2/4/5/7/12

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEMS

BRIEFING DOCUMENT

15TH JUNE 1995

CONSTITUTIONAL ASSEMBLY

To: **All Theme Committee 5 Members**

From: **Noël Taft**

Date: **15 June 1995**

Re: **Update on Theme Committee 5**

Theme Committee 5 have now concluded its Work Programme in terms of Public Hearings, Workshops, Oral Submissions. The rest of the Theme Committee meetings will be used to discuss and approve the outstanding reports. The outstanding reports will be tabled at the next Theme Committee meeting.

The Draft Text on Blocks 1 - 4 is presently being discussed at Constitutional Committee level. (Documents attached).

The Draft Report on Block 5, compiled by the Ad hoc Committee on Traditional Authorities and comments by Ms L Gcabashe, is attached.

Theme Committee 5 Members have responded well to the invitations to partake in the Public Participation Programmes of the CA. The Reports of these meetings will be forwarded to you shortly.

Please call Ms F Mohammed, our Deputy Financial Director at 24 5031, with any outstanding claims.

Thank you.

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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 leave[7] 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 APPEAL[9]

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 appeal[10] 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' COURTS[11]

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 right[12] 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.

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5
THE JUDICIARY
AND LEGAL SYSTEMS

DRAFT REPORT

ON

BLOCK 5
(TRADITIONAL AUTHORITIES &
CUSTOMARY LAW)

14TH JUNE 1995

DRAFT MOTIVATION FOR THE INCLUSION OF A CONSTITUTIONAL PROVISION ON TRADITIONAL COURTS

1. RELEVANT CONSTITUTIONAL PROVISIONS

Our considered opinion is that the issue of traditional courts is a matter that falls primarily within Constitutional Principle V which states:-

> **The legal system shall ensure equality of all before the law an equitable legal process...**

and Constitutional Principle VII which states:-

> **The judiciary shall be appropriately qualified, Independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.**

Traditional courts or any other courts for that matter, should be preserved for no reason other than as a means for ensuring access to justice for all regardless of cultural diversity. In this regard constitutional provision such as Principle XIII, XI an possibly XXXIV should be seen as ancillary to the two key provisions.

2. INTERPRETATION OF CONSTITUTIONAL PRINCIPLES

The Constitutional Principle may present interpretive problems especially if the provision is not read as a whole and in the context of the other constitutional principles.

There is no sense in reading the first sentence which states: **The Institution, status and role of traditional leadership, according to indigenous law, shall be recognised and applied protected in the constitution** separately from the following sentence which states: **Indigenous law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the constitution and to legislation dealing specifically therewith.** When the sentence is read as a whole, the preservation of the role the institution of traditional leadership with regard to access to justice or any other functions becomes subject to indigenous law interpreted in terms of fundamental rights and with a view to ensuring continued enjoyment of the latter.

Coherent reading ensures that preservation of traditional courts remains within the goal of ensuring access to an equitable legal system and enjoyment of fundamental rights by every person, including members of communities which fall under traditional leadership and indigenous law. The performance of judicial functions by traditional courts is not per se a fundamental right. The issue falls within the challenge of translating the right to access to justice to all including members of traditional or indigenous communities.

Principle XIII calls for the recognition and protection of the:

- institution
- status
- role

of traditional leadership in the Constitution, according to indigenous law. According to that law, traditional leaders have at present (and have had in the past) the status, among others, of judicial officers and the role of determining disputes in their **"courts"**. [Whether these as presently consisted are **"courts of law"** according to orthodox criteria is irrelevant at this stage]. To strip them of this aspect of their functional package would require a conscious political decision and a separate motivation.

If such status and such role are not disputed, then the next sentence in the Principle assumes importance: **"Indigenous law .... shall be recognised and applied by the courts...."**. We are of the opinion that adding a parenthetical elaboration to this language (i.e. **"... INCLUDING COURTS ESTABLISHED SPECIFICALLY FOR THE PURPOSE")** would not do harm to support the spirit of the Principle. In other words, the Principle does not foreclose on any options and certainly does not in its language limit the application of indigenous law to courts presently established.

This would pave the way to the inclusion in the constitution of an enabling provision under the authority of which traditional courts would be established and regularized. Assuming relevance in this regard are section 96 and 103 of the Interim Constitution.

