



The Library

University of the Witwatersrand
Johannesburg

**TWELFTH REPORT OF THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL
2 SEPTEMBER 1993**

1. INTRODUCTION

- 1.1 It has been accepted by the Negotiating Council that South Africa will become a constitutional state in which the judiciary will have the power to review and set aside unconstitutional legislation and actions. There has, however, as yet been no debate in the Council concerning the structure and functioning of the courts. These are important issues because of the role the Courts will have to play in the future dispensation.
- 1.2 In this report we deal specifically with the Courts. We identify matters that will have to be considered by the Negotiating Council, and the instructions that we require to enable us to draft the relevant provisions of the constitution.
- 1.3 For the purposes of our present report we have had regard to submissions made to us by the participants in the Multi Party Negotiating Process. We have also had regard to the public debate within the legal profession dealing with the Court system including the report of the South African Law Commission on Group and Human Rights, and its report on Constitutional

Models. We have been assisted by a draft of a proposed chapter on the Administration of Justice prepared by the Technical Committee on Fundamental Rights During The Transition.

2. THE ROLE OF THE CONSTITUTIONAL COURT

- 2.1 In the Interim Report of the South African Law Commission on Group and Human Rights it is said:

The Commission considers that a Constitutional Court, as a court of specialisation, which would not necessarily consist of present judges and which would not necessarily be composed from among the ranks of senior practising counsel, would be the proper tribunal [to declare invalid those laws and executive and administrative acts that violate the Bill of Rights].

(Para 10.85 of the Law Commission Report)

- 2.2 In its report on Constitutional Models the Law Commission reaffirmed this view:

The Commission is convinced that the arguments in favour of a Constitutional Court are clearly decisive. Such an institution could become a juridical jewel and a wise arbiter in a new dispensation. It would also create the opportunity to appoint a Constitutional Court bench consisting of practising judges and constitutional experts such as legal academics. This would in turn create the opportunity immediately to appoint members of all population groups to such a bench.

(Para 1.619 of the Law Commission Report)

2.3 The arguments most frequently advanced in favour of establishing a separate Constitutional Court are:

- (a) It will have the crucial task of upholding the Constitution as the supreme law, and developing a rights culture. This heralds a new legal and constitutional dispensation, substantially different to that under which the Courts have previously functioned.
- (b) There is in the circumstances a need for a specialist court to which appointments can be made from a larger pool of suitably qualified candidates than is presently the case with judicial appointments.
- (c) The Constitutional Court as a new court, more representative of all sections of the population than the existing courts are, will have the legitimacy needed for the crucial task of upholding the Constitution.

2.4 The Negotiating Forum, by its instructions to us, has indicated its preference for a Constitutional Court to "ensure the justiciability of the Constitutional Principles, of the fundamental rights and of the Constitution itself". (Resolution 21).

3. THE STRUCTURE OF THE CONSTITUTIONAL COURT

3.1 A Constitutional Court can be established as a separate court, or a separate system of courts, parallel to the ordinary courts, with exclusive jurisdiction to deal with constitutional issues. It can also be established as an integral part of a single court system, in which it functions primarily as the final court of appeal in respect of constitutional issues.

There are various ways in which the parallel and integrated systems can be made to function, but these are differences of detail rather than principle. It

is also possible to design a hybrid system, parallel in some respects and integrated in others.

- 3.2 In the parallel system the ordinary courts have either no or very little jurisdiction to deal with constitutional issues. In the integrated system, the ordinary courts have jurisdiction to deal with constitutional issues, but the Constitutional Court acts as the final court of appeal, and its decisions on such issues are binding on all other courts.
- 3.3 The Technical Committee on Fundamental Rights During the Transition expressed a preference for a hybrid model based on a parallel system in respect of issues relating to the validity of laws and disputes between organs of the State, and an integrated system in respect of appeals concerned with important constitutional issues.
- 3.4 The Law Commission favours an integrated model which it considers to be more efficient than a parallel system, because it results in a saving of time, the avoidance of duplication, and consequently a saving of costs. It also has the advantage of infusing "the values of the constitution and its bill of rights into mainstream legal reasoning and adjudication".
- 3.5 We favour a system in which a separate Constitutional Court will be the Court of final instance on constitutional issues. Provision should also be made for direct access to the Constitutional Court to secure a ruling on the constitutional principles as contemplated by Chapter 5 of the Constitution, for the President to secure a ruling on the constitutionality of a bill if he or she requires such a ruling before signing the Bill, and in other special circumstances where it may be desirable to approach the Constitutional Court directly.

3.6 The Law Commission proposal is for the Constitutional Court to be made a special Chamber of the Appellate Division. The proposal that the Constitutional Court should be established as a separate Chamber of the Appellate Division is a possible approach. The arguments in support of this approach are:

- (a) Appeals in which there are constitutional and non-constitutional issues can be heard at one time. This could avoid the delays and additional costs which could be the result of separating such issues at the stage of the final appeal.
- (b) It retains the Appellate Division as the highest court of the land for all issues.
- (c) It makes the constitutional judges and other appellate judges part of the same court giving them an equal status, and facilitating co-operation between them.

We think, however, that consideration should also be given to creating an independent and entirely separate Constitutional Court, to serve as the court of final instance in all constitutional issues.

