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DRAFT

29 JUNE 1995

THEME COMMITTEE 5 OF THE CONSTITUTIONAL ASSEMBLY

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

DRAFT CHAPTER FOR DISCUSSION

(29 JUNE 1995)

CHAPTER.....

THE COURTS AND THE ADMINISTRATION OF JUSTICE

GENERAL PROVISIONS

Judicial Authority

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

[Footnotes]

1. The Freedom Front proposes the deletion of "national" so as to ensure that provincial law is also applicable. See note 4 below.

- (7) The functioning of the judicial system shall be regulated only by a national law.

The judicial system

2. There shall be the following courts of law in the Republic:
- (i) The Constitutional Court, which shall be the highest court in all matters arising from the protection, interpretation or enforcement of the Constitution.
 - (ii) The Supreme Court of Appeal shall be the highest court in all other matters.
 - (iii) Such Courts of Appeal as may be established by law², which shall hear appeals from the High Court or courts of similar status.
 - (iv) The divisions of the High Court and other courts presided over by a judge.

[Footnotes]

2. Advisers' comment: The creation of Courts of Appeal (intermediate between the High Court - currently the inappropriately named "Supreme Court" - and the Supreme Court of Appeal - currently the AD) was canvassed in materials before TC 5 and has been under discussion since February. It is supported (in criminal matters) by the Chief Justice and by the Law Commission. They are accepted in principle by the parties, but their exact ambit will have to await the Hoexter Commission Report and a consequent consultative process. See further note 13 below.

(v) Magistrates' Courts³ and other courts presided over by a magistrate.

(vi) Such other courts as may be established by law.⁴

THE CONSTITUTIONAL COURT

Composition of the Constitutional Court

3. (1) The Constitutional Court shall consist of a President, a Deputy-President and nine other judges.
- (2) The judges of the Constitutional Court shall hold office for non-renewable terms not exceeding 7 [or 10] years.⁵

[Footnotes]

3. Advisers' comment: The ANC questions whether there should be any reference to Magistrates' Courts in the Constitution. The Advisers believe that this is necessary, given the fact that some constitutional jurisdiction for Magistrates' Courts is contemplated (see section 13(2) below) and thus must be provided for in the Constitution. The right to appeal should also be stated in the Constitution. See further section 13 below.
4. Advisers' Comment: 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 and regulated by a national law, which in turn would be subject to the Constitution in general and the provisions of this Chapter in particular. 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.
5. Advisers' comment: Still to be resolved. ANC: 7 years. NP: 10 years. Others: not a major point of debate.

- (3) Persons who are judges of the Constitutional Court at the time this Constitution takes effect, and who will not attain the age of 70 years within five years of such date, shall be entitled to continue in office for a further period of five years.⁶

Jurisdiction of the Constitutional Court

4. (1) The Constitutional Court shall have jurisdiction to decide any issue arising from the protection, interpretation or enforcement of the Constitution.⁷
- (2) The Constitutional Court only shall decide:
- (a) the constitutionality of a Bill before the National Assembly, the Senate or a provincial legislature;
 - (b) constitutional disputes between the national and provincial governments or between provincial governments.⁸
- (3) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.

[Footnotes]

6. Advisers' comment: Is ordinary attrition or a panel appointment to be adopted? This is a difficult problem. Certain members of TC 5 have been in favour of a mechanism for panel appointments to the CC in future. Others have favoured ordinary attrition. Both viewpoints are concerned about achieving continuity in the Court by staggering appointments, and not unduly politicising the appointments process. This provision as drawn is tentative: it may provide a middle way between natural attrition and a panel, and achieve staggering. We deal below (in section 15(3)) with actual appointment mechanisms for CC judges.
7. The NP has suggested the addition at the end of this provision of the words "or any right, obligation or duty created by such provision". The Advisers believe that this is redundant.
8. This also needs to be dealt with in the section dealing with provincial constitutions.

- (4) The final decision as to whether a matter falls within its jurisdiction lies with the Constitutional Court.
- (5)
 - (a) If the Constitutional Court finds any law, executive or administrative act to be inconsistent with the Constitution, it shall declare such law or act⁹ invalid to the extent of its inconsistency.
 - (b) The Constitutional Court may make such further order as it may deem just and equitable, including whether or to what extent any declaration of invalidity is to have retrospective operation, and an order as to costs.
 - (c) The Constitutional Court may suspend a declaration of invalidity for a specified period to allow the competent authority to correct the defect, and impose such conditions as it may decide.
- (6) If any other court holds a national or provincial statute or any executive action of the President¹⁰ to be inconsistent with the Constitution, such finding shall have no force or effect unless confirmed by the Constitutional Court on appeal to it or on application to it by any person.

