2/4/5/7/11

# DRAFT

## 14 JUNE 1995

SUBMISSION TO THE CONSTITUTIONAL COMMITTEE

OF THE CONSTITUTIONAL ASSEMBLY

# THE JUDICIAL AUTHORITY

# AND THE

# ADMINISTRATION OF JUSTICE

## COMMENTS ON FURTHER REVISED DRAFT OF 6 JUNE 1995

10/6/95

## INTRODUCTORY NOTE BY TECHNICAL ADVISERS

1. On Monday, 8 May 1995, we were required to attend a meeting of a working group of TC 5, convened on an urgent basis, to discuss the original draft chapter which we had prepared and submitted as early as 18 April 1995. Arising from that discussion, we were required further to prepare a revised draft as a matter of great urgency for (we understood it) consideration by the Constitutional Committee on Friday, 12 May 1995. We duly met in Johannesburg and worked through the night of Tuesday, 9 May 1995 to accomplish that.

2. On 23 May 1995, we received a memorandum from the Managing Secretary to TC 5, advising us of a "crucial meeting" to finalise the draft text of Theme Committee 5 three days later on 26 May 1995. We were asked to attend. In the event, this meeting was apparently deferred.

3. On Thursday, 8 June 1995, we were advised that a revised draft of the draft of 9 May 1995 had been prepared, and that we were required to give it our urgent consideration. This draft was furnished to us on the afternoon of 9 June 1995. We were required to consider the document, and to attend a meeting to be arranged this week.

4. On Tuesday, 13 June 1995, we were informed that we were now required to furnish a written memorandum, and to attend a meeting scheduled for the afternoon of 14 June 1995. Later today we were told that the meeting was now scheduled for tomorrow (15 June).

5. In these circumstances we have been obliged to approach the important questions raised with an unfortunate degree of urgency. We must point out that this is not conducive to the degree of reflection and consideration best suited to the determination of such important questions as those raised by the drafting of a new Constitution. The circumstances are also, as we have pointed out previously, extremely difficult for us to accommodate within an existing framework of other duties and obligations. We must ask accordingly that we are accorded adequate notice of further requirements contemplated for us, if we are at all to be able to assist the Constitutional Assembly in its important tasks.

6. In the circumstances, we have furnished such comments as we are able to do. We must however record a general observation. As previously noted by us in the Introduction to our Revised Draft Chapter of 9 May

1995, that revision and the comments we offer in relation to the revised draft of 6 June 1995 are subject to the explicit caveat that in our view, South Africa's constitutional requirements are better served by what we consider to be the more carefully framed and explicit terms of the original draft of 18 April 1995.

7. The overarching feature of the revised draft of 6 June 1995 is that (through intention or otherwise) it appears to resuscitate the concept of an "exclusive" jurisdiction of the Constitutional Court (instead of according the Constitutional Court the position as court of final instance in constitutional matters, at the apex of the curial hierarchy). Presumably in the interests of relative brevity, it collapses provisions dealing with the composition of that court and other courts with issues pertaining to jurisdiction. It "defines" the jurisdiction of the Constitutional Court in generally very confused terms. It fails to make plain the interconnection of jurisdictions between the High Court, the Supreme Court of Appeal and the Constitutional Court. And it still considers as unresolved at this late stage issues pertaining to the constitutional role of one very old South African court (the magistrate's court), while it leaves to one side a dealing with "Intermediate Courts of Appeal" (which, if not introduced, will disable the Appellate Division from assuming - as the Supreme Court of Appeal - the role contemplated for it in the draft of 6 June 1995). When in doubt, or otherwise, the draft moreover has resort to the general formulation that issues are to be regulated "by law". We have previously raised the fact that this can hardly assist the ordinary litigant, or person simply seeking to understand the Constitution which regulates his or her life, and is open (as the previous history of this country exemplifies) to manipulation of the constitutional edifice by using devices as fundamental as the appointment of judges or the jurisdiction of particular courts.

8. For these reasons, we must formally record our serious concern that the present draft does not meet the Constitutional Principles laid down in the Constitution of South Africa Act, Act 200 of 1993, and we are unable to support it.

**Adv J. J. Gauntlett SC** **The Hon. Mr Justice P J J Olivier**

**Cape Town**

**14 June 1995**

## COMMENTS BY TECHNICAL ADVISERS TO TC 5

## ON DRAFT OF 6 JUNE 1995

1. **Ad section 1 (Judicial Authority)**

In this section (and in several others) there is inconsistency in language: either in accordance with ordinary drafting technique, the formulation "**shall** [vest]" should be used, or otherwise the present tense should be used throughout. We would strongly advise that the ordinary drafting technique be applied.

