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D R A F T

29 MAY 1995

DRAFT (29 MAY 1995)

THE COURTS AND THE ADMINISTRATION OF JUSTICE

Judicial Authority

1. (1) The judicial authority of the Republic vests in the courts established by this Constitution or a national law.
- (2) The courts shall be independent and subject only to this Constitution and the law¹.
- (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) Orders issued by the courts within their respective jurisdictions shall bind all persons and all organs of state to which such orders apply.
- (6) Organs of state shall enforce the orders of court in accordance with law and shall, through legislative and other measures, give the courts the necessary assistance to protect and ensure their independence, dignity and effectiveness.

¹ The term "law" as used in this phrase includes statutory law, with the result that Parliament will remain competent to make laws with regards to the courts provided such laws are not inconsistent with the Constitution and the principles contained therein. It is envisaged that the Constitution will in any event contain a general provision vesting in Parliament the power to make laws for the Republic which are not inconsistent with the Constitution. See section 37 of the Interim Constitution.

Judicial system

2. There shall be the following courts in the Republic:².

- (a) The Constitutional Court.
- (b) The Supreme Court of Appeal.
- (c) The Divisions of the High Court.
- (d) Such other courts as may be established by a national law.

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 hold office for a non-renewable term of 10 years, provided that not less than five judges shall be appointed every five years³.
- (3) No fewer than 8 judges shall hear any matter before the Constitutional Court.

² No agreement on question of Intermediate and Magistrates Courts.

³ A transitional mechanism must be provided for to facilitate such staggered terms. No agreement on term of office and mechanism.

Jurisdiction of the Constitutional Court

4. (1) The Constitutional Court has jurisdiction to hear and finally determine any issue involving the protection interpretation or enforcement of this Constitution or a provincial constitution.⁴.
- (2) Only the Constitutional Court has jurisdiction to examine the validity of or to invalidate a Bill before Parliament, to invalidate an Act of Parliament, [and to determine any dispute with regard to any issue within its jurisdiction between organs of state established by this Constitution⁵].
- (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 binds all other courts.
- (5) 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

⁴ All parties agreed except F.F.

⁵ This clause will require fine-tuning.

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.

- (6) If the Constitutional Court declares any law, act or conduct invalid it shall consider the consequences of such invalidation and may in the interest of justice and good government issue an order with regard thereto.

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, where leave to appeal has been granted by the Supreme Court of Appeal, or where such leave has not been granted, with the special leave of the Constitutional Court.
 - (b) By way of an appeal from a court, other than the Supreme Court of Appeal, upon petition to and with the special leave of the President of the Constitutional Court.

- (c) 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.
 - (d) In the case of a dispute on the constitutionality of a Bill before Parliament, by way of application by the Speaker of the National Assembly or the President of the Senate, acting upon a petition by at least one-third of the members of the National Assembly or the Senate, as the case may be.⁶
 - (e) In the case of a dispute between organs of state established by this Constitution, by way of application by one of the parties to the dispute.
- (2) The Constitutional Court may determine its own rules and procedures subject to the provisions of this Constitution and the law.

⁶ No agreement on the percentage of members of the National Assembly or the Senate.

Supreme Court of Appeal

6. (1) The Supreme Court of Appeal shall consist of a Chief Justice, a Deputy Chief Justice and other judges of appeal.⁷
- (2) The Supreme Court of Appeal has jurisdiction to hear and determine appeals from a Division of the High Court or such other court as determined by law.
- (3) The Supreme Court of Appeal shall be the court of final instance in all matters except those which fall within the jurisdiction of the Constitutional Court.

High Court

7. (1) There shall be such Divisions of the High Court with such composition as determined by law.
- (2) The Divisions of the High Court have inherent jurisdiction to hear and determine all civil disputes and criminal prosecutions and appeals from lower courts, including all matters within the jurisdiction of the Constitutional Court which are not reserved exclusively for the Constitutional Court.

⁷ No agreement on number of judges

- (3) A division of the High Court may examine⁸ the validity of an Act of Parliament and make a finding in respect of its validity, but it may not invalidate an Act of Parliament.

Other Courts

8. (1) The composition and jurisdiction of other courts shall be as determined by law. Community courts and courts functioning in terms of a system of indigenous and customary law may be provided for by law.

- (2) No such court, unless specifically provided for in law, shall have the power to examine or to rule on the validity of a law of a provincial legislature or any other law. If the validity of such an Act or law is in issue in any proceedings before such a court, the court shall deal with the matter in the manner prescribed by law on the presumption that the Act or law is valid.

- (3) Special or extraordinary courts or tribunals may not be established for the prosecution of offences of a political nature. Such offences shall be prosecuted before the ordinary courts

⁸ Provision may be required to be made so as to enable such examination to occur pendente lite. See for example section 16 of the Constitutional Court Complementary Act in which the Supreme Court is given jurisdiction to grant interim relief "pending the determination by the Court of any matter referred to in section 98(2) of the Constitution, notwithstanding the fact that such interdict or relief might have the effect of suspending or otherwise interfering with the application of the provisions of an Act of Parliament."

of the land.

Judicial Service Commission

9.

Appointment of Judges and Judicial Officers

- 10. (1)** No person shall be qualified to be appointed a judge or other judicial officer unless he or she is a South African citizen and is a fit and proper person to be appointed a judge or judicial officer.
- (2)** A judge or other 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)** Appointment of CC judges ...
(Vacancies to be dealt with under this sub-section).
- (4)** Appointment of other judges ...
- (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

11. (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 pending the finalisation of such investigation.