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**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL
COMMITTEE**

**FRIDAY
25 AUGUST 1995
14h00
OLD ASSEMBLY
CHAMBER**

***SUB-COMMITTEE REPORT ON
COURTS AND THE
ADMINISTRATION OF JUSTICE***

Embargoed until 14h00 25 August 1995



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

DATE: 23 August 1995.
TO: The Constitutional Committee
FROM: Hassen Ebrahim
RE: **MATTERS REGARDING THE JUDICIARY AND LEGAL SYSTEMS
DRAFT FORMULATIONS.**

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A. Judicial Authority and Jurisdiction of other courts

(See Footnotes 1, 2 and 10)

The Sub-Committee is agreed that Magistrates Courts and other courts should be given constitutional jurisdiction. The contention is the extent of this constitutional jurisdiction. This is a matter of technical drafting and has been referred to the law advisers for an opinion.

No decision is required.

B. Appointment of Judicial Officers

There is no consensus on this issue. The contention is the appointment of the Chief Justice, President and Deputy President of the Constitutional Court and all other judges of the Constitutional Court. The two views are as follows:

1. **Appointment of the Chief Justice and President of the Constitutional Court.**
 - a) The Chief Justice and the President of the Constitutional Court shall be appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.
 - b) The Chief Justice and the President of the Constitutional Court shall be appointed by the President (in consultation with the Cabinet and) on the advice of the JSC.

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THE NEW CONSTITUTION

The contention in (1) is whether the appointment is "after consultation" or "on the advice" of the Judicial Service Commission.

2. Appointment of Constitutional Court Judges.

- a) Section 99(4) and (5) of the Interim Constitution (attached).
- b) The Deputy President of the Constitutional Court and all the judges of the Constitutional Court shall be appointed by the President after advice by the Judicial Service Commission and in consultation with the leaders of all political parties represented in Parliament. In the event of no consensus having been reached by the party leaders, the judges will be appointed by a majority of more than 75% of the members of the National Assembly and Senate sitting together. (Please note that this is the Compromise position of the NP. The original position being appointments in the same way as the Human Rights Commission is appointed in the present constitution but after advice from the JSC).

The contention in (2) is whether we retain the present formula of the Interim Constitution as stated in 2(a) or allow for more parliamentary approval of appointments as stated in 2(b).

C. Jurisdiction of the Constitutional Court

The Sub-Committee proposed that this matter be debated at a Constitutional Assembly level: The clause in the draft reads as follows:

"to consider the constitutionality of any Bill before (passed by) Parliament or a provincial legislature. At the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature acting on a petition by not less than 20% of each of the Assembly or Senate, or legislature, as the case may be, or all the members of all parties not constituting the majority party in such body, and with the leave of the Constitutional Court."

The contention is whether a Bill can be referred to the Constitutional Court "before approval" or "after passed" by Parliament. This clause needs to be reformulated once agreement is reached. There is also a view that this clause is unnecessary.



CONSTITUTIONAL ASSEMBLY

SECTION 99(4) AND (5) OF THE INTERIM CONSTITUTION

Composition of Constitutional Court and appointment of judges of Constitutional Court

99. (1) Unless the new constitutional text provides otherwise, the judges of the Constitutional Court shall be appointed by the President for a non-renewable period of seven years.

(2) No person shall be qualified to be appointed President or a judge of the Constitutional Court unless he or she —

(a) is a South African citizen; and

(b) is a fit and proper person to be a judge of the Constitutional Court; and

(c) (i) is a judge of the Supreme Court or is qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least 10 years after having so qualified, practised as an advocate or an attorney or lectured in law at a university; or

(ii) is a person who, by reason of his or her training and experience, has expertise in the field of constitutional law relevant to the application of this Constitution and the law of the Republic.

(3) Four judges of the Constitutional Court shall be appointed from among the judges of the Supreme Court by the President in consultation with the Cabinet and with the Chief Justice.

(4) Subject to subsection (5), six judges of the Constitutional Court shall be appointed by the President in consultation with the Cabinet and after consultation with the President of the Constitutional Court: Provided that not more than two persons may be appointed from the category of persons referred to in subsection (2)(c)(ii).

(5) (a) Subject to subsection (6), an appointment or appointments under section 97(2) or subsection (4) or (7) of this section shall only be made from the recommendations of the Judicial Service Commission, and with due regard to its reasons for such recommendations, of not more than three nominees in excess of the number of persons required to be appointed: Provided that in respect of the first appointment after the commencement of this Constitution of the six judges referred to in subsection (4), the Judicial Service Commission shall submit a list of ten nominees.

(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.

CHAPTER.....

