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**CONFIDENTIAL AND PRIVATE TO THEME COMMITTEE 5  
OF THE CONSTITUTIONAL ASSEMBLY**

**THE JUDICIAL AUTHORITY  
AND THE  
ADMINISTRATION OF JUSTICE**

**DRAFT CHAPTER (FIRST)**

**BY**

**TECHNICAL COMMITTEE TO THEME COMMITTEE 5**

18 April 1995

## INTRODUCTION

1. This draft of the proposed successor to chapter 7 of the interim Constitution has been prepared by the Technical Committee of Theme Committee 5 of the Constitutional Assembly. It follows the submission to TC 5 of our Report dated 13 March 1995, the debating of that Report by TC 5, and the drawing up of a Schematic Summary of the Report. It is a draft prepared jointly by Judge Olivier and Adv J.J. Gauntlett SC, and with which Ms Gcabashe is in broad agreement. Prof Benjamin is to submit separately his comments coupled with some alternative proposals in certain respects. (Unfortunately an arrangement made through the CA Secretariat for an earlier draft of this document to be urgently hand-delivered to Prof Benjamin in Cape Town on the same day took three days to effect.)
  
2. The draft draws upon a considerable volume of materials and oral submissions presented to TC 5 since January of this year by members of the public, many organisations, the judiciary, professional legal bodies and other interest groups.
  
3. We have sought to reflect in this draft what we understand to be current consensus in TC 5 in relation to material aspects, in the light of the debate which took place in relation to our Report, and the adoption by the Core Group of TC 5 of the Schematic Summary in its final form.

4. We understand it to be a general concern that South Africa's new Constitution (and indeed, all new legislation) should be in the simplest and clearest terms possible. We understand there also to be a more contentious concern that the Constitution should be as brief as possible. In preparing a first draft, mindful of these concerns, we have faced an acute dilemma. This has several components. The first is that this chapter regulates judicial power, which, under a justiciable Bill of Rights, is itself the critical balancing component in the constitutional mechanism. It does not deal with subjects which, in their very nature, are perhaps more peripheral to a constitutional instrument. The second is that the mechanism has to be specified in some detail - the difficulty is how much - if it is to be constitutionally protected. If it is not (for instance in relation to the establishment, composition or general jurisdiction of a particular court) then the mechanism may be easily dismantled by ordinary legislative or even executive action. The third is that, even if some provisions are safely and properly capable of being dealt with in ancillary legislation, we have thought it desirable to attempt to paint a full and clear canvas here. The TC, and the CA itself, will need to see the implications of implementing in legislative terms the consensus reached in TC 5. We must stress that whatever "detail" is ultimately determined not to be incorporated in the Constitution itself, must not - from the viewpoint of constitutionalism - be vital to the essential mechanism. That detail will have to be carefully regulated in ancillary legislation. It cannot be wished away. And it must be asked

(if too many provisions are consigned to various pieces of ancillary legislation) whether the overall constitutional scheme is not thereby made less accessible to the citizen.

5. In short, the acid test, we consider, is this: is a particular aspect one which can safely be omitted from the Constitution, and conveniently and appropriately be dealt with in other legislation ? Will the overall picture be clear enough and sufficiently accessible to ordinary South Africans ?
  
6. It will be noted that we have adopted a somewhat different sequence in relation to matters currently dealt with in Chapter 7 of the interim Constitution. It seems to us a simpler and clearer approach to commence with the general aspect of judicial authority, then to proceed to deal with the structure of the courts, composition and jurisdiction. Thereafter we deal with appeal and other access procedures in what seems to be the logical sequence: from the bottom up. The appointment of judges follows, and thereafter various related matters.
  
7. We may note that from all the materials before TC 5, and its own debates, we understand there to be general acceptance of the functional need for a hierarchy of courts. We also understand there to be general support for a new (and more appropriate) description of several of these courts. We deal with these aspects more particularly in the footnotes

to the draft.

