

2/4/5/7/9

**D R A F T**

**6 JUNE 1995**

DRAFT (6 JUNE 1995)

THE COURTS AND THE ADMINISTRATION OF JUSTICE

Judicial Authority<sup>1</sup>

1. (1) The judicial authority of the Republic vests in the courts established by this Constitution or a national<sup>2</sup> law.
- (2) The courts shall be independent and subject only to this Constitution and the law<sup>3</sup>.
- (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 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.

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1. The implications (if any) need to be considered if the Bill of Rights is to be horizontally applicable.

2. The Freedom Front proposes the deletion of "national" so as to ensure that provincial law is also applicable.

3. 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.

Sub-clauses (2) and (3) may need to be re-ordered.

### **Judicial system**

2. (1) There shall be the following courts in the Republic:<sup>4</sup>
  - (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.<sup>5</sup>
- (2) 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 of the land.

### **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

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4. No agreement has been reached on the constitutionalisation of Intermediate and Magistrates Courts.

5. Provincial powers to establish indigenous courts have not been agreed upon as yet.

judges shall be appointed every five years.<sup>6</sup>

- (3) No fewer than 8 judges shall hear any matter before the Constitutional Court<sup>7</sup>.

#### **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.<sup>8</sup>
- 2) Only the Constitutional Court has jurisdiction to -
- (a) determine the constitutionality of a Bill before Parliament;
  - (b) invalidate an Act of Parliament<sup>9</sup>;
  - (c) determine any dispute of a constitutional nature between

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

7. The more detailed formulation contained within clause 8 of the Constitutional Court Complementary Bill may be preferable.

8. The F.F does not want provincial constitutions to be included in this clause.

The NP is concerned that the following issues may need to be expressly included in clause 4:

- (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;
- (e) any dispute of a constitutional nature between organs of state at any level of government;

9. A provision of an Act is taken to be included here.

organs of state established by this Constitution<sup>10</sup>; or

(d) certify that the text of any draft provincial constitution is not inconsistent with this Constitution, prior to which certification a provincial constitution shall be of no force or effect<sup>11</sup>.

(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) If the Constitutional Court declares any law, act, conduct or omission invalid<sup>12</sup>, it shall consider the consequences of such invalidation and may in the interests of justice or good government issue an order with regard thereto.

(6) If the Constitutional Court finds any law unconstitutional, it shall declare such law invalid. The Court may, in the interests of justice

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10. Additional disputes between organs of state may be required to be included in this clause. This clause requires fine-tuning.

11. This clause was included on the basis of section 160(4) of the Interim Constitution. The Interim Constitution requires that a provincial constitution comply with the Constitutional Principles.

12. A definition of "conduct" in a general definitions clause may cover acts and omissions.

or good government, require Parliament or any other competent authority, to correct the defect in the law within a period specified by the Court and the invalidation of such law shall then be suspended pending correction or the expiry of the period specified<sup>13</sup>

<sup>14</sup>.

### Access to and procedures of the Constitutional Court

5. (1) A matter within its jurisdiction may be brought before the Constitutional Court<sup>15</sup> -

(a) by way of an appeal with leave of the Supreme Court of Appeal or with special leave of the President of the Constitutional Court as regulated by law or the rules of the Constitutional Court<sup>16</sup>.

(b) by way of direct access where the matter is reserved exclusively for the Constitutional Court or where it is in the interests of justice and as regulated by national law or the

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13. An act or conduct is taken to include an omission.

14. Technical Experts to give an opinion regarding this clause as currently drafted. A further opinion is required concerning the inclusion of the clause: "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."

15. NP's view depending on agreement with regard to Intermediate courts .... " 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 .... or section 12(8) hereof;

16. Grounds of appeal to be regulated by law.

rules of the Constitutional Court.

(c) in the case of a dispute on the constitutionality of a Bill before Parliament or a provincial legislative, by way of application by the Speaker of the National Assembly, the President of the Senate, or the Speaker of the provincial legislature, acting upon a petition by at least one-third<sup>17</sup> of the members of the National Assembly, Senate<sup>18</sup> or provincial legislature.

(2) The Constitutional Court shall<sup>19</sup> determine its own rules and procedures subject to the provisions of this Constitution and the law<sup>20</sup>.