3.7 The arguments in support of the Constitutional Court and the Appellate Division being separate courts are:

- (a) Adjudication on Constitutional issues, including disputes between the different organs of the state, requires a specialised knowledge of constitutional law coupled with an understanding of the dynamics of society.
- (b) If the Constitutional Court is established as a Chamber of the Appellate Division, the Chief Justice has to decide which Chamber will hear

cases in which there are both constitutional and non-constitutional issues. This is not likely to be an unusual occurrence, and has two consequences, neither of which is desirable:

- (i) The Chief Justice has to decide which court will hear such cases, which in effect gives the Chief Justice a discretion on the composition of the court. Although this is the present convention in the functioning of the Appellate Division, it should be avoided in the very sensitive area of constitutional appeals.
- (ii) In cases where constitutional issues are referred to the Ordinary Chamber, precedents on important constitutional issues may be established by judges who are not constitutional judges; conversely, if such cases are referred to the Constitutional Chamber, precedents on important issues of "ordinary law" may be established by the constitutional judges.
- (c) Given the crucial nature of its tasks, the Constitutional Court should be able to establish its own identity and its own legitimacy, distinct from that of the Appellate Division. It should be the court of final instance for all cases dealing with constitutional issues. It should have its own judges, appointed according to procedures which need not necessarily be the same as those followed in the appointment of other judges. It should have its own rules and procedures, appropriate for constitutional litigation, which need not necessarily be the same as the rules and procedures of the Appellate Division. It should be able to establish its own identity and its own legitimacy.
- (d) The Appellate Division ordinarily sits in panels of 3 to 5 judges to enable it to deal with its extensive workload. A Constitutional Chamber should be composed differently and should function on the

basis that all the constitutional judges sit in all the cases that come before it. This will ensure that the views of the different judges within the court, coming from different backgrounds, are brought to bear in all cases of a constitutional nature. It will also avoid a situation in which some of the constitutional judges are excluded from deliberations on some constitutional cases, which would be a consequence of the panel system. If provision is made for the Constitutional Chamber to sit as a full panel in all cases that come before it, it will in effect become a separate Court. It should therefore be established as a separate court and not as part of the Appellate Division.

4. ALTERNATIVE MODELS FOR A CONSTITUTIONAL COURT

- 4.1 We require instructions from the Negotiating Council in regard to the type of Constitutional Court for which provision should be made in the Constitution for the transitional period.
- 4.2 To facilitate the debate on this issue we set out below examples of possible structures for the court. Example 1 has been prepared to reflect the proposal made by the Law Commission. It shows the Constitutional Court as Chamber of the Appellate Division and as part of an integrated system, where it will be the highest court of appeal in respect of matters allocated to it by the Chief Justice. Examples 2 and 3 have been prepared to reflect suggestions made by the Technical Committee on Fundamental Rights During the Transition. They show the Constitutional Court in an hybrid system functioning in part parallel to the ordinary courts, and in part as a final court of appeal. Example 4 has been prepared by us. It shows the Constitutional Court as a separate court in a hybrid system in which it will be the court of final instance on constitutional issues.

4.3 Example 1

- * The Appellate Division has two Chambers, a General Chamber and a Constitutional Chamber.
- * Judges of the Appellate Division may be appointed to one or both Chambers.
- * The Appellate Division is the final court of Appeal for all matters.
- * The Chief Justice decides whether an appeal should be heard by the General Chamber or the Constitutional Chamber.

4.4 Example 2

- * A separate Constitutional Court consisting of the Chief Justice and Judges of the Constitutional Court is established as the Court of final instance for all constitutional issues.
- * The ordinary courts will have no jurisdiction to pronounce upon the validity of any legislation or disputes between organs of the state concerning the constitutionality of the actions of one of them.
- * If the validity of any legislation is disputed in any proceedings the court hearing such matter shall refer the question of the validity of the legislation to the Constitutional Court, and shall suspend the proceedings before it pending the decision of such court.
- * If a dispute arises between organs of the State concerning the constitutionality of the actions of one of them, the authority disputing the validity of the action, may apply to a judge of the Supreme Court

to refer the question of the validity of such action by way of a stated case to the Constitutional Court.

- * The Appellate Division has jurisdiction to hear and determine as a court of final instance appeals from any other division of the Supreme Court in all matters, including matters which raise constitutional issues.
- * The Constitutional Court has jurisdiction to hear and determine -
 - (a) As a court of first and final instance any questions concerning the validity of legislation referred to it by another court.
 - (b) As a court of first and final instance any dispute between organs of the state concerning the validity of any action the constitutionality of which is disputed by one of them.
 - (c) As a court of final instance any appeal referred to it by the Chief Justice or the senior judge of the Appellate Division, on the grounds that any such appeal is of such constitutional importance that it should be determined by the Constitutional Court.

4.5 Example 3

- * The Appellate Division has two Chambers, a General Chamber and a Constitutional Chamber.
- * The judges of the Appellate Division are judges of both Chambers. In addition, a list of suitably qualified persons is compiled by the National Assembly, and persons on the list can be asked by the Chief Justice to sit as members of the Constitutional Chamber in any case.

- * The Chief Justice selects a panel of five (including himself or herself) to hear appeals dealing with important constitutional issues. He or she may include "one or two" members from the list as part of that panel.
- * The Constitutional Chamber will function in the same way as the Constitutional Court functions under example 3.

4.6 Example 4 (See addendum)

- * A separate Constitutional Court is established as the court of final instance for all constitutional issues.
- * The President and Judges of the Constitutional Court are nominated by a joint, multi-party standing committee of Parliament, confirmed by a specified majority of Parliament and appointed by the President.
- * The ordinary courts have jurisdiction to apply the Constitution, adjudicate on matters relating to fundamental rights and to determine the validity of legislation of SPR and local governments, but subject to appeal to, and the authoritative interpretation of, the Constitutional Court.
- * The Constitutional Court has exclusive, final jurisdiction in all matters of a constitutional nature, and the Appellate Division retains its appellate jurisdiction in all other matters.
- * Direct access to the Constitutional Court is allowed for, and special provision is made for the development of a procedure for direct access in terms of the rules of the Constitutional Court.
- * The Constitutional Court has the jurisdiction set out in paragraph 5.1 below.