OPTION 1

If traditional courts were conceived of as part of the mainstream judicial system, then section 96 (1) could be left intact, since it simply provides that judicial authority in the country will vest in the courts **established** by the Constitution and any other law. Those courts are:

- the Constitutional Court (ss.98 - 100)
- the Supreme Court (ss.101 - 102)
- the Magistrates Court (which, though not established in the Constitution clearly would find legitimacy under **"Other Courts"** in s.103, and is in any case indirectly recognised in the establishment of a Magistrates Commission in s. 109).

IN THE SAME WAY AS THE MAGISTRATES COURTS, TRADITIONAL COURTS COULD BE MADE TO DEPEND ON S.104 (1) WITHOUT ANY FURTHER LANGUAGE.

POINTS TO NOTE:

a. Adopting this approach would mean that traditional courts would then be the only ones in the ordinary hierarchy which are not mentioned by name in the constitution, which might be seen as sinister. (This is of course if the aim would be to incorporate the chief's courts into the ordinary hierarchy, as the bottom rung of the ladder: mentioning all the other levels and pointed refraining from naming traditional courts would send the message that they did not really belong).

b. Fully incorporating traditional courts into a single court structure and having them and their officers included in the labels **"judiciary"** and **"judicial officers"** as set out in s96 (1), (2) and (3) would necessitate a new scrutiny of those provisions. For example, would traditional leaders, holding in their portfolios more than the judicial power, fit comfortably into s96 (2) and (3)?

c. The concerns expressed in section 103 (2) - (4) would seem inappropriate to traditional courts, and would have to be scrutinized a fresh. (They are all concerned with a challenge to the constitutional validity of a law).

OPTION 2

To avoid the defects of Option 1, traditional courts must not only find their authority in the constitution but the relevant language should name the courts specifically, taking care to be wide enough to allow for these courts to be differentiated where their nature or the nature of their business do not quite fit into the ordinary mould.

The obvious place seems to be under **"Other courts"** - i.e. in s103 (1), which should be expanded to prescribe the minimum components of the country's court hierarchy by the addition of the words **below the level of the Supreme Court** between **"courts"** and **"shall"** and the proviso: **PROVIDED that such other courts shall include but shall not be restricted to Magistrates courts and Traditional Courts.**

A new section 103 (1) would thus read:

"The establishment, jurisdiction, composition and functioning of all other courts below the level of the Supreme Court shall, subject to section 241 and 242, be as prescribed by or under any law: PROVIDED that such other courts shall include but shall not be restricted to Magistrates courts and Traditional Courts"

OPTION 3

A more comprehensive provision could state:-

"Notwithstanding the provision in as X and Y above (referring to provisions dealing with the Independence and impartially of the judiciary), a Traditional Court which exists in a community which subscribes to Indigenous Law and according to the will of such community, shall be recognised as such provided that this arrangement is consistent with equal access to an equitable legal process regardless of gender, age or any other distinction and also provided that such court operate in accordance with the law".

The above provision should be accompanied by a provision to the effect that:

"Parliament shall enact laws to regulate issues such as the jurisdiction of, procedures in, disputes arising from the operation of these courts and their relationship with other courts of the land"

NOTE:

The remarks above are predicated on the assumption that a political decision will be taken to:-

- recognise indigenous courts
- recognise the role of traditional leaders as adjudicators
- place these courts at the bottom of the hierarchy, below the magistrates courts, to give the country one court hierarchy.

Issues such as whether they should be restricted to customary law, or to civil matters, or whether their jurisdiction should be increased or their personnel trained, or where their appeals should go are not matters for the constitution.

RT Nhlapo, T Madonsela, RB Mqeke
Ad hoc Committee on Traditional Leader

RESPONSE RE: DRAFT MOTIVATION FOR THE INCLUSION OF A CONSTITUTIONAL PROVISION ON TRADITIONAL COURTS

With regard to the submissions by the Technical Experts for the Ad hoc committee on Traditional Leaders, my comments are as follows:

I agree with the context within which this issue should be approached, as set out under points 1 and 2 of the Technical Experts motivation.

In fact, in addition to the Constitutional Principles that they rely on their submissions, there is strong support for their arguments in sections 181 (1) and (2) as well as section 241 (1A) (c) of the Interim Constitution.