THE COURTS AND THE ADMINISTRATION OF JUSTICE

Judicial Authority

1. (1) The judicial authority of the Republic shall vest in the courts established by the Constitution or an Act of Parliament.
- (2) The courts shall be independent and subject only to this Constitution and the law.
- (3) The courts shall apply the Constitution and the law impartially and without fear, favour or prejudice.
- (4) No person and no organ of state shall interfere with the courts in the performance of their functions.
- (5) The orders issued by the courts within their respective jurisdictions shall bind all persons and organs of state.
- (6) Organs of state shall, through legislative and other measures, give the courts the necessary assistance to protect and ensure their independence, dignity and effectiveness.

- (7) The constitutional jurisdiction¹ of all courts and the jurisdiction of the Supreme Court of Appeal shall only be determined by this Constitution; the ordinary jurisdiction of all other courts shall be determined by an Act of Parliament²
- (8) All other matters pertaining to the functioning of any court shall be regulated only by an Act of Parliament or regulations or rules made thereunder.

The judicial system

2. There shall be the following courts of law in the Republic:

- (i) The Constitutional Court, which shall be the highest court with constitutional jurisdiction, and which shall consist of a President, a Deputy President and nine other judges, four of whom shall be appointed from among the judges of the Supreme Court of Appeal or the High Court.
- (ii) The Supreme Court of Appeal³, which shall be the highest court of appeal in all matters other than those within constitutional jurisdiction, and which shall consist of the Chief Justice, a Deputy Chief Justice and such number of judges of appeal as may be determined.

¹ "Constitutional jurisdiction" - used here and in sections 3(1) and 4(1) - to be defined in a definition section - as "jurisdiction in respect of all matters relating to the interpretation, protection and enforcement of this Constitution and all Provincial Constitutions."

² This sub-clause may have to be reformulated once finality has been achieved as regards the constitutional jurisdiction of the Magistrate's Court and other Courts.

³ The SCA is a redesignation of the Appellate Division, with the addition of constitutional jurisdiction. Transitional provisions must provide for any reference in any other law to the AD to be construed as a reference to the SCA.

- (iii) Such Courts of Appeal as may be established by Act of Parliament, to hear appeals from the High Court or courts of similar status.
- (iv) The provincial and local divisions of the High Court and other courts of similar status⁴.
- (v) Magistrates' Courts and other courts of similar status.⁵
- (vi) Other courts established by law.⁷

Jurisdiction of the Constitutional Court

- 3. (1) The Constitutional Court only shall have jurisdiction:
 - (a) to determine constitutional disputes between the national and provincial governments or between provincial governments.
 - (b) to consider the constitutionality of any Bill before (passed by) Parliament or a provincial legislature. At the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature acting on a petition by not less than 20% of each of the Assembly or Senate, or legislature, as the case may be, or all the members of all parties not constituting the majority party in such body, and with the leave of the Constitutional

⁴ Such as the Water Court, Labour Appeal Court, Special Income Tax Court, and perhaps now the Land Claims Court. Consider the insertion of the words "presided over by a judge".

⁵ Consider the insertion of words "Presided over by a magistrate".

⁷ This section makes provision for the establishment of traditional land community courts, should this upon further investigation be determined to be desirable and feasible.

Court.⁸

- (2) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.
- (3) The final decision as to whether a matter falls within its jurisdiction lies with the Constitutional Court.
- (4) There shall be direct access to the Constitutional Court where the interests of justice so require with leave of the Constitutional Court.
- (5)
 - (a) If the Constitutional Court finds any law, executive or administrative act to be inconsistent with the Constitution, it shall declare such, law or act invalid to the extent of its inconsistency.
 - (b) The Constitutional Court may in any matter make such further order as it may deem just and equitable, including whether or to what extent any declaration of invalidity is to have retrospective operation, and an order as to costs.
 - (c) The Constitutional Court may suspend a declaration of invalidity for a specified period to allow the competent authority to correct the defect, and impose such conditions in that regard as it may decide.
- (6)
 - (a) All other courts having constitutional jurisdiction may make the orders set out in clauses 4(a), (b) and (c).
 - (b) If any other court other than the Constitutional Court holds a national or provincial statute or any executive action of the President to be inconsistent with the Constitution, such finding shall have no force or effect unless confirmed by the Constitutional Court on appeal to it or on application to it by any person or organ of state with a sufficient interest.

⁸

Two views on 3(1)(b) - retain (b) or delete (b). Formulation on (b) to be debated.