- 4.7 Each of the examples which we have given can be modified to include some features of the other examples. In each instance supporting provisions will be necessary to deal with the manner in which the Court will function and the powers that will be vested in it.

5. THE JURISDICTION OF THE CONSTITUTIONAL COURT

- 5.1 The Constitutional Court should have the jurisdiction to protect and enforce the Constitution. This would include the protection of fundamental rights, adjudication of the constitutionality of government actions and the validity of laws, disputes between organs of state, including disputes between different levels of government, and compliance with the Constitutional Principles in the process of constitution-making.
- 5.2 The Constitution should deal with the consequences flowing from a declaration by a court that legislation is invalid. Such a declaration could be prospective, in the sense that it has no bearing upon the validity of acts done under that legislation prior to the declaration of invalidity, or it could be retrospective, in the sense that it affects the validity of anything done under the legislation from the time that it was enacted.
- 5.3 Theoretically anything done under invalid legislation is a nullity. This will be the position if nothing is said in the Constitution. Legislation existing at the date of coming into force of the Constitution for the transition will remain in force. It will include legislation of the Self- Governing Territories, the reincorporated TBVC states, and local authorities as well as parliamentary statutes. It will not be feasible to bring all these laws into line with the fundamental rights contained in the Constitution before the constitution comes into force. There are likely to be challenges to this and other legislation in the transitional period, and unless the courts have the discretion in appropriate cases to make orders with prospective effect only, the striking down of a particular law could have adverse consequences out of proportion to the

benefit that would result from such an order. To deal with this problem the Constitutional Court could be given the power to put the relevant legislature on terms to remedy the defect in the legislation within a particular period of time, failing which the legislation would be declared to be invalid. The German Constitutional Court has this power and a provision to this effect is contained in the Namibian Constitution.

5.4 Consideration could be given to a procedure whereby the Constitutional Court can be approached to give an opinion on the constitutionality of a Bill introduced or passed by Parliament. Different models for such a procedure can be developed, including:

- * referral of the bill prior to or during its introduction in Parliament; or
- * referral of the bill after it has been passed by Parliament, but before its being assented to or before its coming into operation.

As to the initiation of such a procedure -

- * it may be left to the executive or head of state to approach the Constitutional Court for its opinion on a bill passed by Parliament in the event of doubt as to its constitutionality; or
- * a certain minority (eg one third) of the members of either or both of the Houses of Parliament could be allowed to petition the Constitutional Court through the President, the Speaker or the President of the Senate while the bill is under consideration in Parliament; or
- * a minority (eg one third) of members of a House of Parliament could similarly be allowed to petition the Constitutional Court after its

adoption by Parliament but before its being assented to, or before its coming into operation. Considerations in this connection are as follows:

- * a procedure of this nature should, if adopted, promote constitutionality of legislation and should not facilitate abuse by a minority of members with a view to unduly delaying legislation;
- * the Constitutional Court as part of the judiciary should not be involved in the legislative process as such, but it should be empowered as a guardian of the Constitution to prevent the enactment of unconstitutional legislation;
- * The Constitutional Court will in any event have the jurisdiction to strike down laws that are inconsistent with the Constitution, but it may be more cost-effective, less time consuming and, in a time of renewal and flux, more protective of the Constitution to allow for a pre-promulgation procedure as opposed to the arbitrary flow of confrontational constitutional litigation possibly involving third parties.

6. THE ORDINARY COURTS

- 6.1 The existing court structure makes provision for two tiers of courts. One is the Supreme Court, which consists of the Appellate Division and various Provincial and Local Divisions; the other is the lower courts which consist of Regional and District Magistrate's Courts and of Chiefs and Headmen. The Appellate Division is the highest court, and the court of final instance for all cases no matter where or in what court they arise. Its judgments are binding on all courts. This results in the development of a harmonised system of law which has the advantage of certainty.

- 6.2 We think that it would be undesirable in a Constitution for the transitional period to make more changes in the organisation and functioning of the courts than are absolutely necessary. It should be possible for the Court system to be kept largely intact during the transition, and we consider it desirable that this be done.
- 6.3 It may be desirable to eventually reorganise the Supreme Court so that a Division is established in each SPR, and to adjust the existing jurisdictional boundaries of the different Divisions of the Supreme Court to achieve this result. Depending on the decisions that are taken in regard to SPR boundaries this should present no difficulties in respect of the SPRs that are established in the jurisdictions presently served by the Natal Provincial Division, the Eastern Cape Division, the Northern Cape Division, the Cape of Good Hope Provincial Division the Orange Free State Provincial Division and the Transkei and Ciskei courts. In some SPRs two or more courts may have to be consolidated, but the courts could be organised in a way which brings the area of their jurisdiction into line with SPR boundaries. But in the area of jurisdiction presently served by the Transvaal Provincial Division and the Courts of Bophuthatswana and Venda there will be greater difficulty. There is at present no permanent seat of the Supreme Court in the envisaged Eastern Transvaal SPR, and the present established judiciary of the Transvaal Provincial Division will probably be too large for any one SPR. In our view time should be allowed for the reorganisation of the Courts after the SPRs have been established and this should be catered for in the Constitution through appropriate transitional provisions.
- 6.4 Magistrates' courts and Courts of Chiefs and Headmen should not be affected to any significant degree, and although appropriate adjustments may have to be made to the areas of jurisdiction of certain Regional Magistrates' Courts, most of the other courts could remain intact.