As with other sections of the constitution, however, it is important to separate judicial structures and functions relating to indigenous and customary law, from the other competencies of traditional leaders and authorities. Doing this will not necessarily detract from a constitutional recognition and protection of the institution, status, and role of traditional leadership. However, in separating the judicial functions of traditional authorities, the question that must then be answered is whether traditional courts, as a structure, should specifically be mentioned in the Constitution. I think they should not be specifically mentioned, for the reasons set out below.

It is envisaged that the other court structures will, if and where necessary, apply indigenous law and custom. In the long term, much of south African law will, over time, gradually be infused with principles and practices that originally might have been the preserve of indigenous and customary law. The recognition of indigenous law is thus a separate matter to be recognised separately in the constitution - viz section 181 (2) of the Interim constitution.

With regard, to traditional courts as a structure, I consider them to be the same level as all other courts that may be established by means of national legislation. This includes community courts, magistrate's courts, the industrial court etc.

I do not think it wise or necessary to specially mention any of these courts by name in the section of the constitution dealing with the structure of the courts. A general provision providing for the establishment of other courts below the level of supreme Court should suffice, with the rider that such courts may only be established by means of legislation emanating from the national Parliament.

The reason for this preference is that any specific mention any of a particular lower court, as suggested in the proviso to section 103 (1) in Option 2 of the Technical Experts motivation, is that in interpreting that proviso, some legal advisor might seek to give added weight to those courts that are specifically mentioned in the constitution. This would thus unnecessarily prefer certain lower courts over others.

Finally, this approach would also standardise the application of section 96 to all judicial officers who preside in courts that are established by means of legislation.

The entire Bill of rights would then obviously also be applicable to all such courts (obviating the need to specifically mention issues of gender sensitivity, and equality of access).

L.Gcabashe
Technical Expert
Theme Committee 5

SUBMISSION TO THE CONSTITUTIONAL COMMITTEE

OF THE CONSTITUTIONAL ASSEMBLY

THE JUDICIAL AUTHORITY

AND THE

ADMINISTRATION OF JUSTICE

COMMENTS ON FURTHER REVISED DRAFT OF 6 JUNE 1995

14 May 1995

INTRODUCTORY NOTE BY TECHNICAL ADVISERS

1. On Monday, 8 May 1995, we were required to attend a meeting of a working group of TC 5, convened on an urgent basis, to discuss the original draft chapter which we had prepared and submitted as early as 18 April 1995. Arising from that discussion, we were required further to prepare a revised draft as a matter of great urgency for (we understood it) consideration by the Constitutional Committee on Friday, 12 May 1995. We duly met in Johannesburg and worked through the night of Tuesday, 9 May 1995 to accomplish that.

2. On 23 May 1995, we received a memorandum from the Managing Secretary to TC 5, advising us of a "crucial meeting" to finalise the draft text of Theme Committee 5 three days later on 26 May 1995. We were asked to attend. In the event, this meeting was apparently deferred.

3. On Thursday, 8 June 1995, we were advised that a revised draft of the draft of 9 May 1995 had been prepared, and that we were required to give it our urgent consideration. This draft was furnished to us on the afternoon of 9 June 1995. We were required to consider the document, and to attend a meeting to be arranged this week.

4. On Tuesday, 13 June 1995, we were informed that we were now required to furnish a written memorandum, and to attend a meeting scheduled for the afternoon of 14 June 1995. Later today we were told that the meeting was now scheduled for tomorrow (15 June).

5. In these circumstances we have been obliged to approach the important questions raised with an unfortunate degree of urgency. We must point out that this is not conducive to the degree of reflection and consideration best suited to the determination of such important questions as those raised by the drafting of a new Constitution. The circumstances are also, as we have pointed out previously, extremely difficult for us to accommodate within an existing framework of other duties and obligations. We must ask accordingly that we are accorded adequate notice of further requirements contemplated for us, if we are at all to be able to assist the Constitutional Assembly in its important tasks.

6. In the circumstances, we have furnished such comments as we are able to do. We must however record a general observation. As previously noted by us in the Introduction to our Revised Draft Chapter of 9 May

1995, that revision and the comments we offer in relation to the revised draft of 6 June 1995 are subject to the explicit caveat that in our view, South Africa's constitutional requirements are better served by what we consider to be the more carefully framed and explicit terms of the original draft of 18 April 1995.