Access to and procedures of the Constitutional Court

5.
 - (1) A matter within its jurisdiction may be brought before the Constitutional Court
 - (a) by way of an appeal from the Supreme Court of Appeal with leave of that court or with special leave of the President of the Constitutional Court;

[Footnotes]

9. "Law" perhaps to be defined to include any provision thereof, and "act" to include omission.
10. This is a new proposal by the advisers for consideration, given the constitutional importance of executive actions vested in the President.

- (b) by way of direct appeal from any other court presided over by a judge only with special leave of the President of the Constitutional Court;
 - (c) by way of direct access where it is within the exclusive jurisdiction of the Constitutional Court or where the interests of justice so require but only with special leave of the President of the Constitutional Court.
 - (d) at the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature acting on the request of not less than 20% of each of the Assembly or Senate, or legislature, as the case may be, or all the members of all parties not constituting the majority party in such body, and with the special leave of the President of the Constitutional Court¹¹;
- (2) The granting of special leave to appeal and direct access to the Constitutional Court shall be regulated by a national law or the rules of that court.

SUPREME COURT OF APPEAL

Composition of the Supreme Court of Appeal

6. The Supreme Court of Appeal shall consist of a Chief Justice, a Deputy Chief Justice and such other judges of appeal as may be appointed from time to time, not exceeding 15 in number.¹²

[Footnotes]

11. This represents a tentative compromise between the parties.
12. This number will have to be determined, particularly in consultation with the Chief Justice. A limit is seen as desirable to prevent the danger of "packing" (as happened in the 1950's).

Jurisdiction of the Supreme Court of Appeal

7. The Supreme Court of Appeal shall hear and finally decide all appeals from all courts presided over by a judge, whether of civil, criminal, constitutional or other nature, subject to the right of appeal to the Constitutional Court in matters within the jurisdiction of that Court.

[INTERMEDIATE] COURTS OF APPEAL¹³

Composition of [Intermediate] Courts of Appeal

8. The composition of such Intermediate Courts as may be established shall be determined by law.

Jurisdiction of [Intermediate] Courts of Appeal

9. (1) A Court of Appeal shall have jurisdiction to hear and determine all appeals from all courts presided over by a judge within its area of jurisdiction as provided for by law and whether of civil, criminal, constitutional or other nature.

[Footnotes]

13. Advisers' comment: Still to be determined. 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 doubtful whether the AD would be able to discharge an additional constitutional jurisdiction unless the new level is created. It is contemplated that these would 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.

- (2) An appeal shall lie from a decision of a [Intermediate] Court of Appeal to the Supreme Court of Appeal with the leave of that court or the special leave of the Chief Justice.

THE HIGH COURT AND OTHER COURTS PRESIDED OVER BY A JUDGE

Composition of the High Court and other courts presided over by a judge

10. (1) There shall be such divisions of the High Court of South Africa as may be established by law.
- (2) Each division of the High Court shall consist of a Judge President, a Deputy Judge President and other judges as determined by law.
- (3) National legislation may provide for the establishment and composition of other courts presided over by a judge.

Jurisdiction of the High Court and other courts presided over by a judge

11. (1) A division of the High Court shall have jurisdiction as a court of first instance, to decide all matters, whether of civil, criminal, constitutional or other nature, within its jurisdiction and subject to such limitations as are provided by law.¹⁴
- (2) A division of the High Court shall have the jurisdiction to decide all appeals and reviews from all courts not presided over by a judge, within its area of jurisdiction.

[Footnotes]

14. Advisers' comment: This latter phrase contemplates threshold limitations (thus excluding certain classes of litigation - e.g labour, elections, water or patents - and to enable dovetailing with the magistrates' courts and other courts)

- (3) The jurisdiction of other courts presided over by a judge shall be regulated by law.

- (4) An appeal from any division of the High Court or any other court presided over by a judge shall lie to the Intermediate Court of Appeal or the Supreme Court of Appeal with the leave of that court or with the special leave of the Judge-President of the Intermediate Court of Appeal or the Chief Justice, as the case may be.¹⁵

MAGISTRATES' COURTS¹⁶

Composition of Magistrates' Courts

- 12. There shall be such Magistrates' Courts with such composition as shall be established by law.

Jurisdiction of Magistrates' Courts

- 13. (1) A Magistrate's Court or other court presided over by a magistrate shall have jurisdiction to hear and determine all civil and criminal matters arising within its area of jurisdiction and subject to such limitations as are provided by law.