8. We have endeavoured to give effect in this draft to one major contemplated change to the current Constitution: an enhanced constitutional access, and the removal of a complex, dilatory and costly system of referrals, by according constitutional jurisdiction in important respects to all courts. The separate existence and constitutional pre-eminence of the Constitutional Court is however retained.
9. This document is submitted as a confidential draft to TC 5. It is not for publication or general distribution, without the prior consent of the Secretariat of the Constitutional Assembly.
10. We have asked through the Secretariat for an opportunity to present this draft formally, to deal with any questions arising, and to be consulted in relation to any proposed alterations.
11. We were informed by the CA Secretariat that an abbreviated draft by the CA's legal adviser would be delivered to Prof Benjamin and Adv J.J. Gauntlett SC today to enable us to comment upon it. We must record that this too unfortunately was also not timeously effected, with the result that we have not been able to do so.

**Adv J. J. Gauntlett SC**

**The Hon. Mr Justice P J J Olivier**

**Ms Leah Gcabashe**

**18 April 1995**

# CHAPTER.....

## THE COURTS AND THE ADMINISTRATION OF JUSTICE

### GENERAL PROVISIONS<sup>1</sup>

#### Judicial Authority<sup>2</sup>

1. (1) The judicial authority of the Republic shall vest in the courts established by this Constitution and any other law.
- (2) The courts shall be independent and subject only to this Constitution and the law.
- (3) No person and no organ of state shall interfere with the courts in the performance of their functions.
- (4) The orders of all courts of competent jurisdiction shall bind the executive organs of state, and shall be executed by them according to law.<sup>3</sup>
- (5) The courts shall apply the Constitution and the law impartially and without fear, favour or prejudice.

#### The judicial system

2. There shall be the following courts of law<sup>4</sup> in the Republic:
  - (a) The Constitutional Court.

- (b) The Supreme Court of Appeal.
- (c) The Intermediate Courts of Appeal.<sup>5</sup>
- (d) The divisions of the High Court.
- (e) Magistrates' Courts.
- (f) Such other courts as are established by Act of Parliament.<sup>6</sup>

## COMPOSITION OF COURTS

### Composition of the Constitutional Court

- 3. (1) The President shall on the recommendation of<sup>7</sup> the Judicial Service Commission appoint a President and a Deputy-President of the Constitutional Court, who shall hold office for non-renewable<sup>8</sup> terms not exceeding<sup>9</sup> seven years.
- (2) Not less than nine and not more than eleven other judges of the Constitutional Court shall be appointed in accordance with the provisions of section 17 for non-renewable terms not exceeding seven years.<sup>10</sup>

### Composition of the Supreme Court of Appeal<sup>11</sup>

- 4. (1) The President shall appoint on the recommendation of the Judicial Service Commission a Chief Justice and a Deputy Chief Justice<sup>12</sup> of the Supreme Court of Appeal, who shall hold office according to law.<sup>13</sup>
- (2) The President acting on the recommendation of the Judicial Service Commission shall appoint not more than 16<sup>14</sup> other



judges of the Supreme Court of Appeal, who shall hold office according to law.

**Composition of the Intermediate<sup>15</sup> Courts of Appeal<sup>16</sup>**

5. There shall be such Intermediate Courts of Appeal with such jurisdictions and composition as may be established by law.<sup>17</sup>

**The High Court<sup>18</sup>**

6. There shall be such divisions of the High Court of South Africa with such jurisdictions and composition as may be established by law.

**Magistrates' Courts**

7. There shall be such Magistrates' Courts, with such jurisdiction and composition as shall be established by law.<sup>19</sup>

**Other Courts**

8. The jurisdiction, composition and functioning of all other courts shall be as prescribed by or under a law.<sup>20</sup>