1.1 **Subsection 6**

(a) We were asked to insert a provision in these terms (as sub-section 5) in our revised draft of 9 May 1995. It remains however a concern that as it stands, the provision is a *lex imperfecta*. It namely is not a self-executing provision in the terms in which it is couched, yet there is no mechanism created elsewhere in the chapter to give effect to it.

(b) We do not see any point in footnote 1. Whether or not the Bill of Rights is made "horizontally applicable" or not, or whether a hybrid vertical/horizontal application is devised, we consider that provisions relating to judicial authority in these same terms will be required.

2. **Ad section 2 (Judicial System)**

2.1 **Footnote 4**

(a) It is a matter of concern that it is still being recorded on behalf of TC 5 that "**no agreement has been reached on the constitutionalization of intermediate and magistrates' courts**". It was our own understanding from the meeting of 8 May 1995 that a substantial degree of consensus had been reached in relation to the

need for "Intermediate Courts of Appeal". It was also stressed at this meeting that our own understanding was that the judicial structure - and in particular the Appellate Division - would <u>not</u> be able to cope with the added constitutional jurisdiction <u>without</u> the introduction of Intermediate Courts of Appeal which already in relation to criminal matters have received the support of the Chief Justice and the Minister of Justice). We are concerned that unless this is resolved, there is effectively <u>no</u> system for constitutional adjudication.

(b) We are unaware from our perusal of the materials put before TC 5, and from the discussion on 8 May 1995, of any serious dispute relating to the "constitutionalization" of magistrates' courts.

(c) <u>When</u> is it then contemplated that these fundamental aspects are to be resolved ? We are firmly of the view that the entire drafting exercise in relation to this Chapter is a futility unless there is clarity in relation to the curial mechanisms by which it is to be enforced.

2.2 **<u>Subsection 2</u>**

This in our view is inept. It accords constitutional recognition to the repugnant concept of **"offences of a political nature"** - and that these may legitimately be prosecuted **"before the ordinary courts of the land"** !

3. **<u>Ad section 3 (Constitution Court)</u>**

Our own marginal heading (to distinguish these provisions from those which follow) was in fact **"Composition of the Constitutional Court"**. We suggest that that be adhered to.

3.1 **Subsection 2**

We are unaware of any agreement (or even discussion) relating to provision for a non-renewable term for Constitutional Court judges of ten years. We consider that in principle this is probably too long, and in contrast with shorter periods of office in other countries.

3.2 **Footnote 6**

Footnote 6 raises the fact that what is termed **"a transitional mechanism"** must be **"provided for to [sic] facilitate such staggered terms"**. We believe that this was achieved on the basis of the wording in our revised draft of 9 May, where we provided that such judges **"shall hold office for non-renewable terms not exceeding XXX years"**. We had in mind that persons who otherwise might be disqualified by age or reason of health or other considerations might be disabled from accepting a term of appointment of a full seven or ten years, might be appointed for a lesser period. Staggering would soon arise in a quite natural way (and not en bloc, which is undesirable for continuity).

4. **Ad section 4**

(a) This section, incidentally, exemplifies the erratic use of the present tense in contrast with the ordinary imperative ("shall have") used in the immediately preceding sections.

(b) We do not understand the value or even sense of the addition to the words **"interpretation or enforcement of this Constitution"** in subsection 1 of the word **"protection"**. Again, we must warn against the addition of provisions in a way which are not self-executing, but yet are not coupled with a mechanism for enforcement. In any event, it is difficult to understand in what sense the Constitutional Court would deal with "the protection" of the Constitution without either interpreting or enforcing it.

4.1 **Subsection 2**

(a) One of the most serious criticisms we have to make relating to this draft pertains to this provision. It seems to us to be entirely confused. The immediately preceding subsection acknowledges the jurisdiction of the Constitutional Court as essentially being one of **final** determination of a constitutional issue. Now this subsection reverts (it would seem) to the exclusive jurisdiction-type language of the current Constitution (which has been generally criticised in precisely that respect). It gives no attention to the placing of the Constitutional Court in the hierarchy of courts, and their own capacity to deal with constitutional issues. It is, even more curiously, probably in conflict with the Constitutional Court Complementary Act as regards section 4(2)(c) (where for instance one organ of state were to seek interdictory relief against another organ of state in the Supreme Court).