- 6.5 In certain of the submissions made to us a dual structure of "Federal Courts" and SPR Courts is proposed. We think that it would be undesirable to introduce such a system particularly during the transition. A dual system of courts is more expensive, and could result in differences in the growth and development of the common law in the different SPRs. It is also associated with "forum shopping" by litigants who choose the court thought to be most advantageous for their purposes for the initiation of litigation. A single court of last instance, with jurisdiction to hear appeals from all SPR courts, is necessary to prevent this abuse. The existing system, which could be adapted to allow each SPR to have its own division of the Supreme Court, should meet the needs of the SPRs.

7. APPOINTMENT OF JUDGES

- 7.1 At present the power to appoint judges in South Africa vests in the executive. It is conventionally exercised by making appointments from the ranks of Senior Counsel practising at the Bar, after consultation between the Minister of Justice and the senior judge of the division to which the appointment is made. This has been the practice since Union in 1910, although there may have been some exceptions.
- 7.2 Vesting the power of judicial appointment in the executive is a common practice followed in many countries which have an adversarial system of justice similar to the system prevailing in South Africa. This is the practice in the United Kingdom and some parts of the Commonwealth. In the USA, which also has an adversarial system of justice, appointments to the Supreme Court and Federal Courts are made by the President, but are subject to confirmation by the Senate, which conducts public confirmation hearings through its judicial committee. In some states of the USA, judges are elected for a specific term and they have to stand for re-election on the termination of that period. In some Commonwealth countries a Judicial Service Commission has a role to play either as the authority on whose advice

appointments are made, or as an authority to be consulted before appointments are made. In countries which have a Judicial Service Commission, a distinction is sometimes made between the power to appoint the Chief Justice, which is vested in the President, and the power to appoint other judges, where the President is required to act on, or after taking, the advice of the Judicial Service Commission. In European countries with an inquisitorial court system, it is common for employment in the judicial service, other than the constitutional courts, to be a career path, chosen by young lawyers early in their career, who progress through the ranks to higher posts within the court system.

7.3 In jurisdictions in which there are constitutional courts, special procedures are often followed for the appointment of judges to the Constitutional Court. We refer to the following as examples:

- (a) In Germany half the members of the Federal Constitutional Court are elected by the Bundestag and half by the Bundesrat. The Bundestag makes its selection through a committee composed of members of different parties in proportion to their representation in the Bundestag. A two thirds majority of the committee is required for the selection. The Bundesrat selection is also made by a two-thirds majority.
- (b) In Austria the President, the Vice President and six additional members of the constitutional Court are appointed on the recommendation of the Federal Government. Another six members are appointed by the President of the Republic from candidates nominated by the two house of Parliament. Each house can make nominations for three positions. They are required to submit lists containing three alternatives for each position to the President, who makes the final selection. The houses make their choices according to a system of proportional representation.

- (c) In Italy five members of the Constitutional Court are nominated by the senior judiciary from amongst their ranks; five members are nominated by Parliament and five members are nominated by the President.
- (d) In Portugal ten members of the Constitutional Court are appointed by the legislature and three additional members are co-opted by the Constitutional Judges.
- (e) In Spain four members of the Constitutional Court are elected by the Lower House of Parliament, four are elected by the Senate, two are nominated by the government and two by a Council of the judiciary. The members elected by Parliament require the support of a three fifths majority of the House by which they are elected.
- (f) In the United States of America, where the Supreme Court serves as the Constitutional Court, appointments are made by the President subject to confirmation by a majority of the Senate.
- (g) In France the validity of proposed legislation can be tested by means of a petition to the Constitutional Council prior to its final enactment. The Council consists of three members appointed by the President of France, three by the President of the National Assembly and three by the President of the Senate. The president of the Court is chosen by the President of France and is given a casting vote. All former Presidents of France are ex officio members of the Council.
- (h) In Zambia the Chief Justice and the members of the Supreme Court (which exercises constitutional jurisdiction) are appointed by the President at his or her discretion.

- (i) In Zimbabwe the Chief Justice is appointed by the President on the advice of the Prime Minister. The Prime Minister is required to consult the Judicial Service Commission before giving advice to the President but is not obliged to follow their recommendation. Other judges of the Appellate Division (which exercises constitutional jurisdiction) are appointed on the advice of the Judicial Service Commission. The Judicial Service Commission consists of the Chief Justice, the Chairman of the Public Service Commission, and two other members appointed by the President acting on the advice of the Prime Minister.
- (j) In Botswana the President of the Court of Appeal is appointed by the President of Botswana. Other appointments to the Court of Appeal (which exercises constitutional jurisdiction) are made on the advice of the Judicial Service Commission. The Judicial Service Commission consists of the Chief Justice, the Chairman of the Public Service Commission and one other member appointed jointly by these two persons.
- (k) In Namibia the Chief Justice and other judges of the Supreme Court (which exercises constitutional jurisdiction) are appointed on the recommendation of the Judicial Service Commission. The Judicial Service Commission consists of the Chief Justice, a judge appointed by the President of Namibia, the Attorney-General (who is appointed by the President to be the principal legal adviser of the government) and two representatives of the legal profession.
- (l) In Canada the executive of the Federal government makes appointments to the Supreme Court, which exercises constitutional jurisdiction.

(m) In Australia the executive of the Federal government makes appointments to the High Court, which exercises constitutional jurisdiction.

(n) In India the executive of the central government makes appointments to the Supreme Court, which exercises constitutional jurisdiction.

7.4 A Judicial Service Commission is usually composed of representatives of the judiciary, the practising legal professions, Parliament and/or the executive. The establishment of such a Commission is seen as a way of ensuring the appointment of suitably qualified persons as judges, and of minimising political influence over such appointments. The Law Commission recommended that the appointment of judges, including the judges of the Constitutional Court (it favours a special Chamber of the Appellate Division) be made on the advice of such a Commission. It recommended that the Commission be composed as follows: the Chief Justice, the Minister of Justice, the six Judge Presidents of the various Provincial Divisions of the Supreme Court; two members of Parliament elected by Parliament; one senior advocate nominated by the General Council of the Bar; one senior attorney nominated by the Association of Law Societies.