**JURISDICTION**

**Jurisdiction of Magistrates' Courts**

9. (1) An appeal shall lie as of right<sup>21</sup> against a judgment of a Magistrate's Court by a convicted person in all criminal proceedings, and by any unsuccessful party to civil proceedings, to the division of the High Court having local jurisdiction as

provided for by law.<sup>22</sup>

- (2) A Magistrate's Court shall have additional jurisdiction in respect of the matters set out in section 13(1)(a)<sup>23</sup>.
- (3) If it is alleged in any proceedings in a Magistrate's Court that any Act of Parliament, provincial law or presidential proclamation or any provision thereof is invalid on the grounds of a conflict with the Constitution, the court shall decide the matter on the assumption that the law or provision is valid.<sup>24</sup>
- (4) In the event of any decision, judgment or order being handed down by a Magistrate's Court dealing with a matter referred to in sub-section (2) or (3), and no appeal being duly lodged against such decision, judgment or order, the presiding magistrate shall refer such decision, judgment or order to the High Court of local jurisdiction within a period of seven days of date of expiry of such period as may be prescribed by law for the lodging of an appeal to such court, for automatic review.<sup>25</sup>

#### Jurisdiction of the High Court

10. (1) Subject to this Constitution, the divisions of the High Court shall have the jurisdiction, including the inherent jurisdiction, vested in the Provincial and Local Divisions of the Supreme Court of South Africa immediately before the commencement of this Constitution, and any further jurisdiction conferred upon it by this Constitution or by any law.
- (2) The High Court shall have jurisdiction in respect of the additional matters specified in section 13(1), and subject to the application of the provisions of sub-sections (3) to (7) of section 13, save that the references in these provisions to the Constitutional Court shall here be taken to apply to the High Court.<sup>26</sup>
- (3) An appeal shall lie as of right from any decision, judgment or order of a High Court sitting as a court of first instance in civil proceedings, or in criminal proceedings in which a convicted person is the appellant, to the Intermediate Court of Appeal of

local jurisdiction.

- (4) An appeal shall lie against any decision, judgment or order of a High Court to the Intermediate Court of Appeal of local jurisdiction in an instance where the High Court has not sat as a court of first instance, only with the leave of the High Court,<sup>27</sup> or in the event of such leave being refused, with the special leave of such Intermediate Court of Appeal upon petition to it.
- (5) An appeal shall lie against any decision, judgment or order of a High Court directly to the Supreme Court of Appeal only with the special leave of that court upon petition to it: provided that such leave shall not be granted unless the matter is one of urgency, compelling public concern or such other exceptional considerations as that Court may determine.
- (6) Any decision, judgment or order of the High Court pronouncing upon the validity of an Act of Parliament [or Bill before Parliament or a provincial legislature<sup>27</sup>] shall not take effect unless and until confirmed by the Constitutional Court on appeal to it from the Supreme Court of Appeal.<sup>28</sup>
- (7) In the event of a High Court holding that an Act of Parliament is consistent or inconsistent with the Constitution, and no appeal being lodged against any order to that effect, the Registrar of such High Court shall refer such decision, judgment or order within seven days of date of expiry of such period as may be prescribed by law for the lodging of any such appeal, to the Supreme Court of Appeal for automatic review.<sup>29</sup>
- (8) An appeal shall lie against any decision, judgment or order of a High Court directly to the Constitutional Court with the special leave of the latter Court upon petition to it, only if the appeal depends upon the adjudication of a matter specified in section 13(1), and if the matter is one of urgency or compelling public concern or raises such other exceptional consideration as the Constitutional Court may determine.

**Jurisdiction of the Intermediate Court of Appeal**<sup>30</sup>

11. (1) An Intermediate Court of Appeal shall have jurisdiction to hear and determine all appeals duly lodged with such court in terms of the provisions of this Chapter and any other law.
- (2) No appeal shall lie against a decision of an Intermediate Court of Appeal to the Supreme Court of Appeal or to the Constitutional Court save with the leave of such Intermediate Appeal Court, or in the event of such leave being refused, with the special leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be, upon petition to it: provided that no leave to appeal from an Intermediate Court of Appeal direct to the Constitutional Court shall be granted unless the determination of the appeal depends upon the adjudication of a matter specified in section 13(1) and unless the matter is one of urgency, compelling public concern or raises such other exceptional consideration as the Constitutional Court may determine.