(b) This confusion is worse confounded by the entire lack of clarity now in this Chapter as to what we thought was clearly enough agreed, more particularly at the meeting on 8 May 1995. This was that the Constitutional Court would find its true position at the apex of constitutional jurisdiction, but that the other courts would not generally be excluded from constitutional adjudication. That scheme now seems to have been destroyed, and nothing coherent put in its place.

4.2 **Footnote 8**

(a) We do not understand, if the constitutional principles relating to the supremacy of the Constitution are to be implemented, how provincial constitutions can be excluded from the ultimate control of the Constitutional Court.

(b) The concerns stated by the NP in this footnote essentially reflect as we understand them our original draft, which, we have stated, we consider to be preferable to the revised draft of 9 May 1995 which we were instructed to prepare. (Our

reasons for that view are summarised in the introductory note to that draft).

4.3 **Subsection 4**

We note that without any comment, the provisions of section 4(2) in our draft of 9 May 1995 (which we had understood to be the subject of general consensus and which elicited no debate on 8 May), have been narrowed by the exclusion of reference to the Constitutional Court binding all persons and all legislative and executive organs of state, and not only other courts. See also section 13(2) of our original draft. This seems to us to be a serious limitation on the power of the Constitutional Court.

4.4 **Subsections (5) and (6)**

(a) These provisions seem to us to be entirely confused. Subsection 5 deals with **"any law, act, conduct or omission"**. (This language seems to us to be not readily comprehensible: what is meant by "conduct" in distinction to or conjunction with "act" or "omission", for instance, eludes us). This aside, subsection 6 immediately thereupon proceeds to deal with "any law" separately, which has already been dealt with in general terms in subsection (5).

(b) As appears from our original draft, we are firmly of the view that it is necessary to deal successively (see section 13(3) to (6) of our first draft of 18 April) with varying aspects meriting specific attention: thus in turn laws, then executive or administrative acts, and thereafter provision for ancillary matters such as costs. This all in our view becomes entirely confused if the opportunity to be given to the legislature for remedial legislative action is bundled up with some generalised duty to **"consider the consequence of such invalidation"** and to issue (without any further definition) **"an order with regard thereto"**.

4.5 **Footnote 14**

We have already given our views (see 4.4(b) above) in relation to **"this clause as currently drafted"**. We consider it necessary for there to be provision (as there was in section 13(6) of our original draft, and in section 4(6) of the revised draft of 9 May 1995) to give the Constitutional Court the discretionary power to order costs. If this is not inserted, then that court (as a creature of statute) will not have that power under **any** circumstances.

5. **Ad section 5**

We have already referred to the general confusion created by the new section 4(1) and (2), as regards the removal of a clear scheme of constitutional jurisdiction incorporating the other courts. This is now exacerbated by the fact that in this provision, there is no longer (as we had in section 5(1)(a) of the revised draft of 9 May) reference to appeal from the Supreme Court of Appeal **"in terms of section 7(3) hereof"** (where we specified **in the Constitution** the means of access). This is now all left to be regulated extra-constitutionally **"by law or [sic] the rules of the Constitutional Court"**. The consequences, simply stated, can only be further confusion and a lack of adequate constitutional entrenchment. Assuming that the general endeavour is to make the Constitution readily accessible, it must be apparent that the general reader will be left with no understanding of the constitutional jurisdiction of the other courts, and how this relates in particular to access to the Constitutional Court.

5.1 **Section 5(1)**

This section shows the extent to which the confusion relating to the jurisdiction of the Constitutional Court (see the comment on section 4(2) above) permeates this entire draft. It is still evidently contemplated that there will be matters **"reserved exclusively for the Constitutional Court"**. We reiterate that that is not our understanding of the consensus which had been achieved, and that the extensive materials received by TC 5 indicated a general and serious concern for the social consequences of the current complex system of referrals

between courts made necessary by the creation of (ill-defined) exclusive and general constitutional jurisdictions.

5.2 **Section 5(2)**

We have been asked (in footnote 19) **"to give an opinion on the words 'may' and 'shall'"**. "Shall" would be appropriate.

5.3 **Footnote 20**

This, with respect, reveals no understanding of the constitutional function or capacity of the Judicial Service Commission. It is not a rule- making body placed for that purpose above the courts. We can see no valid basis on which the mechanisms contained in section 19 of our revised draft of 9 May 1995 should be abrogated.