7. The overarching feature of the revised draft of 6 June 1995 is that (through intention or otherwise) it appears to resuscitate the concept of an "exclusive" jurisdiction of the Constitutional Court (instead of according the Constitutional Court the position as court of final instance in constitutional matters, at the apex of the curial hierarchy). Presumably in the interests of relative brevity, it collapses provisions dealing with the composition of that court and other courts with issues pertaining to jurisdiction. It "defines" the jurisdiction of the Constitutional Court in generally very confused terms. It fails to make plain the interconnection of jurisdictions between the High Court, the Supreme Court of Appeal and the Constitutional Court. And it still considers as unresolved at this late stage issues pertaining to the constitutional role of one very old South African court (the magistrate's court), while it leaves to one side a dealing with "Intermediate Courts of Appeal" (which, if not introduced, will disable the Appellate Division from assuming - as the Supreme Court of Appeal - the role contemplated for it in the draft of 6 June 1995). When in doubt, or otherwise, the draft moreover has resort to the general formulation that issues are to be regulated "by law". We have previously raised the fact that this can hardly assist the ordinary litigant, or person simply seeking to understand the Constitution which regulates his or her life, and is open (as the previous history of this country exemplifies) to manipulation of the constitutional edifice by using devices as fundamental as the appointment of judges or the jurisdiction of particular courts.

8. For these reasons, we must formally record our serious concern that the present draft does not meet the Constitutional Principles laid down in the Constitution of South Africa Act, Act 200 of 1993, and we are unable to support it.

Adv J. J. Gauntlett SC **The Hon. Mr Justice P J J Olivier**

Cape Town

14 June 1995

COMMENTS BY TECHNICAL ADVISERS TO TC 5

ON DRAFT OF 6 JUNE 1995

1. Ad section 1 (Judicial Authority)

In this section (and in several others) there is inconsistency in language: either in accordance with ordinary drafting technique, the formulation "**shall** [vest]" should be used, or otherwise the present tense should be used throughout. We would strongly advise that the ordinary drafting technique be applied.

1.1 Subsection 6

(a) We were asked to insert a provision in these terms (as sub-section 5) in our revised draft of 9 May 1995. It remains however a concern that as it stands, the provision is a *lex imperfecta*. It namely is not a self-executing provision in the terms in which it is couched, yet there is no mechanism created elsewhere in the chapter to give effect to it.

(b) We do not see any point in footnote 1. Whether or not the Bill of Rights is made "horizontally applicable" or not, or whether a hybrid vertical/horizontal application is devised, we consider that provisions relating to judicial authority in these same terms will be required.

2. Ad section 2 (Judicial System)

2.1 Footnote 4

(a) It is a matter of concern that it is still being recorded on behalf of TC 5 that "**no agreement has been reached on the constitutionalization of intermediate and magistrates' courts**". It was our own understanding from the meeting of 8 May 1995 that a substantial degree of consensus had been reached in relation to the

need for "Intermediate Courts of Appeal". It was also stressed at this meeting that our own understanding was that the judicial structure - and in particular the Appellate Division - would <u>not</u> be able to cope with the added constitutional jurisdiction <u>without</u> the introduction of Intermediate Courts of Appeal which already in relation to criminal matters have received the support of the Chief Justice and the Minister of Justice). We are concerned that unless this is resolved, there is effectively <u>no</u> system for constitutional adjudication.

(b) We are unaware from our perusal of the materials put before TC 5, and from the discussion on 8 May 1995, of any serious dispute relating to the "constitutionalization" of magistrates' courts.

(c) <u>When</u> is it then contemplated that these fundamental aspects are to be resolved ? We are firmly of the view that the entire drafting exercise in relation to this Chapter is a futility unless there is clarity in relation to the curial mechanisms by which it is to be enforced.

2.2 <u>Subsection 2</u>

This in our view is inept. It accords constitutional recognition to the repugnant concept of **"offences of a political nature"** - and that these may legitimately be prosecuted **"before the ordinary courts of the land"** !

3. <u>Ad section 3 (Constitution Court)</u>

Our own marginal heading (to distinguish these provisions from those which follow) was in fact **"Composition of the Constitutional Court"**. We suggest that that be adhered to.

3.1 **Subsection 2**

We are unaware of any agreement (or even discussion) relating to provision for a non-renewable term for Constitutional Court judges of ten years. We consider that in principle this is probably too long, and in contrast with shorter periods of office in other countries.