### Supreme Court of Appeal<sup>21</sup>

6. (1) The Supreme Court of Appeal shall consist of a Chief Justice, a

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17. No agreement has been reached as to the percentage of members required to petition the Speaker of the National Assembly, provincial legislature or the President of the Senate.

18. The reference to the Senate could possibly be omitted.

19. Technical Experts to give an opinion on words "may" and "shall".

20. Such determination of rules and procedure should be done in consultation with the Judicial Service Commission.

21. Technical Experts to give an opinion on "Inherent Jurisdiction" Alternate view - 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.

Deputy Chief Justice and other judges of appeal.<sup>22</sup>

(2) The Supreme Court of Appeal has jurisdiction as regulated by law to hear appeals from other courts, and to finally determine all appeals save for those which fall within the jurisdiction of the Constitutional Court<sup>23</sup>.

(3) A matter may be brought before the Supreme court of Appeal where leave to appeal has been granted by another court, or with the special leave of the Chief Justice as determined by law<sup>24</sup>.

### High Court

7. (1) There shall be such Divisions of the High Court as determined 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.

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22. No agreement on number of judges or whether the number should be specified.

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- Technical Experts to give opinion as to use of phrase: "Highest Court in all non-constitutional matters."
- Consideration must be given to how courts of final instance such as Small Claims Courts are to be dealt with.
- It is unclear as to whether provision must be made for review proceedings and the power to re-try or re-open a matter for further evidence.
- Does this provision allow for the by-passing of the Supreme Court of Appeal where direct access to the CC is granted? This clause requires fine-tuning.

24. Proposed as an alternative to this clause is the following:  
"The Supreme Court of Appeal shall have jurisdiction to hear and determine all appeals against decisions, judgements and orders of any Intermediate Court of Appeal or High Court, in accordance with the Constitution and any law, where leave to appeal has been granted, or where leave has not been granted upon petition to and with the special leave of the Chief Justice."



- (3) The inherent jurisdiction of the High Court to hear and determine criminal or civil matters shall be regulated by law<sup>25</sup>.
- (4) The Divisions of the High Court may hear and determine all matters within the jurisdiction of the Constitutional Court which are not reserved exclusively for the Constitutional Court.
- (5) A division of the High Court may<sup>26</sup> make a finding in respect of the validity of an Act of Parliament, provided that if the court finds an Act of Parliament to be invalid, then the matter shall be referred to the Constitutional Court for final determination<sup>27</sup>.

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25. It is assumed that this would include the hearing of matters both as a court of first instance and on appeal. The inclusion of review needs to be considered.

\* The NP has queried whether the inclusion of the following clauses is necessary:

- (4) An appeal shall lie against any decision, judgement 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, or in the event of such leave being refused, with the special leave of the Chief Justice upon petition to it.
  - (5) An appeal shall lie against any decision, judgement 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 the Court may determine.
  - (6) 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, judgement 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.
26. 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."
27. Technical Experts to give an opinion - "The jurisdiction to decide but if invalid only take effect once confirmed by the CC. How is a matter to be referred to the CC and who will bear the costs?"

### **Other Courts**

8. (1) The composition and jurisdiction of other courts shall be as determined by law<sup>28</sup>.
- (2) To improve public access to justice, community courts and courts functioning in terms of a system of indigenous and customary law shall<sup>29</sup> be provided for by law<sup>30</sup>.

### **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

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28. No agreement as yet as to whether this should include both national and provincial law.

29. The use of "shall" as opposed to "may" is queried. Constitutional principle requires indigenous courts to be established.

30. It is proposed that both of the following clauses be scrapped in that they are covered elsewhere in the chapter: " 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 " and

"(3) 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 national or provincial law. "

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.

- (3) The remuneration of judges and acting judges of the Constitutional courts, High courts and supreme Court of appeal will be prescribed by law and will not be reduced during their continuation in office.

## **NATIONAL PARTY FOOTNOTES TO BE INCLUDED IN THE LATEST WORKING DRAFT**

### **Addition after footnote 3 on page 1**

The National Party is concerned that the above-mentioned interpretation may have the implication that statutory law can detrimentally affect the competence of the courts.