**Jurisdiction of the Supreme Court of Appeal**

12. (1) The Supreme Court of Appeal shall have the jurisdiction, including the inherent jurisdiction, vested in the Appellate Division of the Supreme Court of South Africa immediately before the commencement of this Constitution, and any further jurisdiction conferred upon it by this Constitution or by any law.
- (2) The Supreme Court of Appeal shall have jurisdiction to hear and determine all appeals against decisions, judgments and orders of any Intermediate Court of Appeal or High Court, in accordance with the Constitution and any law.
- (3) An appeal shall lie from a decision, judgment or order of the Supreme Court of Appeal to the Constitutional Court with leave of the Supreme Court of Appeal, or failing the granting of such leave, with the special leave of the Constitutional Court in either instance only if the adjudication of the matter requires the determination of an issue specified in section 13(1) hereof.

**Jurisdiction of the Constitutional Court**

13. (1) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including<sup>31</sup> -
- (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
  - (b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;
  - (c) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
  - (d) any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to subsection (7);
  - (e) any dispute of a constitutional nature between organs of state at any level of government;
  - (f) the determination of questions whether any matter falls within its jurisdiction; and
  - (g) the determination of any other matters as may be entrusted to it by this Constitution or any other law.
- (2) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.
- (3) 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 any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.

- (4) 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 a provision thereof -
  - (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
  - (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.
- (5) In the event of the Constitutional Court declaring an executive or administrative act or conduct or threatened executive or administrative act or conduct of an organ of state to be unconstitutional, it may order the relevant organ of state to refrain from such act or conduct, or, subject to such conditions and within such time as may be specified by it, to correct such act or conduct in accordance with this Constitution.
- (6) The Constitutional Court may in respect of the proceedings before it make such order as to costs as it may consider fair in the circumstances.
- (7) The Constitutional Court shall exercise jurisdiction in any dispute referred to in subsection 1(d) only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who shall make such a request to the Constitutional Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or such provincial legislature, as the case may be, requiring him or her to do so.

**Engaging the Constitutional Court**

14. (1) The Constitutional Court may be seized of any matter within its jurisdiction as follows:
- (i) by way of appeal from the Supreme Court of Appeal in terms of section 12(3) hereof;
  - (ii) by special leave on a direct appeal from an Intermediate Court of Appeal or the High Court to the Constitutional Court in terms of section 11(2) or section 10(8) hereof;
  - (iii) at the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature, in terms of section 13(7) hereof.
- (2) Notwithstanding any other provision of this Constitution or any other law, with special leave of the President of the Constitutional Court any party to a matter disposed of by any other court may appeal directly to the Constitutional Court for the determination of a matter referred to in section 13(1).
- (3) The rules of the Constitutional Court may make provision for direct access to that Court where it is in the interests of justice to do so, or in circumstances of urgency, or compelling public concern, or such other exceptional circumstances as the President of the Constitutional Court may determine.

**Procedural Matters**

15. The rules of procedure in the courts of law in the Republic shall be published in the *Government Gazette* and shall be made by:
- (i) the Chief Justice and the President of the Constitutional Court in respect of the rules pertaining to the Constitutional Court;

- (ii) the Chief Justice in respect of the rules pertaining to the Supreme Court of Appeal and the Intermediate Courts of Appeal;
- (iii) the Judge President of each division of the High Court in respect of such division;
- (iv) by the Minister of Justice acting on the advice of the Magistrates' Commission in respect of the Magistrates' Courts;
- (v) by the Minister of Justice or other responsible Minister of State acting on the advice of the Chief Justice in respect of all other courts.

### JUDICIARY

#### Appointment, removal from office and remuneration of judges<sup>32</sup>

16. (1) No person shall be qualified to be appointed a judge unless he or she -
- (a) is a South African citizen; and
  - (b) is a fit and proper person to be a judge.
- (2) Judges and acting judges of the Constitutional Court, High Court and Supreme Court of Appeal shall receive such remuneration as may be prescribed by or under law, and their remuneration shall not be reduced during their continuation in office.
- (3) Any judge or acting judge shall, before commencing to perform the functions of his or her office, make and subscribe an oath or solemn affirmation in the terms set out in Schedule X before any other judge.