7.5 In the circumstances that presently exist in South Africa, the judiciary, senior advocates, and senior members of the attorneys' profession consist almost entirely of white men. If they dominate the appointment panel this could have a bearing on perceptions concerning the legitimacy of the Court.

7.6 The Constitutional Court will have an important and a sensitive role to play in the constitution making process. Its members should be persons of integrity, suitably qualified for the responsibilities that they will assume. Existing judges, advocates, attorneys and legal academics could constitute the pool from which the appointments will be made. It is important that the Judges of the Constitutional Court should be perceived to have the legitimacy that will

promote public confidence in their decisions. For that reason no party, person or profession should be in a position to dominate the selection.

- 7.7 Due to its popular election, the newly elected Parliament will enjoy legitimacy. If it is given a central role in the nomination of the Court, and appropriate procedures were to be prescribed for the way in which the nominations are to be made, its participation in the process could provide the necessary legitimacy. An appropriate structure for the participation of the Parliament could be the appointment by it of a multi-party standing committee from amongst its members, which will make recommendations to Parliament regarding the nomination of the Judges of the Constitutional Court. The standing committee should function according to procedures that require its recommendations to have unanimous or balanced support among the parties represented in Parliament. This could provide both the required legitimacy and the necessary safeguards.
- 7.8 The appointment of other judges could be made on the advice of a Judicial Service Commission composed in a balanced way of representatives of the judiciary, the executive, the legislature, and the legal professions. It should, however, be constituted in a way which does not permit any person, party or profession to dominate the selection process.
- 7.9 The merits of the appointment of a Judicial Service Commission and the manner in which it could be composed, are crucial issues to be debated in the Negotiating Council.

8. THE REMOVAL OF JUDGES FROM OFFICE

The power to remove judges from office, to transfer them from the Court to which they have been appointed to another Court, or to interfere with their remuneration or other conditions of employment, could be used to undermine their independence. To protect judges against such actions, the Constitution should include provisions dealing

with their status and conditions of service. The Judicial Service Commission could be given a special role in this regard, and be made responsible for proceedings concerned with the impeachment of judges, and generally for their conditions of service and tenure.

9. INSTRUCTIONS REQUIRED

To promote debate we have prepared an outline for a chapter dealing with the courts. This outline can be developed in the light of the debate on the issues raised in this report, and the instructions given to us by the Negotiating Council.

The Judicial Power and the Administration of Justice

Judicial authority

86. (1) The judicial authority of the Republic shall vest in the courts established in terms of this Constitution and any other law.

(2) The judiciary shall be independent, impartial and subject only to the Constitution and the law.

(3) No person or organ of the state shall interfere with judicial officers in the execution of their duties.

The Constitutional Court and its jurisdiction

87. (1) There shall be a Constitutional Court consisting of a President and other judges of the Constitutional Court appointed in terms of section 88.

(2) The Constitutional Court shall have jurisdiction in all parts of the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of all the provisions of this Constitution, including -

- (a) the violation or anticipated violation of any fundamental right enshrined in Chapter 3 of this Constitution;
- (b) the constitutionality of executive and administrative conduct of all organs of the state;
- (c) the constitutionality of any law, including an Act of Parliament, irrespective of whether such law came into operation or was adopted prior to or after the coming into operation of this Constitution;
- (d) disputes of a constitutional nature between organs of the state at all levels of government;

(c) compliance in accordance with the provisions of Chapter 5 and Chapter 9 of this Constitution with the Constitutional Principles contained in Schedule 7;

(f) whether any matter falls within its jurisdiction; and

(g) any other matter provided for in this Constitution or any other law.

(3) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of the state.

(4) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or the competent authority, within a period specified by the Court, to correct the defect in the law, which shall then remain in force pending correction or the expiry of the specified period.

(5) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or any provision thereof -

(a) existing at the commencement of this Constitution, shall not invalidate anything done in terms thereof before the coming into effect of such declaration of invalidity; or

(b) enacted after the commencement of this Constitution shall invalidate anything done in terms thereof.

(6) In the event of the Constitutional Court declaring executive or administrative conduct to be unconstitutional, it may order the relevant organ of the state to refrain from such conduct, or it may order it, subject to such conditions and within such time as may be specified by it, to correct its conduct, in order to conform with the Constitution.

(7) The Constitutional Court may in respect of the proceedings before it make such order as to costs as it may deem just and equitable in the circumstances.

Composition of the Constitutional Court and appointment of Judges of the Constitutional Court

88. (1) The President and judges of the Constitutional Court shall be appointed by the President in accordance with the provisions of subsection (3).

(2) No person shall be qualified to be appointed President or 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) is a judge of the Supreme Court of South Africa or is qualified to be admitted as an advocate and has, for a cumulative period of at least 10 years after having so qualified:
 - (i) practised as an advocate or an attorney, or
 - (ii) lectured in law at a university; or
- (d) 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 South African law.

(3) A joint standing committee of Parliament, composed of one member of every political party represented in the National Assembly and the Senate, shall, subject to subsection (4), within 30 days of the first sitting of the Senate and after having interviewed *in camera* all candidates that it wishes to consider -

- (a) unanimously nominate a person to be appointed as the President of the Constitutional Court; and
- (b) unanimously nominate 10 persons to be appointed as judges of the Constitutional Court,

and the nominees, if their nomination is approved *en bloc* by resolution adopted by 75% of the members present at a joint sitting of the National Assembly and the Senate, shall be appointed as such by the President under his or her hand and the Seal of the Republic of South Africa: provided that, in connection with such resolution, no debate shall be allowed.