### **Footnote after footnote 5 — referring to Clause 2(2)**

The National Party is of the view that reference should specifically be made that the special courts will not be competent to undermine the rule of law and will be subject to the jurisdiction of the Constitutional Court and the High Court.

### **Footnote after footnote 12 on page 4 and referring to the last word "or" in Clause 4(5)**

The National Party is of the view that "or" should be amended to read "and".

### **Footnote before footnote 13 on p5 and referring to the first "or" in Clause 4(6)**

The National Party is of the view that "or" should be amended to read "and".

### **The following to be added to footnote 15 on page 5.**

The National Party is of the view that none of the matters referred to in the following National Party proposal should be left out:

**6. Access to the Constitutional Court.**

- (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 . . . of;
  - (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 . . . . or section . . . 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 . . . 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 . . .
- (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.

**The following footnote to be placed after footnote 16 on page 5 and referring to the last line of Clause 5(1)(b) on page 5.**

The word "and" should be amended to read "or"; and the word "or" should be amended to read "and".

**Footnote 8 on page 3 should be amended to the effect that the words "The NP is concerned that the following issues may need to be expressly included in clause 4 . . .any level of government" be substituted by the following words:**

The National Party is of the view that none of the matters referred to in the following NP proposal should be left out:

### **Jurisdiction of the Constitutional Court.**

- (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 –
  - (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.

**Add the following words to footnote 20 on page 6:**

The National Party is of the view that the following words should be added to Clause 6(1):

“ . . . who shall hold office according to law”.

**Add the following words to footnote 19 on page 6:**

The National Party is of the view that none of the matters referred to in the following proposal should be left out:

## **Jurisdiction of the Supreme Court of Appeal**

- (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, judgements 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, judgement 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 5(1) hereof.

The NP is furthermore of the view that Intermediate Courts of appeal will have to be dealt with in detail after the Hoexter Commission has submitted its report. The present NP proposal in this regard reads as follows:

## **INTERMEDIATE COURTS OF APPEAL**

### **Composition of the Intermediate Court of Appeal**

- (1) The composition of this court will be laid down in this clause. It would consist of not more than x number of judges appointed by the President on the advice of the JSC.
- (2) The establishment of a particular court and the area of jurisdiction will be laid down in an Act of Parliament.

### **Jurisdiction of the Intermediate Court of Appeal**

- (a) The jurisdiction of this court should be set out in this section. It should be made clear that except for matters heard for the first time in the High Court, this Court will be the court of final instance on matters of fact.

**NB:** The Hoexter report would be helpful before Clauses 9 and 10 can be finalised. These two clauses should be held over until the Hoexter Report becomes available

**Footnote 23 on page 7 be amended by the substitution of the words "The NP has queried . . . automatic review" is substituted by**

The NP is of the view that none of the matters referred to in the following proposal should be left out.

### **Jurisdiction of the High Court**

- (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 . . . , and subject to the application of the provisions of sub-sections (3) to (7) of section . . . , save that the references in these provisions to the Constitutional Court shall here be taken to apply to the High Court.

- (3) An appeal shall lie as of right from any decision, judgement 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, judgement 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, 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, judgement 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 the Court may determine.
- (6) Any decision, judgement or order of the High Court pronouncing upon the validity of an Act of Parliament [or Bill before Parliament or a provincial legislature] shall not take effect unless and until confirmed by the Constitutional Court on appeal to it from the Supreme Court of Appeal.
- (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, judgement 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.

- (8) An appeal shall lie against any decision, judgement 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 . . . , and if the matter is one of urgency or compelling public concern or raises such other exceptional consideration as the Constitutional Court may determine.

**Footnote of footnote 25 on page 8 and referring to other Courts:**

The National Party is of the view that specific reference should be made to the Magistrates Courts at least in the wording contained in Sec 109 of the interim Constitution.

**Footnote on page 9 referring to JSC**

The National Party is of the view that Section 105 of the interim Constitution should be retained.

**Footnote to Clause 10(1) on page 9**

The National Party is of the view that a minimum age for judges as well as minimum qualifications and experience should be incorporated.

The National Party is furthermore of the view that the provision which provides that judges salaries cannot be reduced should be set this Section.