- (4) A judge or acting 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 praying for such removal.
- (5) A judge or acting judge who is the subject of an investigation by the Judicial Service Commission in terms of subsection (4) may be suspended by the President pending such investigation.

**Appointment of judges of the Constitutional Court**<sup>33</sup>

- 17. (1) (a) Subject to subsection (2), an appointment or appointments shall only be made from the recommendations of the Judicial Service Commission, and with due regard to its reasons for such recommendations, of not more than three nominees in excess of the number of persons required to be appointed.
  - (b) If the appointing authorities decide not to accept any or some of such recommendations, the Judicial Service Commission shall be informed thereof and be furnished with the reasons therefor.
  - (c) After having been informed in terms of paragraph (b), the Judicial Service Commission shall, in accordance with paragraph (a), submit further recommendations, whereafter the appointing authorities shall make the appointment or appointments from the recommendations as supplemented in terms of this paragraph.
  - (d) In submitting its recommendations to the appointing authorities in terms of paragraphs (a) and (c) the Judicial Service Commission shall have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender.
- (2) Vacancies in the Constitutional Court shall be filled in accordance with sub-section (2).

- (3) Acting judges of the Constitutional Court shall be appointed by the President on the recommendation of the President of the Constitutional Court in consultation with the Chief Justice.<sup>34</sup>

**Judicial Service Commission**<sup>35</sup>

18. (1) There shall be a Judicial Service Commission, which shall, subject to subsection (3), consist of -
- (a) the Chief Justice, who shall preside at meetings of the Commission;
  - (b) the President of the Constitutional Court;
  - (c) one Judge President designated by the Judges President;
  - (d) the Minister responsible for the administration of justice or his or her nominee;
  - (e) two practising advocates designated by the advocates' profession;
  - (f) two practising attorneys designated by the attorneys' profession;
  - (g) one professor of law designated by the deans of all the law faculties at South African universities;
  - (h) four senators designated *en bloc* by the Senate by resolution adopted by a majority of at least two-thirds of all its members;
  - (i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet;

- (j) on the occasion of the consideration of matters specifically relating to a provincial division of the High Court, the Judge President of the relevant division and the Premier of the relevant province.

(2) The functions of the Judicial Service Commission shall be -

- (a) to make recommendations regarding the appointment, removal from office, term of office and tenure of judges of the High Court and Supreme Court of Appeal in terms of section X<sup>36</sup>;
- (b) to make recommendations regarding the removal from office of judges of the Constitutional Court in terms of section X; and
- (c) to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice;
- (d) to investigate and report to the Chief Justice and Minister of Justice on complaints lodged with it relating to the conduct of judges.<sup>37</sup>

(3) When the Commission performs its functions in terms of subsection 2(c), it shall sit without the four senators referred to in subsection (1)(h).

(4) The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decisions.

(5) The Commission may appoint committees from among its number and assign any of its powers and functions to such committee.

**OTHER MATTERS**<sup>38</sup>**Seats of Courts**

19. (1) The seat of the Constitutional Court shall be Johannesburg.
- (2) The seat of the Supreme Court of Appeal shall be Bloemfontein.
- (3) The seats from time to time of the Intermediate Courts of Appeal shall be determined by the Chief Justice after consultation with the Minister of Justice.
- (4) The seats of the Provincial and Local Divisions of the High Court shall be determined by the Chief Justice after consultation with the Minister of Justice.

**Attorneys-General**

20. (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 and functions of an attorney-general shall be as prescribed by or under law.
- (3) No person shall be appointed as an attorney-general unless he or she is appropriately qualified in terms of a law regulating the appointment of attorneys-general in the Republic.

**Languages**

21. (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, subject to section X, be kept in any official language: provided that the relevant rights relating to language and the status of languages in this regard existing at the commencement of this Constitution shall not be diminished.

## NOTES

1. The scheme of this draft chapter is to proceed from General Provisions, to Composition, to Jurisdiction (including key aspects such as appeals and direct access), to Appointment of Judicial Officers and related matters.
  