(4) If the joint standing committee referred to in subsection (3) is unable to reach unanimity on the nomination of the President and Judges of the Constitutional Court, the President and eight Judges of the Constitutional Court may be nominated by a majority of 75% of the members of the said committee, and the 2 remaining judges may be nominated by the majority of the remaining 25% of the members of said committee.

(5) If the nominations are not approved at the joint sitting as contemplated in subsection (3), the matter shall be referred back to the joint standing committee for reconsideration according to subsections (3) and (4).

(6) Vacancies on the bench of the Constitutional Court shall be filled in accordance with the procedure prescribed in subsection (3).

Engaging the Constitutional Court

89. (1) The conditions upon which the Constitutional Court may be seized of any matter in terms of this Constitution or any other law, and all matters relating to the conduct of proceedings before the Court, shall be regulated subject to the provisions of this Constitution by rules prescribed by the President of the Constitutional Court published in the *Government Gazette*.

(2) The Constitutional Court shall be seized of a matter in accordance with the provisions of this Constitution and the rules of the Constitutional Court.

(3) The rules of the Constitutional Court may make provision for direct access to the Court under the circumstances provided for in sections 90 and 91.

The Supreme Court

90. (1) There shall be a Supreme Court of South Africa which, subject to section 96, shall consist of an Appellate Division and such SPR and local divisions as may be prescribed by law.

(2) Subject to the provisions of this Constitution, the Supreme Court shall have the jurisdiction, including the inherent jurisdiction, vested in it prior to the coming into operation of this Constitution and any further jurisdiction conferred upon it by this Constitution or by any law.

(3) The Appellate Division shall have no jurisdiction to adjudicate on any matter within the jurisdiction of the Constitutional Court.

(4) An SPR or local division of the Supreme Court shall, subject to the provisions of this Court have jurisdiction in the following constitutional matters:

- (a) to inquire into and pronounce upon the validity of a law, other than an Act of Parliament, within its area of jurisdiction;
- (b) the violation or anticipated violation of the fundamental rights enshrined in Chapter 3 of this Constitution; and
- (c) the constitutionality of executive and administrative conduct of all organs of the state.

(5) If an SPR or local division of the Supreme Court is satisfied that an Act of Parliament relevant to any proceedings before it may reasonably be found to be inconsistent with the provisions of this Constitution, it shall refer the question of the validity of such Act to the Constitutional Court for decision, and in that event, it shall suspend the proceedings before it pending the decision of the Constitutional Court.

(6) A decision by a division of the Supreme Court on any matter within its jurisdiction in terms of subsection (4), and a decision not to refer the question as contemplated in subsection (5) after having been requested to do so by a party to the proceedings before it, and after the matter has been decided by such Court, shall be appealable to the Constitutional Court according to its rules.

(7) If the state is not a party to the proceedings referred to in subsection (5), it shall be entitled to intervene as a party before the Constitutional Court or shall be entitled to submit written argument to the said Court.

(8) Appeals against decisions of an SPR or local division of the Supreme Court dealing with any matter referred to in section 87(2) shall be made to the Constitutional Court, and appeals against decisions on all other matters shall be made to the Appellate Division.

(9) Appeals to the Appellate Division and the Constitutional Court shall be regulated by the rules of such courts and by statute, which may provide that leave of the Court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal.

(10) The rules of the Constitutional Court may provide for direct access to it in respect of any matter referred to in section 87(2).

(11) If a dispute arises between organs of the state regarding the question whether or not any conduct of one of those organs is consistent with this Constitution, the organ disputing the validity of the act may apply to the Supreme Court to refer the question of the validity of such conduct to the Constitutional Court.

(12) A decision by the Court not to refer a matter mentioned in subsection (11), shall be appealable to the Constitutional Court.

Other Courts

91. (1) The establishment, jurisdiction, composition and functioning of all other courts shall be regulated by legislation.

(2) If in any proceedings before a court referred to in subsection (1) it is alleged that any law or provision of such law is invalid on the ground of inconsistency with a provision of this Constitution, the court shall, subject to the other provisions of this section, decide the matter on the assumption that the law or provision is valid.

(3) If in any proceedings before a court referred to in subsection (1) the presiding officer is of the opinion that it is in the interests of justice so to do, he may postpone the proceedings to enable the party who has alleged that a law is invalid, to apply to the Supreme Court for relief in terms of subsection (4).

(4) If the Supreme Court to which the matter is referred in terms of subsection (3) is of the opinion that a decision regarding the validity of the law or provision is material to the adjudication of the matter and there is a reasonable prospect that the relevant law will be held to be invalid, the Court shall -

- (a) if the matters raised are within its jurisdiction, deal with such matters itself, and if they are in the exclusive jurisdiction of the Constitutional Court, refer them to the Constitutional Court for its decision; and
- (b) suspend the proceedings before the court referred to in subsection (1) pending the decision of the Supreme Court or the Constitutional Court, as the case may be.

Appointment, removal, term of office and tenure of judges

92. (1) The Chief Justice and all other Judges of the Supreme Court shall be fit and proper persons appointed by the President under his hand and the Seal of the Republic of South Africa acting on the advice of the Judicial Service Commission as constituted in terms of section 93.

(2) Judges appointed under subsection (1) or section 88 shall receive such remuneration as may be prescribed by law, and their remuneration shall not be reduced during their continuation in office.

(3) Any Judge shall, before commencing to exercise the functions of his or her office, take an oath or make an affirmation which shall be subscribed by him or her in the form set out in Schedule 6 of this Constitution.

(4) A Judge may only be removed from office by the President on the grounds of misbehaviour, incapacity or incompetence established by the Judicial Service Commission and upon receipt of an address from both the National Assembly and the Senate in the same session praying for such removal.

