

FREEDOM FRONT

13 MARCH 1995

THEME COMMITTEE 5: JUDICIARY AND LEGAL SYSTEMS

Block 1: The relationship between different levels of the court;  
a single or split judiciary

The various subdivisions of the subject-matter dealt with by this theme committee can conveniently be set out under the following headings:

- (i) Independence and impartiality of the judiciary (Constitutional Principles 6 and 7 generally;  
the appointment and removal from office of judges (no specific Constitutional Principles, but sections 104 and 205 of the Transitional Constitution).
- (ii) Equality of all before the law and an equitable legal process  
(Constitutional Principle 5 and section 107 of the transitional Constitution).
- (iii) The various courts in South Africa and their Jurisdiction (including enforcement powers in respect of the common law, statute law, the Transitional Constitution and indigenous law  
(Constitutional Principles 7, 13 and 34).

Presumably it is contemplated that (i) above will not be dealt with in Block 1 but in one of the later blocks. This document is therefore confined to subdivisions (ii) and (iii) above.

2) Equality of all before the law -- equitable legal process

Constitutional Principle 5, in prescribing equality before the law, specifically requires that such equality 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 ('affirmative action.').

The mandatory provisions of Principle 5 find their present counterpart in section 8 of chapter 3 (Fundamental Rights) of the transitional Constitution. This latter provision is, however, more extensive in scope than the provisions of Principle 5. It follows that the new Constitution need not necessarily include the extensive grounds set out in the present equality clause (section 8), one or more of which way well prove to be contentious, eg. the question of sexual orientation.

As far as the scope of the above-mentioned affirmative action requirements are concerned the view may be adopted that they should not be so extensive as to be counter-productive and in effect bring about reverse discrimination. Should affirmative action not be aimed solely at equality of opportunity, coupled with implementation on the basis of merit only? Any other formula would be neither in the interest of the individual concerned, nor that of his employer or principal, nor of the country as a whole.

Equality of all before the law and an equitable legal process requires constitutional provisions ensuring what can generally be termed 'access to justice'.

The concept 'access to Justice' covers many aspects of the judicial system, but two predominant aspects should be mentioned at this stage, viz the plight of indigent litigants and the need to conduct legal proceedings in a language understood by parties

to litigation, accused persons and witnesses (see, in this regard, section 107 of the transitional Constitution).

Whereas section 107 --.'a to deal with the latter problem, it

is submitted that the provisions of section 3 of the transitional Constitution are inadequate to afford sufficient protection to at least some of the present official languages, and that these provisions, if re-enacted without amendment in the new Constitution, will have a bearing on any section in such Constitution that will replace the present section 107.

As far as indigent litigants are concerned, statutory provisions governing legal aid and a right to legal representation pose special problems, if not of a juridical nature, then at least of an economic nature (a question of financial resources and of manpower).

### 3) The various courts and their Jurisdiction

Constitutional Principle VII, dealing with the qualifications, independence and impartiality of the judiciary, is merely a re-affirmation of principles already enshrined in our law, with the exception of adjudication in respect of fundamental rights.

### 3

Constitutional Principle XIII deals with the protection of the institution, status and role of traditional leadership, according to indigenous law. According to this Principle indigenous law as well as the common law shall be recognised and applied by the court, but subject to the fundamental rights contained in the Constitution and legislation dealing specifically with the latter.

The application of the common law poses no special problems. However, the application of indigenous law is now made subservient to the fundamental rights to be acted out in the Constitution and related legislation. This means that there is a potential conflict between rules of indigenous law on the one hand, and the Constitution and the above mentioned related legislation on the other hand. To avoid a clash of these two legal systems, with its potential for social and political discord and strife, the Constitution should be drafted in a 'manner that preserves indigenous law to the greatest extent possible. Conflict of other laws with indigenous law should in this way be reduced to a minimum.

Ordinary statute law and the provisions of the transitional Constitution ought to create no special problems either: such provisions will be applied by all courts, within such limits on their jurisdiction as may be imposed by statute.

Constitutional Principle XXXIV envisages the self-determination of communities in certain circumstances. Self-determination in this context implies a judicial system that will be aimed also at the protection of community interests safeguarded by the Constitution. A Constitutional guarantee of community self-determination would not

be effective without appropriate measures of enforcement by the judiciary. This Principle contemplates different forms of self-determination. The adoption of a particular form of self-determination for a community will have an impact on the judicial system applicable to that community whether it will prove to be, in the words of this Principle, 'in a territorial entity within the Republic or in any other recognised way'.