2. More detailed provisions relating to the functioning of courts and the duties of judicial officers are to be found in a variety of other statutes (eg. the Criminal Procedure Act, the Magistrates' Courts Act, the Supreme Court Act, the Labour Relations Act, the Income Tax Act, and many more). We do not believe that detailed provisions of this kind can be incorporated in a Constitution of this type. This section is restricted to underlying constitutional aspects of judicial authority, and applies to all judicial officers (howsoever designated) in all courts.
  
3. This is intended to make explicit the constitutional duty of organs of state to implement court orders, and to reduce the risk of an ignoring of court orders by the Executive (as has happened on several occasions in Zimbabwe). It is also an echo of the present section 98(4) (see also section 13(2) of this draft).
  
4. The CA will have to decide whether the present names of courts are to be retained unchanged. We favour the redesignation set out here for these reasons: the old names are no longer appropriate (thus a "Supreme Court" which in fact refers *inter alia* to a judge of first instance, whose judgments are both subject to a higher appellate court and a constitutional court); a fresh constitutional start needs to be signalled; and there appears to be a general recognition of the need to create a new intermediate appellate court (with an entirely new name). A separate identity for each of these courts needs to be recognised, which we do not believe can be treated as mere "divisions" of each other. This approach is also based on the strong preponderance of views in materials submitted to TC 5 that a hierarchy of courts in South Africa, as in other democratic societies, is required and that an endeavour to collapse higher into lower courts is impractical.
  
5. The creation of an Intermediate Court of Appeal was canvassed in materials before TC 5. It is supported (in criminal matters) by the Chief Justice and by the Law Commission. This aspect is still under consideration by the Minister of Justice, and no final decision has been taken by TC 5 yet.

6. This is to allow, for instance, for the creation of the new Labour Courts contemplated by the Labour Bill currently before Parliament, and any other specialist courts which may be determined as necessary from time to time. It is to be noted that in terms of this draft, a court can only be created by an Act of Parliament, which in turn would be subject to the Constitution in general and the provisions of this Chapter in particular. If the CA determines that courts need not be established by Acts of Parliament, but simply "by law" (thus including provincial legislation), this provision will have to be adapted accordingly. This section also makes provision, it will be noted, for the establishment of traditional and community courts, should this upon further investigation be determined to be desirable and feasible.
  
7. This is the language used in the Schematic Summary of TC 5. If this is not used, then we consider that the wording should be "in consultation with" rather than "after consultation with". The former expression imposes a stronger obligation (as section 233(3) of the interim Constitution spells out).
  
8. We understand this to be a non-contentious issue in TC 5. It will mean, of course, that judicial experience in the CC itself will always be limited to seven years; that members of the CC will be conscious in many cases of the need to pursue subsequent careers (which is not a good thing for judicial independence); and that pension and retirement benefits will obviously have to allow for this brief term.
  
9. We consider that provision should be made for the appointment of some CC judges for a fixed period of less than seven years. An outstanding candidate may otherwise be eliminated because he or she (by reason of age, family obligations or some other personal factor) is unable to serve for exactly seven years.
  
10. This will enable the JSC to deal with the problem of continuity by enabling it to "stagger" appointments. We also considered that the maximum number of judges needs to be fixed in the Constitution, as the constitutional protection created by the CC might otherwise be undone by the simple experiment of enlarging it (as in fact happened in the 1950's in relation to the so-called "Coloured vote" constitutional crisis).

It does not seem to us that matters such as quorums and other detailed aspects of the functioning of the CC can however properly be regulated here. See note 2 above. The contemplated Constitutional Court Complementary Act will in any event determine these.

