Parliament unconstitutional should no longer be applicable under the permanent constitution.

The structure suggested above is based on the federal court structure in the United States. In a sense it involves decentralising the Appellate Division, breaking its three chambers down into separate appellate courts, and putting the High Court at the apex with the power to hear constitutional matters and also important cases of a non-constitutional nature where the importance and difficulty of the point at issue justifies the case being heard at the highest

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level. For example, a question such as whether there is a general enrichment action could and should be considered by the highest court as would cases where the various Circuit Courts of Appeal have given conflicting judgments.