6. **Ad section 6 (Supreme Court of Appeal)**

We are deeply disturbed as to the unsatisfactory ambit of the proposed section 6. It apparently represents an endeavour to collapse into one provision aspects dealing (separately as we had them) with the composition of such a court, and its jurisdiction. Resort has again been had to mere provision in a constitution that the court has **"jurisdiction as regulated by law"**. We had in both our previous memoranda indicated that in our view (and with reference to clear historical precedents in this country) that constitutes no constitutional protection of any kind. We have also repeatedly given the view that we cannot see how the reader of the Constitution is helped to any greater understanding by a provision which gives an entirely generalised cross-reference to "law" determinative of his or her rights, and which he or she is in some way obliged to find. It is a fundamental tenet of constitutionalism that a constitution should set out clearly the constitutional role of a court, and its place in the hierarchy.

6.1 **Footnote 21**

We have been asked to give **"an opinion on 'inherent jurisdiction'"**. We have previously answered this question. (We refer to this fully in paragraph 8 of the letter of 25 April 1995 to the Executive Secretary of the Constitutional Assembly in response to the draft prepared by a legal adviser of the CA)We pointed out that "inherent jurisdiction" was fully analysed in **Universal City Studios Inc v Network Video 1986 (2) SA 734 (A)**. What was there said was this:

**"There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice..... It is probably true that... the court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw....." (at 754G-H).**

We consider that section 6(2) of the new draft is not an adequate substitute for section 7(1) of the revised draft of 9 May 1995.

7. **Ad section 7 (High Court)**

(a) What we have had to say above in relation to the Supreme Court of Appeal, as regards the collapsing of aspects of composition and jurisdiction, and the general lack of clarity as to its place in the constitutional hierarchy, applies here too.

(b) The provision (subsection 3) that **"the inherent jurisdiction of the High Court... shall be regulated by law"** shows, with respect, no understanding of the concept, and is in any event impossibly vague.

7.1 **Subsection 4**

For the reasons already given, this provision is incoherent. As section 4(1) and (2) currently read, the Constitutional Court appears to be the court of first and final instance in relation to virtually all constitutional matters (and no line is clearly drawn between the "exclusive" and general jurisdictions).

7.2 **Subsection 5 (and footnote 27)**

We would once again draw attention to the fact that in our original draft (of 18 April) we dealt pertinently with this aspect (in section 10(6) last line, read with footnote 26). What we there advised was that a declaration of invalidity by the High Court would not take effect unless **"confirmed by the Constitutional Court"**. We had in mind that in terms of the Constitutional Court rules, provision would have to be made for instances of this kind where there is no appeal pending by either of the parties (in which case the issue would doubtless be ventilated). In such circumstances, the Constitutional Court would be obliged to deal with the matter - raising an issue of fundamental public importance such as the constitutionality of a statute - by a system akin to automatic review. Doubtless the rules would make provision for the matter to be properly argued before the Constitutional Court in the absence of an appeal (for instance, by the appointment of *amici curiae* and the question of costs in this regard).

8. **Ad section 8 (Other Courts)**

It has to be observed that a curious consequence of the present draft is that while it is concerned to make no express provision for the magistrates' courts (despite the preponderance of views in support of their preservation), nor the proposed Intermediate Court of Appeal (despite the apparent acceptance of a pressing need for them), yet this provision creates - in peremptory terms - a constitutional obligation (enforceable by whom ? against whom ? in what way ?) to constitute undefined **"community courts"** and **"courts functioning in terms of a system of indigenous and customary law"**.

9. **Ad section 10 (Appointment of judges and judicial officers)**

(a) On the premise (exemplified by the provisions in this section) that **"judicial officers"** include judges, more appropriate terminology would in our view simply be **"appointment of judicial officers"** (or otherwise **"appointment of judges and other judicial officers"**).

(b) We are concerned to note that it is evidently considered that insufficient consensus **still** exists in relation to the critical aspects of the appointment of CC judges, and other judges. The recent constitutional crisis in Malaysia has brought forcibly home the fact that unless there is proper constitutional provisions relating to the appointment of judges, virtually any other form of constitutional protection can be undone.

(c) Once again, it seems to us that lip service alone is paid to constitutional protection by a provision as inherently meaningless as subsection (5):

**"The appointment of acting judges shall be regulated by law"**

10. **Ad section 11 (Removal of judges from Office)**

This marginal heading is inappropriate to the contents, particularly given the fact that the provisions relating to the protection of the conditions of service of judges has evidently been removed from section 1(7) of our draft, and now inserted here (as subsection 3). It is further to be noted that in any event, this provision should not relate only to "remuneration", but generally to **"all emoluments and conditions of service"**.

**P. J. J. OLIVIER** **J. J. GAUNTLETT SC**

**Cape Town**
**14 June 1995**