11. This is, we believe, a more appropriate redesignation of the current "Appellate Division of the Supreme Court of South Africa". See note 3 above. In relation to all issues other than constitutional ones (as defined in section 13(1)), it stands at the apex of the court structure, and it is properly in that sense, "Supreme". Even in relation to constitutional issues, in many cases it may be the final court.
12. This is a new proposal. It is made with the support of the Chief Justice, in view of the increasing administrative duties of the Chief Justice (such as the Judicial Service Commission). It would also mirror the appointment of a Deputy President now to the CC (in terms of the Constitutional Court Complementary Bill).
13. TC 5 has not dealt pertinently (to our knowledge) with the appointment of the Chief Justice. We recommend this formulation as consistent with that applying to the President of the CC. See note 6 above.
14. This provision (with separate provision in sub-section (1) for a CJ and DCJ) reflects the current number of judges in the AD/SCA. We consider that a stipulation of this kind would prevent any danger of "packing" of the Court (in the way this happened in the 1950's) when the size of a court is left undetermined in the Constitution. See further note 20 below.
15. Or. "Circuit".
16. See note 5 above - an entirely new court. This is a recommendation by the advisers; clarity will have to be obtained. There appears to be general acceptance in TC 5 that the current burden on the present Appellate Division is extremely heavy, and that in the light moreover of its acquisition of a new constitutional jurisdiction as well, intermediate courts of appeal are required. It is indeed the conviction of the Chief Justice that the AD would not be able to discharge an additional constitutional jurisdiction unless the new level is created. It is contemplated that these will have both criminal and civil jurisdiction. As regards the latter, they would serve in part the function of current provincial division Full Benches, and in part, relieve of the AD/ SCA in particular, of appeals essentially factual in nature. It is contemplated that initially three circuits would be created - perhaps a northern, central and southern (or eastern) - covering all the provinces; that the courts would be presided over by an AD/SCA judge and two High Court judges allocated by the Chief Justice (in liaison with the appropriate Judges



President for a term); and that the judges would sit at High Courts on a rotating basis.

17. This will have to be determined by appropriate ancillary legislative provisions (such as section 12 of the Supreme Court Act).
18. Our proposed redescription of the current "Supreme Court" local and provincial "divisions". See note 4 above.
19. At present, the Magistrates' Court Act, 1944.
20. These would include the courts of traditional authorities (which appear to be in urgent need of examination and restructuring), such community courts as may henceforth be recognised and regulated, Small Claims courts, Special Income Tax courts, Labour courts, Water courts and the Court of the Commissioner of Patents, etc. Our draft section 2(f) (read with footnote 5 above) would however require that the establishment of courts would have to be by Act of Parliament, to ensure that there is national consistency and equality. There appears to be no finality in this respect as regards traditional or community courts.
21. We understand there to be consensus in TC 5 that there should be a right of appeal at first instance. There appears also to be consensus that - for reasons both of justice to both parties in litigation, and the ability of the administration of justice to cope - there cannot be an automatic right of appeal thereafter.
22. This is a new provision which creates the possibility of an appeal to a local division of the High Court, and not only to a provincial division (cf. **section 19(2) of the Supreme Court Act, 59 of 1959**). If this suggestion is adopted, the latter provision will have to be adapted.
23. This provision is intended to remove the uncertainty created by the present section 103 as regards the jurisdiction of the magistrates' courts in relation to constitutional issues.
24. We consider this to be an essential mechanism, if the system of referrals which characterises Chapter 7 of the interim Constitution is to be eliminated. TC 5 received many submissions criticising the implications

for delays in the administration of justice, costs and ultimate denial of access to justice, of a system of referral of constitutional issues.