- (2) A Magistrate's Court or other court presided over by a magistrate shall have no jurisdiction to pronounce any national, provincial or subordinate legislation inconsistent with this Constitution.

[Footnotes]

- 15. See notes 2 and 13 above.

- 16. See note 3 above.

- (3) An appeal shall lie against any decision of a Magistrate's Court or other court presided over by a magistrate to the division of the High Court having local jurisdiction as provided for by law.

OTHER COURTS

Composition and jurisdiction of other courts

14. (1) The composition and jurisdiction of all other courts shall be as prescribed by law, except that no such courts shall have jurisdiction over a matter within the jurisdiction of the Constitutional Court.¹⁷
- (2) All other courts shall be subject to review by the High Court.

[Footnotes]

17. Advisers' comment: We note that the introduction and role of community courts and courts functioning in terms of indigenous and customary law is still under consideration. It would seem doubtful that this can be achieved before the new Constitution is finalised.

JUDICIAL OFFICERS¹⁸

Appointment and removal from office of judicial officers

15. (1) No person shall be qualified to be appointed a judicial officer or acting judicial officer unless he or she is a South African citizen¹⁹ and is a fit and proper person to be a judicial officer.
- (2) A judicial officer shall, before commencing to perform the functions of his or her office, make and subscribe an oath or solemn affirmation in the terms set out in Schedule X before a judge.
- (3) Judges shall be appointed by the President on the recommendation of the Judicial Service Commission.²⁰
- (4) Acting judges shall be appointed by the Minister of Justice on the recommendation of the President of the Constitutional Court, the Chief Justice, or the Judge President of the appropriate division of the High Court or other court constituted in terms of section 10(3) for a period not exceeding six months in respect of any one such appointment.
- (5) The Chief Justice shall be appointed by the President. The Deputy President of the Constitutional Court, the Deputy Chief Justice and all other judges of appeal shall be appointed by the President on the recommendation of the Judicial Service Commission.

[Footnotes]

18. Advisers' comment: To be defined (in a definition section) in terms including any person presiding over a court contemplated by section 2 above (and "acting judicial officer" accordingly). Judges to be defined as judicial officers appointed to the CC, SCA, and HC (and similar courts: see section 10(3))
19. Advisers' comment: To be considered. Some members feel that the restriction is undesirable: desirable appointees, it is suggested, may be drawn from other countries. On the other hand there may be a policy concern about appointing non-South Africans to judicial office when they could not hold comparable executive or legislative positions.
20. The NP position is currently that the JSC should nominate, the President then to appoint in consultation with all leaders of all parties representing the National Assembly, with an appropriate deadlock mechanism (or a 75% vote in the Assembly or Senate: see section 110 of the interim Constitution).

Removal of judges from office

16. (1) The President may remove a judge from office on grounds of misbehaviour, incapacity or incompetence upon a finding to that effect by the Judicial Service Commission and the adoption by Parliament of a resolution calling for the removal of such judge from office.
- (2) A judge who is the subject of an investigation may be suspended by the President in consultation with the Chief Justice pending the finalisation of such investigation.
- (3) The emoluments and pension and other benefits of judges and acting judges of the Constitutional Courts, High Courts and Supreme Courts of appeal shall be prescribed by law and shall not be reduced during their continuation in office.

Judicial Service Commission

17. (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 members of the National Assembly and four senators designated *en bloc* by the National Assembly and Senate respectively, in each instance by resolution adopted by a majority of at least two-thirds of members;
 - (i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet;
 - (j) on the occasion of the consideration of matters specifically relating to a provincial division of the High Court, the Judge President of the relevant division and the Premier of the relevant province.
- (2) The functions of the Judicial Service Commission shall be -
- (a) to make recommendations regarding the appointment and removal from office of judges in terms of sections 15 and 16;
 - (b) to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice;
 - (c) to recommend and advise, in terms of section 17(2).
- (3) When the Commission performs its functions in terms of subsection 2(b), it shall sit without the four members of the National Assembly and four senators referred to in subsection 1(h).
- (4) The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decision.

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

OTHER MATTERS

Procedural Matters

18. (1) 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.
- (2) All rules of procedure in the courts of law shall be submitted to the Judicial Service Commission for its recommendation and advice.

Seats of Courts

19. [TC 1 must report]

Language

20. [TC 1 must report]

Attorneys-General

21. [TC 1 must report]

J. J. GAUNTLETT SC

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