3.2 **Footnote 6**

Footnote 6 raises the fact that what is termed "a transitional mechanism" must be "provided for to [sic] facilitate such staggered terms". We believe that this was achieved on the basis of the wording in our revised draft of 9 May, where we provided that such judges "shall hold office for non-renewable terms not exceeding XXX years". We had in mind that persons who otherwise might be disqualified by age or reason of health or other considerations might be disabled from accepting a term of appointment of a full seven or ten years, might be appointed for a lesser period. Staggering would soon arise in a quite natural way (and not en bloc, which is undesirable for continuity).

4. **Ad section 4**

(a) This section, incidentally, exemplifies the erratic use of the present tense in contrast with the ordinary imperative ("shall have") used in the immediately preceding sections.

(b) We do not understand the value or even sense of the addition to the words "interpretation or enforcement of this Constitution" in subsection 1 of the word "protection". Again, we must warn against the addition of provisions in a way which are not self-executing, but yet are not coupled with a mechanism for enforcement. In any event, it is difficult to understand in what sense the Constitutional Court would deal with "the protection" of the Constitution without either interpreting or enforcing it.

4.1 **Subsection 2**

(a) One of the most serious criticisms we have to make relating to this draft pertains to this provision. It seems to us to be entirely confused. The immediately preceding subsection acknowledges the jurisdiction of the Constitutional Court as essentially being one of **final** determination of a constitutional issue. Now this subsection reverts (it would seem) to the exclusive jurisdiction-type language of the current Constitution (which has been generally criticised in precisely that respect). It gives no attention to the placing of the Constitutional Court in the hierarchy of courts, and their own capacity to deal with constitutional issues. It is, even more curiously, probably in conflict with the Constitutional Court Complementary Act as regards section 4(2)(c) (where for instance one organ of state were to seek interdictory relief against another organ of state in the Supreme Court).

(b) This confusion is worse confounded by the entire lack of clarity now in this Chapter as to what we thought was clearly enough agreed, more particularly at the meeting on 8 May 1995. This was that the Constitutional Court would find its true position at the apex of constitutional jurisdiction, but that the other courts would not generally be excluded from constitutional adjudication. That scheme now seems to have been destroyed, and nothing coherent put in its place.

4.2 **Footnote 8**

(a) We do not understand, if the constitutional principles relating to the supremacy of the Constitution are to be implemented, how provincial constitutions can be excluded from the ultimate control of the Constitutional Court.

(b) The concerns stated by the NP in this footnote essentially reflect as we understand them our original draft, which, we have stated, we consider to be preferable to the revised draft of 9 May 1995 which we were instructed to prepare. (Our

reasons for that view are summarised in the introductory note to that draft).

4.3 **Subsection 4**

We note that without any comment, the provisions of section 4(2) in our draft of 9 May 1995 (which we had understood to be the subject of general consensus and which elicited no debate on 8 May), have been narrowed by the exclusion of reference to the Constitutional Court binding all persons and all legislative and executive organs of state, and not only other courts. See also section 13(2) of our original draft. This seems to us to be a serious limitation on the power of the Constitutional Court.

4.4 **Subsections (5) and (6)**

(a) These provisions seem to us to be entirely confused. Subsection 5 deals with **"any law, act, conduct or omission"**. (This language seems to us to be not readily comprehensible: what is meant by "conduct" in distinction to or conjunction with "act" or "omission", for instance, eludes us). This aside, subsection 6 immediately thereupon proceeds to deal with "any law" separately, which has already been dealt with in general terms in subsection (5).

(b) As appears from our original draft, we are firmly of the view that it is necessary to deal successively (see section 13(3) to (6) of our first draft of 18 April) with varying aspects meriting specific attention: thus in turn laws, then executive or administrative acts, and thereafter provision for ancillary matters such as costs. This all in our view becomes entirely confused if the opportunity to be given to the legislature for remedial legislative action is bundled up with some generalised duty to **"consider the consequence of such invalidation"** and to issue (without any further definition) **"an order with regard thereto"**.

4.5 **Footnote 14**

We have already given our views (see 4.4(b) above) in relation to **"this clause as currently drafted"**. We consider it necessary for there to be provision (as there was in section 13(6) of our original draft, and in section 4(6) of the revised draft of 9 May 1995) to give the Constitutional Court the discretionary power to order costs. If this is not inserted, then that court (as a creature of statute) will not have that power under **any** circumstances.