25. This provides for a system of automatic constitutional review (similar to the present system of automatic criminal review) in relation to constitutional issues, in view of their importance. Our draft provision may require further refinement to deal with the situation which would arise if an appeal is lodged but later lapses.
26. We ourselves would prefer to substitute the usual shorthand phrase, "mutatis mutandis" for the phrase "save that... Court", but the latter may be clearer to the ordinary reader. It will be noted that the effect of also including section 13(7) here is that the Speaker of Parliament or a national legislative would have a choice as to whether to refer the constitutionality of a Bill to the High Court (more specific provision may have to be made for the specific division) or the Constitutional Court. If the High Court can determine the constitutionality of an Act, should it not be able to do so (if the Speaker thinks it appropriate) by the High Court ? Or should all Bills - national or provincial - whose constitutionality is challenged, not be referred direct to the CC ?
27. See 21 above.
28. This is intended to avoid the situation where one High Court might declare an Act of Parliament (or Bill before Parliament) invalid while its status is undetermined in another province (or is in fact held by a High Court there to be valid), and the further undesirability of a statute affecting others besides the litigants in a particular matter being struck down in what may be essentially "private" litigation.
29. Procedures would have to be devised to accommodate this contemplated additional function of the Supreme Court of Appeal.
30. See notes 5 and 16 above.
31. We here follow the provisions of the current section 98(3) (save for slightly simplified language in (6)). A superficially attractive course would be to use instead a shorthand phrase such as "any constitutional

issue". But that would beg the question. It is furthermore important to define these matters to avoid any attempts to swamp the Constitutional Court (and to prolong litigation) by the spurious "constitutionalising" of what are not truly constitutional disputes.

32. We have added references in this section to acting judges.
33. In contrast with section 99(3) and (4) of the interim Constitution, we do not make provision for four of the eleven judges to be appointed from the ranks of the serving judiciary, and six not subject to that constraint. We also reduce the earlier specific qualifications to "fit and proper persons", as agreed in TC 5.
34. See section 3 of Act 29 of 1994.
35. We are not aware of final consensus in TC 5 relating to the composition of the JSC. We understand a reduction in the number of nominees by the President (and a concomitant increase in nominees from the legislature), for instance, to be mooted. The size of the JSC must be a matter for concern. We have however here simply repeated the current provisions, in the absence of any other clear directions.
36. The reference is to the equivalent of section 17 in the interim Constitution.
37. There appears to be consensus that an appropriate mechanism is required to investigate and report upon complaints relating to judicial misconduct. Such a mechanism would in our view best operate through a committee of the JSC, reporting to the Chief Justice and Minister of Justice.
38. We understand that all these matters - sections 19 to 21 of our draft - are in fact under consideration by other Technical Committees. The question of the status and powers of Attorneys-General has been a matter of debate, *inter alia* before TC 5, but no directions have been given to us relating to any change in the present position. We enclose however our own draft (taken essentially from the existing provisions in the interim Constitution) to ensure that there is no underlap. Our section 19(3), for instance, is new and a necessary corollary to our earlier recommendations.

### GENERAL NOTE

The following consequential adaptations of provisions elsewhere in the interim Constitution will have to be considered.

- (a) The sections equivalent to sections 4 and 229 of the 1993 Constitution should be amended in order to clarify whether or not Acts of Parliament, provincial laws, proclamations, regulations, by-laws and rules of the common law and customary law which are in force at the commencement of the new Constitution will "remain in force" until they are declared unconstitutional by a competent court or repealed or amended by a competent legislature. Cf. section 98(5) of the interim Constitution.
  
- (b) A more precise definition of "organ of state" should be given in the definition section, and a definition of "law" should be introduced. As to the latter, the definition should distinguish between the "countable" and "uncountable" sense of the word "law" (see further Erasmus Superior Court Practice A2-2). It would appear from the 1993 Constitution, for instance, that when "law" is used as a countable noun - see for example, sections 4(1), 35(3), 98(5) and 103(2) ("any law"), sections 98(6), 103(1), 232(3) and 241(3) ("a law"), section 229 ("all laws"), and section 241(1) ("the laws") - it refers to legislative instruments such as Acts of Parliament, provincial laws, provincial ordinances, proclamations, regulations and by-laws, and that when it is used as an uncountable noun - see for example, section 7(2) ("all law in force"), section 8(2) ("equality before the law", "equal protection of the law"), and section 33(1) ("law of general application") - it encompasses all the recognised sources of law, namely legislation, the common law and customary law.
  
- (c) A section equivalent to section 107(1) of the 1993 Constitution should be incorporated in the section equivalent to section 22 of that Constitution; the issue dealt with in section 107(1) really belongs in the bill of rights, cf. section 25(3)(i).