The transitional Constitution leaves the existing court structures intact to a large extent. The paragraphs ~ above show that The new Constitution should make provision for the adaptation of the judiciary system in the manner respects indicated, Adaptation of the system should also take place to Give effect to the proposed general court structure set out below,

The exposition below proceeds on the assumption that a

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Constitutional Court will be Established. However, should that not be the case. the proposed Jurisdiction of a Constitutional Court, referred to below, should be taken to refer to a constitutional chamber of the-Central Supreme Court,

Constitutional provisions to ensure the independence and impartiality of the judges of the Constitutional Court will be dealt with in another block than Block 1 (see (i) above).)

The proposed general court structure

Different courts for different systems

Apart from

(a) courts dealing with indigenous law, there ought to be two different court systems in South Africa, viz

(b) courts for the different provinces or states (hereinafter merely called 'states'); and

(c) courts for the central system.

Each state must have its own lower courts, a supreme court and a court of appeal. All such courts should fall under the legislative competence of the state concerned.

### 1) Courts of states

General: state courts should adjudicate in state matters

The matters in respect of which the courts of states have jurisdiction should coincide with the legislative and executive competence of such states. This includes all administrative matters relating to the administration of such states, as well as all internal constitutional matters of such states.

All judicial officers (judges, magistrates, etc) of the courts of a state should be appointed by the government of such state or by a body established by such state.

A state should have a supreme court and lower courts.

#### Supreme Court

The supreme court of a state should have criminal and civil jurisdiction in respect of all persons in that state and causes of action arising inside such state, according to the current rules relating to jurisdiction. The supreme court of a particular state can also have specialised divisions, e.g. for labour matters, family matters, patents, water law, tax, etc.

#### Lower courts

Lower courts should be established to deal with a wide variety of matters, e.g. magistrates' courts (general civil and criminal Jurisdiction up to certain limits) and small claims courts. The

jurisdiction of such lower courts should extend to all criminal and Civil matters arising from the legislation of such a state or legislation by the central authority. An automatic right of appeal to the supreme court of the state should exist, but the lower

court may be approached to grant leave to appeal directly to the central supreme court in respect of matters arising from legislation by the central government.

### Appeal courts for states

The appeal court in respect of all criminal and civil matters in a state should be the Appeal Court established for that particular state, but the different states can establish a joint court of appeal if they so wish.

### Appeals from the supreme court of a state or from the Appeal Courts for state(s)

The Supreme Court and the Appeal Court of a state have jurisdiction to adjudicate in respect of all constitutional matters, but should be obliged to reserve a particular question affecting the powers or duties of the central government for adjudication by the Constitutional Court.

## 2) Central or national supreme court

A central supreme court should be established. This court may have its seat at different venues within the different states. The central supreme court ought to have original criminal and civil jurisdiction in respect of all matters relating to the legislative and executive competence of the central government.

This court should also have jurisdiction in respect of all inter-state disputes, viz. disputes between the different states, as well as disputes concerning litigation between the governments of the different states, and disputes in respect of all administrative and constitutional matters directly affecting the central legislative and executive organs and their competence.

The central supreme court should, moreover, have appellate jurisdiction in cases where leave to appeal has been granted by courts in the different states.

There should be an appellate division of the central supreme court to hear all appeals from that court.

3) An ultimate tribunal for all constitutional issues

There should be a final court of appeal in respect of all constitutional matters flowing from any proceedings before the courts of the states. This court could be (a) the central Supreme Court; (b) a separate Constitutional Court, or (c) a chamber of

the central Supreme court. The latter could have three chambers: (i) a civil chamber; (ii) a criminal chamber' and (c) a constitutional chamber.

If there should be a separate Constitutional Court an appeal to the Constitutional Court from the Court of Appeal of the states can be brought with the special leave of either the Court of Appeal of the particular state or, failing that, with the leave of the Constitutional Court itself.

The creation of a Constitutional Court, separate from the tradition judicial hierarchy, will probably lead , to problems such as the following: the overlap of jurisdiction with other courts; multiplicity of legal proceedings; protracted proceedings, due to referral of proceedings (or constitutional aspects of proceedings) from other courts to the Constitutional Court; escalation of costs, clogging of the Constitutional Court etc. (Witness the intricate provisions of, for instance, sections 101, 102 and 103 of the present transitional Constitution.)

For the reasons set out in the paragraph above it is proposed that the ultimate tribunal for all constitutional issues should be a constitutional chamber of the Central Supreme Court, subject to the autonomy of states in respect of internal constitutional matters, referred to above.

The Freedom Front will make further detailed submissions on specific aspects as the work schedule for the various Theme Committee "Blocks" unfold.

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