Jurisdiction of other courts

4. (1) The Supreme Court of Appeal, a Court of Appeal, a provincial or local division of the High Court and any other court of similar status shall, in addition to any inherent jurisdiction existing at the date this Constitution takes effect⁹, have constitutional jurisdiction and any other jurisdiction conferred by an Act of Parliament.
- (2) The Magistrate's Courts and all other courts shall have such constitutional and other jurisdiction as may be conferred by an Act of Parliament.¹⁰

Appointment of judicial officers

5. (1) No person shall be qualified to be appointed a judicial officer or acting judicial officer unless he or she is a South African citizen and is a fit and proper person to be a judicial officer.
- (2) A judicial officer 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 X before a judge.
- (3) The Chief Justice and the President of the Constitutional Court shall be appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.

National Party: The Chief Justice and the President of the Constitutional Court

⁹ See note 4. Transitional provisions must ensure that inherent jurisdiction vesting in the present divisions of the Supreme Court continues in respect of the High Court, any Court of Appeal which may be established, and Supreme Court of Appeal.

¹⁰ No consensus has been reached on this aspect. The present formulation is based on the view that the matter needs further consideration and should be dealt with by Parliamentary legislation. If so, must clause 1(7) be reformulated?

shall be appointed by the President (in consultation with the Cabinet and) on the advice of the JSC.

(4) Appointment of Constitutional Court Judges.

ANC view: Section 99(4) and (5) of the Interim Constitution

National Party: The Deputy President of the Constitutional Court and all the judges of the Constitutional Court shall be appointed by the President after advice by the Judicial Service Commission and in consultation with the leaders of all political parties represented in Parliament. In the event of no consensus having been reached by the party leaders, the judges will be appointed by a majority of more than 75% of the members of the National Assembly and Senate sitting together. (Please note that this is the Compromise position of the NP. The original position being appointment in the same way as the Human Rights Commission is appointed in the present constitution but after advice from the JSC).

(5) The Deputy Chief Justice, Deputy President of the Constitutional Court, and all other judges shall be appointed by the President on the advice of the Judicial Services Commission.

(6) The appointment of other judicial officers shall be regulated by an Act of Parliament.¹¹

(7) Members of the Constitutional Court shall hold office for non-renewable terms not exceeding nine¹² years.

(8) The five oldest members of the Constitutional Court in office at the time of the expiration of the terms of office of the present judges of the Constitutional Court shall retire at such expiration and all other members after the expiration of a further period of

¹¹ Consensus still to be attained. Is it necessary to refer to the Magistrate's Commission?

¹² Advisor's suggested compromise.
ANC - 10 years. NP - 7 years.

four years.¹³

- (9) Acting judges shall be appointed by the Minister of Justice on the advice of the President of the Constitutional Court, the Chief Justice, or the Judge President of the appropriate division of the High Court or other court constituted in terms of section 2(v), as the case may be. An Acting judge to the Constitutional Court shall not serve for a total period exceeding 6 months.

Removal of judges from office

6. (1) The President may remove a judge from office on grounds of incapacity, gross misconduct or gross incompetence upon a finding to that effect by the Judicial Service Commission and the adoption by Parliament in joint session and by a majority of two-thirds of members of a resolution calling for the removal of such judge from office.
- (2) A judge who is the subject of an investigation may be suspended by the President on the advice of the Chief Justice pending the finalisation of such investigation.
- (3) The emoluments and pension and other benefits of judges and acting judges shall be prescribed by Act of Parliament or regulations made thereunder and shall not be subject to reduction.

Judicial Service Commission¹⁴

¹³ This is a transitional mechanism and subject to further debate.

¹⁴ **Consensus issue:** Given the lack of consensus, the current section 105 is simply replicated here (with certain minor consequential changes arising from the other provisions of this draft chapter).

7. (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;
 - (b) the President of the Constitutional Court;
 - (c) one Judge President designated by the Judges President;
 - (d) the Minister responsible for the administration of justice or his or her nominee;
 - (e) two practising advocates designated by the advocates' profession;
 - (f) two practising attorneys designated by the attorneys' profession;
 - (g) one professor of law designated by the deans of all the law faculties at South African universities;
 - (h) four senators designated *en bloc* by the Senate by resolution adopted by a majority of at least two-thirds of its members;
 - (i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet;
 - (j) on the occasion of the consideration of matters specifically relating to a provincial division of the High Court, the Judge President of the relevant division and the Premier of the relevant province.
- (2) The functions of the Judicial Service Commission shall be -

- (a) to make recommendations regarding the appointment and removal from office of judges in terms of sections 5 and 6;
- (b) to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice;
- (3) When the Commission performs its functions in terms of subsection 2(b), it shall sit without the four senators referred to in subsection 1(h).
- (4) The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decision.
- (5) The Commission may appoint committees from among its number and assign any of its powers and functions to such committee.

Seats of Courts

- 8. [TC 1 must report]

Language

- 9. [TC 1 must report]

