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D R A F T

16 JUNE 1995

**SUBMISSION TO THE CONSTITUTIONAL COMMITTEE
OF THE CONSTITUTIONAL ASSEMBLY**

THE JUDICIAL AUTHORITY

AND THE

ADMINISTRATION OF JUSTICE

REVISED DRAFT CHAPTER

(16 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.

The judicial system

2. (a) There shall be the following courts of law in the Republic:
 - (i) The Constitutional Court.
 - (ii) The Supreme Court of Appeal.
 - (iii) Such Intermediate Courts of Appeal as may be established by law.²
 - (iv) The divisions of the High Court.
 - (v) Magistrates' Courts.³

[Footnotes]

2. **Advisers' comment:** The creation of an Intermediate Court of Appeal 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. We treat it in this draft as an unresolved matter, hence the formulation ("such.... as may be established..."). At the request of the Chairman of the CA, to be resolved on 19 June 1995.
3. **Advisers' comment:**We have been asked to note that the position of the Magistrates' Courts is still contentious. To be resolved on 19 June 1995 by TC 5.

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

- (b) Any reference in any other law to the Appellate Division of the Supreme Court of South Africa or to the Supreme Court of South Africa or to one of its divisions shall be construed as a reference to the Supreme Court of Appeal, the High Court or its appropriate division, as the case may be.

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 XXX years,⁵ and shall be appointed in such a manner as may be prescribed by law to ensure that no less than five judges shall be appointed every five years.⁶

[Footnotes]

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 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. (see note 2 above). 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: To be resolved by TC 5 on 19 June 1995.
6. Advisers' comment: This entrenches the principle but leaves the exact mechanism to be worked out.

- (3) No fewer than eight judges shall hear any matter before the Constitutional Court.

Jurisdiction of the Constitutional Court

4. (1) The Constitutional Court shall have jurisdiction to determine any issue arising from the interpretation or enforcement of any provision of this Constitution.
- (2) The Constitutional Court shall have exclusive jurisdiction to hear as a court of first instance and to finally determine:
 - (a) the constitutionality of a Bill before Parliament or a provincial legislature;
 - (b) constitutional disputes between the national and provincial governments or between provincial governments;
 - (c) certify that the text of any draft provincial constitution is not inconsistent with this Constitution, prior to which anticipation a provincial constitution shall be of no force or effect.
- (3) The final decision as to whether a matter falls within its jurisdiction lies with the Constitutional Court.
- (4) A decision of the Constitutional Court shall bind all persons and all legislature, executive and judicial organs of state.
- (5) If the Constitutional Court declares any law, or any executive or administrative act to be unconstitutional, it shall issue such an order as may appear to it to be just and equitable, including an order putting the legislature or other organ of state on terms as to the correction of the law or act complained of, and determining whether or to what extent any declaration of invalidity is to have retrospective operation.

- (6) Any order by a court invalidating a national or provincial statute shall have no force or effect unless confirmed by the Constitutional Court on appeal to it, or on application to it by any party obtaining such order.

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 leave⁷ of the President of the Constitutional Court;
 - (b) by way of an appeal from a Division of the High Court with leave of that Court or with special leave of the President of the Constitutional Court;
 - (c) by way of direct access where the interests of justice so require but only with the 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 pursuant to the provisions of section 4.
- (2) The granting of special leave to appeal and direct access to the Constitutional Court shall be regulated by the Rules of that court.

[Footnotes]

7. **Advisers' comment:** We envisage that the Rules of the Constitutional Court would only provide for special leave in this instance where compelling considerations of urgency and the public interest would warrant bypassing the SCA. This section will have to be adjusted if the Intermediate Court of Appeal is adopted, to regulate appeals to and from it.

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 XX in number.⁸

Jurisdiction of the Supreme Court of Appeal

7. (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, including jurisdiction to determine a matter referred to in section 4(1).
- (2) 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 4(1) hereof.

[Footnotes]

8. Advisers' comment: We reiterate the desirability of such a provision, to prevent the danger of "packing" a Court (in the way this happened in the 1950's) when the size is left undetermined in the Constitution. The number of CC judges is, after all, determined: see section 3(1).

[INTERMEDIATE COURTS OF APPEAL⁹

Composition of Intermediate Courts of Appeal

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

Jurisdiction of the Intermediate Court of Appeal

9. (1) An Intermediate Court of Appeal shall have jurisdiction to hear and determine all appeals duly lodged with such court in terms of 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 4(1) and unless the matter is one of urgency, compelling public concern or raises such other exceptional consideration as the Constitutional Court may determine.]

[Footnotes]

9. 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 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.

THE HIGH COURT

Composition of the High Court

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.

Jurisdiction of the High Court

11. (1) 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, including jurisdiction to determine a matter referred to in section 4(1).
- (2) An appeal shall lie as of right from the 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/ Supreme Court of Appeal], and to the Constitutional Court in relation to a matter referred to in section 4(1) only with the special leave of that Court.

- (3) Where the High Court has given a decision, judgment or order as a court of first instance, there shall be an automatic right of appeal¹⁰ to the competent court of appeal; where it has given a decision, judgment or order on appeal to it, such further appeal shall only lie with the leave of the High Court or the leave of the court of appeal on petition to it.

[MAGISTRATES' COURTS¹¹

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) An appeal shall lie as of right¹² 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.

[Footnotes]

10. **Advisers' comment:** 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.
11. To be resolved on 19 June 1995.
12. See note 10 above.

- (2) A Magistrate's Court shall have no additional jurisdiction in respect of the matters set out in section 4(1)¹³.]

OTHER COURTS

Composition and jurisdiction of other courts

14. The composition and jurisdiction of all other courts shall be as prescribed by or under a law.¹⁴

JUDICIAL OFFICERS

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 citizen 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.

[Footnotes]

13. Advisers' comment: We provided in our first draft (18 April) for partial constitutional jurisdiction for Magistrate's Courts: see section 13(1)(a) read with section 9(2) of that draft. That is now lost as a result of the direction to redraft our old section 13(1) (itself modelled on section 98(4) of the interim Constitution) in the general terms of section 4(1) above. Constitutional issues arising in magistrates' court proceedings will accordingly have to be taken on appeal, and not during the trial.
14. Advisers' comment: We have been asked to record that the introduction and rule of community courts and courts functioning in terms of indigenous and customary law is still under consideration.

- (3) Appointment of CC judges....¹⁵
(Vacancies to be dealt with under this sub-section).
- (4) Appointment of other judges.....¹⁶
- (5) The appointment of acting judges shall be regulated by law.
- (6) The Chief Justice shall be appointed by the President. The Deputy Chief Justice and all other judges of appeal shall be appointed by the President on the recommendation of the Judicial Service Commission.

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 judges 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 will not be reduced during their continuation in office.

[Footnotes]

15. To be resolved on 19 June 1995.

16. To be resolved on 19 June 1995

OTHER MATTERS

Procedural Matters

17. 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.¹⁷

Seats of Courts

18. [TC 1 must report]

[Footnotes]

17. **Advisers' comment:** It has been proposed that Rules to be determined also after consultation with JSC. It is in issue if this is an appropriate rule-making body and whether this would not reflect upon the independence of the courts. Also to be resolved on 19 June 1995.

Language

19. [TC 1 must report]

Attorneys-General

20. [TC 1 must report]

JJG/PJJO

16 JUNE 1995

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).
- (d) "Judicial Officers" will also have to be defined in the definition section.

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- (d) "Judicial Officers" will also have to be defined in the definition section.