(5) A Judge who is the subject of investigations by the Judicial Service Commission in terms of subsection (4) may be suspended by the President pending such investigations.

Judicial Service Commission

93. (1) There shall be a Judicial Service Commission which shall consist of -
- (a) the Chief Justice, who shall preside at meetings of the Commission;
 - (b) the President of the Constitutional Court;
 - (c) the Minister of Justice;
 - (d) 1 practising advocate designated by the General Council of the Bar of South Africa;
 - (e) 1 practising attorney designated by the South African Association of Law Societies;
 - (f) 1 professor of law designated by the deans of all the law faculties at South African universities;
 - (g) 5 Senators designated by the Senate *en bloc* by a two thirds majority; and
 - (h) on the occasion of the consideration of matters specifically relating to an SPR division of the Supreme Court, the Judge President of the relevant division and the Premier of the relevant SPR or a member of the SPR executive designated by the Premier.
- (2) The functions of the Judicial Service Commission shall be -
- (a) to make recommendations regarding the appointment, dismissal, term of office and tenure of judges of the Supreme Court in terms of section 92; and

(b) to advise the national and SPR governments on all matters relating to the judiciary and the administration of justice.

(3) 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 decisions and resolutions.

(4) The Commission may appoint committees from among its number and delegate any of its functions to such committee.

Seats of the Constitutional Court and the Appellate Division

94. (1) The seat of the Constitutional Court shall be

(2) The seat of the Appellate Division of the Supreme Court shall be Bloemfontein.

Languages of the courts

95. (1) A party to litigation, an accused person and a witness may, during the proceedings of a court, use the South African language of his or her choice, and may require such proceedings of a court in which he or she is involved to be interpreted in a language understood by him or her.

(2) The record of the proceedings of a court shall be kept either in Afrikaans or in English.

Continuation of judiciary and legislation relating thereto

96. (1) Every court existing within the Republic on the date of the coming into operation of this Constitution, and every judicial officer holding office on that date, shall continue to function and to hold office until such functioning and appointment may lawfully be changed by the competent authority.

(2) Subject to the provisions of this Constitution, all legislation in operation on the date of the coming into operation of this Constitution relating to the courts and their officers, and all rules of court shall remain in operation until amended or repealed by the competent legislature or authority.

Attorney-General

97. (1) The authority to institute criminal prosecutions on behalf of the state shall vest in the attorneys-general of the Republic.

(2) The area of jurisdiction, powers, functions and duties of an attorney-general shall be prescribed by law.

(3) No person shall be appointed as an attorney-general unless he or she is academically qualified in terms of a law regulating the admission of advocates in the Republic to practise as an advocate and, after having become so qualified, has been involved in the practice, administration or teaching of law for a period of at least 10 years.

Magisterial Services Commission

98. There shall be a Magisterial Services Commission constituted by law to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates, takes place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and properly and to ensure that no victimisation or improper influencing of magistrates occurs.

Oath of Office of Judges (Schedule 6)

I, AB, do hereby swear/solemnly affirm that I will in my capacity as Judge of the Supreme Court/Constitutional Court uphold and protect the Constitution of the Republic of South Africa and the fundamental rights enshrined therein and in so doing administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the laws of the Republic of South Africa.
(In the case of an oath:) So help me God.

EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

THIRTEENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 16TH SEPTEMBER 1993

1. Introduction

There are a number of matters regarding the Constitution for the period of transition addressed in our previous reports, on which no definitive decisions have as yet been taken by the Negotiating Council. We require instructions on these matters to enable us to finalise the constitutional text. There are also various matters which have not yet been addressed by us, which should be included in the Constitution. We are in the process of preparing texts and accompanying reports on those matters.

In Part I of this report we set out preliminary proposals for a chapter of the Constitution dealing with local government, a draft of which is contained in the addendum.

In Part II stock is taken of some of the most important outstanding matters requiring the urgent attention of the Negotiating Council.

Part I

Local Government

2. Considerations relating to the chapter on local government

Due to a number of factors, mostly of an historical, political and financial nature, the current situation regarding the development of a restructured system of local government seems to be fluid and unpredictable.

We are aware of the existence of the Local Government Negotiating Forum, but have not had the benefit of insight into its work or any results of its endeavours.

We have found very little guidance for the drafting of a chapter on local government in submissions received from participants in the MPNP.

We have taken note of the relevant provisions of the *Transitional Executive Council (Draft) Bill* approved by the Negotiating Council on 7 September 1993.

A number of the Constitutional Principles contained in Schedule 7 of the draft outline of the Constitution for the period of transition currently under discussion by the Negotiating Council contain provisions directly relevant to a future system of local government. These are Principles VII, XV, XVI, XVII, XIX, XXI, XXII, XXIV 4 and XXIV 9.

We have not dealt specifically with the role of traditional leaders in local government because this is an aspect of the broader question which has been referred to the Planning Committee.

In the addendum to this report we present a draft text for the chapter in the Constitution on local government with a view to facilitating the debate.

3. The draft text

The draft text contains three sections, respectively dealing with the establishment and status of local government, local government finance and a transitional arrangement concerning existing local governments.

Section 140(1) is intended to accord local government the constitutional status of a level of government and to provide for its further regulation by parliamentary and SPR legislation.

Section 140(2) ensures the democratic nature of local government and affords it a measure of autonomy. The autonomy of a local government regarding its physical environment is specifically provided for in section 140(8).

Section 140(3) sets out the matters that must be regulated in detail by statute, though with due consideration of all the relevant provisions of the Constitution. The powers and functions to be exercised, and the services to be rendered by local government are related in section 140(7) to the maintenance of the well-being of local communities.

