

2/4/5/3/1

CONSTITUTIONAL ASSEMBLY

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REF No:

MEMORANDUM

DATE: 4 November 1994
TO: All Theme Committee 5 Members
FROM: The Secretariat
Theme Committee 5
RE: Work Programme Report

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Dear Members,

The Work Programme Report is attached for your consideration and approval at the next Theme Committee meeting.

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 5
JUDICIARY AND LEGAL
SYSTEMS**

WORK PROGRAMME

4th November 1994

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5 JUDICIARY AND LEGAL SYSTEMS

WORK PROGRAMME REPORT

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

The work of the Theme Committee will in the first instance be guided by the relevant constitutional principles enshrined in the interim constitution. The Constitutional Principles will form the parameters within which the Constitutional provisions dealing with the judicial system will have to be developed.

The rest of the interim Constitution dealing with the judicial system and with traditional leaders and authorities and customary law will form a useful basis and guideline for the further deliberations of the Theme Committee.

Below is indicated the relevant constitutional principles as well as the other issues to be dealt with. The list is by no means exhaustive and can be amended from time to time.

The applicable Constitutional Principles:

- 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.
- IV The Constitution shall be the supreme law of the land. It shall be binding on all levels of government.
- V The legal system shall ensure equality for all before the law and an equitable legal process. Equality before 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 Constitution and fundamental rights.
- XIII The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

PART I: STRUCTURES RELATING TO THE ADMINISTRATION OF JUSTICE

A. CONSTITUTIONAL COURT

- (1) Levels of courts [Section 98]
- (2) Seats of court [Section 106]
- (3) Jurisdiction of courts [Section 98]
- (4) Criteria for appointment [Section 98, 99]
- (5) Composition of Constitutional Court [Section 99]
- (6) Number of judges [Section 98(1)]
- (7) Procedure for appointment [Section 97(2)(a) (b) & 99]
- (8) Term of office [Section 99, 97.2(b)]
- (9) Review/removal [Section 104(4)]
- (10) Remuneration and conditions of service [Section 104 (2)]
- (11) Court Procedures:
 - (a) Engaging the Court [Section 100]
 - (b) Relationship between Constitutional Court and Supreme Court [Section 102]
 - (c) Appeals: Supreme Court to Constitutional Court [Section 102]

B. OTHER COURT STRUCTURES

1. Structures

- a) Levels of courts

- i) Appellate Division [Section 101]
- ii) Supreme Court [Section 101]
- iii) Magistrate Courts [Section 103]
- iv) Specialized Courts, incl. community courts [Section 103]
- v) Traditional Courts

b) Seats of Court

- i) Appellate Division [Section 106]
- ii) Supreme Court [Section 101]

c) Jurisdiction of Courts

- i) Supreme Court [Section 101]
- ii) Magistrates Court
- iii) Specialised courts, incl community courts
- iv) Traditional courts

2. Personnel

a) Structures dealing with appointments

- i) Judicial Service Commission
 - composition [Section 105(1)]
 - functions [Section 105(2)]
- ii) Magistrates Commission [Section 109]

b) Criteria for appointment

- i) Supreme Court [Section 104(1)]

c) Composition of courts

- i) Heads of courts
 - Supreme Court [Section 97]
- ii) Number of Judges [Section 98(1)]

d) Procedure for appointment

- i) Supreme Court [Section 104]
 - Head
 - Judges
- ii) Magistrates Court
- iii) Other courts

- e) **Term of office**
 - i) Supreme Court [Section 97.2(b)]

- f) **Review / removal**
 - i) Supreme Court [Section 104(4)]
 - ii) Magistrates Court

- g) **Remuneration and conditions of service**
 - i) Supreme Court [Section 104 (2)]

3. Court Procedures

- a) Appeals: Magistrates Court to Supreme Court [Section 103]
- b) Appeals: Supreme Court to Appellate Division

B. OTHER JUDICIAL STRUCTURES

1. Attorneys General

- a) Status
- b) Independence/Accountability
- c) Appointment
- d) Provincially based or national

2. State Attorney

C. TRADITIONAL / CUSTOMARY LEGAL SYSTEMS

- 1. Recognition of indigenous law [Section 181]
- 2. Traditional authorities and indigenous law [Section 182]
- 3. Customary courts

PART II: ACCESS TO JUSTICE

- A Right to counsel in certain criminal matters
- B Legal assistance in civil matters
- C Alternative Dispute Resolution Mechanisms

PART III: LEGAL EDUCATION

PART IV: LEGAL PROFESSION

PART V: GENERAL

- A Court languages [Section 107]
- B Continuation of existing law [Section 229]
- C Repeal of laws [Section 230]
- D International law and continuation of agreements [Section 231]
- E Interpretation of laws [Section 232, 233]
- F Amnesty [Postamble]
- G Rationalisation of courts [Section 242]

PART VI: TRANSITIONAL ARRANGEMENTS

[Section 2.41 (1) - (10)]

PART VII: TRADITIONAL AUTHORITIES, INSTITUTIONS, STATUS AND ROLE OF TRADITIONAL LEADERSHIP AND INDIGENOUS LAW

- i) Recognition of indigenous law [Section 181]
- ii) Traditional Authorities and Indigenous Law. [Section 182]
- iii) Provincial House of Traditional Leaders. [Section 183 (1) and (2)]
- iv) Council of Traditional Leaders. [Section 184 (1) - (5)]
- v) Customary Courts
- vi) 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

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

- i) Matters relating to the Constitutional Court
- ii) The relationship between the Constitutional Court and other courts
- iii) Issues relating to the appointment of judicial officers
- iv) Position of Traditional Authorities and indigenous law

(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 further more 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.

It is suggested that should an area of overlap occur in future with regard to the work of this Theme Committee and other Theme Committees, it should be attempted to reach agreement on a division of the matters to be dealt with and thereafter joint committees should be considered to deal with the relevant matter.

(d) Issues to be dealt with in Commissions

It is too early to identify the need for commissions on certain issues

(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) The organisations, groups and persons indicated on the attached list will be notified as well as the public at large. There can be further additions to the list.

(ii) All traditional authorities and traditional leaders, academics in the relevant field, relevant monarchs and the public at large. The traditional leaders will also be consulted on the question of who should be notified.

(h) Community and media liaison assistance required.

Administrative assistance to send invitations to interested persons and organisations 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 relating to the issues to be dealt with as listed above will be required.