Section 140(4) provides for the categorisation of local governments (eg cities, towns, villages) and the concomitant differentiation of powers and functions, and also prescribes some important criteria for the determination of the status of a local government.

Section 140(5) requires consultation with a local government before its status is changed.

Section 140(6) would establish a procedure whereby local government is afforded a fair opportunity to express its opinion on draft legislation which will, if adopted, materially affect local government boundaries, powers and functions.

Section 140(9) expressly grants *locus standi* (the right to engage the court and to be heard) in the Constitutional Court to local governments in matters concerning their competences.

Local government finance is addressed elsewhere in the Constitution and we recommend that this matter be dealt with more extensively in chapters 9 and/or 11 in the interests of clarity and comprehensiveness. Against this background section 141(1) is intended to afford local government financial viability by empowering it to levy taxes and to raise revenue. In the proviso, local governments would however be prevented from raising service charges for profit - we consider this to be a limitation justifiable on the grounds of transparency and accountability of government.

Section 141(2) entitles local government to equitable allocations in the area of inter-governmental financial transfers.

Section 142 is intended to provide for continuity of existing local governments against the background of the process of the restructuring of the third tier of government.

Part II Outstanding Matters

4. Matters relating to the Constitution requiring the consideration of the Negotiating Council

The lists below reflect an overview of most of the issues that need to be addressed in order to enable us to complete the outline of a draft Constitution.

4.1 *Matters raised in previous reports*

- (a) The text of the preamble
- (b) National symbols
- (c) Languages
- (d) The final wording of the chapter on Fundamental Rights
- (e) The electoral system
- (f) Deadlock-breaking mechanisms in the process of constitution-making
- (g) Various issues relating to the national executive
- (h) Various issues relating to the judiciary
- (i) The terminology relating to SPRs (states or provinces or regions)

- (j) The competences of SPRs
- (k) The consolidation and rationalisation of public administration (especially on the SPR level), which is also related to the question of the reincorporation of the TBVC states
- (l) SPR finance and fiscal affairs, including an orderly regulation of financial matters prior to and immediately after the election
- (m) SPR constitutions and the role of SPRs in the further deployment of a new constitutional dispensation
- (n) Traditional leaders.

4.2 Matters not yet considered

- (a) The Ombudsman and a Human Rights Commission
- (b) Financial provisions of a general nature
- (c) The Auditor-General
- (d) The Reserve Bank
- (e) The composition and operation of the Financial and Fiscal Commission
- (f) The Commission for Administration and the Public Service
- (g) The armed forces and the police
- (h) Protection of the organs of civil society
- (i) Various general, transitional and technical provisions relating to, inter alia, the status of international law, continuity of existing laws and the legal system, and definition, construction and commencement clauses.

ADDENDUM TO THE THIRTEENTH REPORT (CONSTITUTIONAL ISSUES)

CHAPTER 10 Local Government

Establishment and status of local government

140. (1) Local governments shall be established for the residents of areas demarcated in terms of law and the functioning and structure of local government shall be regulated by law.

(2) A local government shall be elected democratically and shall be entitled to regulate its own affairs within the limits prescribed by law, which shall guarantee the democratic functioning of such local government.

(3) The boundaries of the area of a local government, the election of its members, the qualifications of voters, the powers and functions of local governments, the formal legislative procedures to be adhered to and all other matters necessary or incidental to local government shall, subject to the provisions of this Constitution, be provided for by law.

(4) A law providing for or relating to local government may make provision for categories of local government with differentiated powers and functions according to considerations of demography, income, physical and environmental conditions and other factors which justify or necessitate such status.

(5) The status of a local government shall not be changed without prior consultation with the local government concerned.

(6) A bill which materially affects the boundaries, powers or functions of local governments shall be published for comment in the *Government Gazette* or the *SPR Gazette* as the case may be, and local governments affected thereby shall be given a reasonable opportunity to make written representations in regard thereto to the legislature concerned.

(7) A local government shall be entitled to exercise those powers and functions and to provide such services as may be necessary to maintain and promote the well-being of the residents of the area of the local government.

(8) Conduct affecting the physical environment of a local government area shall be permissible only after consultation with the local government concerned and shall not be undertaken against the wishes of such local government unless such conduct is reasonably required in the national interest.

(9) A local government shall be entitled to approach the Constitutional Court in any matter relating to the encroachment or threatened encroachment upon its competences under this Constitution or any other law.

Local government finance

141. (1) A local government shall be entitled, subject to the provisions of this Constitution, to levy taxes and raise revenue for the purpose of exercising its powers and functions: provided that service charges shall be raised solely for the purpose of recovering the cost of such services.

(2) A local government shall be entitled to an equitable allocation by the SPR government of the revenue referred to in section 121.

Continuation of existing local governments

142. A local government existing at the commencement of this Constitution shall, subject to any changes lawfully made by a competent authority, continue to exist and shall exercise its powers and functions in accordance with the provisions of this Constitution and any other law consistent with those provisions.

EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL



**FOURTEENTH REPORT OF THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL**

29 SEPTEMBER 1993

1. INTRODUCTION

- 1.1 The Constitutional Principles contained in Schedule 7 of the draft constitution for the transitional period do make provision not only for "universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution" (Principle X) but also for the independence and impartiality of inter alia the office of the Ombudsman "in the interest of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service (Principle XXVI)
- 1.2 In this report we draw attention to the office of the Ombudsman and the Human Rights Commission. We identify those matters which call for decision by the Negotiating Council. Such matters include terminology, the procedure for the appointment of the Ombudsman, the tenure of office, certain powers of the Ombudsman and the relationship between the national Ombudsman and SPR Ombudsman. We also point to the differences between the powers and

339-6649