5. **Ad section 5**

We have already referred to the general confusion created by the new section 4(1) and (2), as regards the removal of a clear scheme of constitutional jurisdiction incorporating the other courts. This is now exacerbated by the fact that in this provision, there is no longer (as we had in section 5(1)(a) of the revised draft of 9 May) reference to appeal from the Supreme Court of Appeal **"in terms of section 7(3) hereof"** (where we specified **in the Constitution** the means of access). This is now all left to be regulated extra-constitutionally **"by law or [sic] the rules of the Constitutional Court"**. The consequences, simply stated, can only be further confusion and a lack of adequate constitutional entrenchment. Assuming that the general endeavour is to make the Constitution readily accessible, it must be apparent that the general reader will be left with no understanding of the constitutional jurisdiction of the other courts, and how this relates in particular to access to the Constitutional Court.

5.1 **Section 5(1)**

This section shows the extent to which the confusion relating to the jurisdiction of the Constitutional Court (see the comment on section 4(2) above) permeates this entire draft. It is still evidently contemplated that there will be matters **"reserved exclusively for the Constitutional Court"**. We reiterate that that is not our understanding of the consensus which had been achieved, and that the extensive materials received by TC 5 indicated a general and serious concern for the social consequences of the current complex system of referrals

between courts made necessary by the creation of (ill-defined) exclusive and general constitutional jurisdictions.

5.2 Section 5(2)

We have been asked (in footnote 19) "to give an opinion on the words 'may' and 'shall'". "Shall" would be appropriate.

5.3 Footnote 20

This, with respect, reveals no understanding of the constitutional function or capacity of the Judicial Service Commission. It is not a rule- making body placed for that purpose above the courts. We can see no valid basis on which the mechanisms contained in section 19 of our revised draft of 9 May 1995 should be abrogated.

6. Ad section 6 (Supreme Court of Appeal)

We are deeply disturbed as to the unsatisfactory ambit of the proposed section 6. It apparently represents an endeavour to collapse into one provision aspects dealing (separately as we had them) with the composition of such a court, and its jurisdiction. Resort has again been had to mere provision in a constitution that the court has "**jurisdiction as regulated by law**". We had in both our previous memoranda indicated that in our view (and with reference to clear historical precedents in this country) that constitutes no constitutional protection of any kind. We have also repeatedly given the view that we cannot see how the reader of the Constitution is helped to any greater understanding by a provision which gives an entirely generalised cross-reference to "law" determinative of his or her rights, and which he or she is in some way obliged to find. It is a fundamental tenet of constitutionalism that a constitution should set out clearly the constitutional role of a court, and its place in the hierarchy.

6.1 **Footnote 21**

We have been asked to give **"an opinion on 'inherent jurisdiction'"**. We have previously answered this question. (We refer to this fully in paragraph 8 of the letter of 25 April 1995 to the Executive Secretary of the Constitutional Assembly in response to the draft prepared by a legal adviser of the CA)We pointed out that "inherent jurisdiction" was fully analysed in **Universal City Studios Inc v Network Video 1986 (2) SA 734 (A)**. What was there said was this:

"There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice..... It is probably true that... the court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw....." (at 754G-H).

We consider that section 6(2) of the new draft is not an adequate substitute for section 7(1) of the revised draft of 9 May 1995.

7. **Ad section 7 (High Court)**

(a) What we have had to say above in relation to the Supreme Court of Appeal, as regards the collapsing of aspects of composition and jurisdiction, and the general lack of clarity as to its place in the constitutional hierarchy, applies here too.

(b) The provision (subsection 3) that **"the inherent jurisdiction of the High Court... shall be regulated by law"** shows, with respect, no understanding of the concept, and is in any event impossibly vague.

7.1 **Subsection 4**

For the reasons already given, this provision is incoherent. As section 4(1) and (2) currently read, the Constitutional Court appears to be the court of first and final instance in relation to virtually all constitutional matters (and no line is clearly drawn between the "exclusive" and general jurisdictions).

7.2 **Subsection 5 (and footnote 27)**

We would once again draw attention to the fact that in our original draft (of 18 April) we dealt pertinently with this aspect (in section 10(6) last line, read with footnote 26). What we there advised was that a declaration of invalidity by the High Court would not take effect unless **"confirmed by the Constitutional Court"**. We had in mind that in terms of the Constitutional Court rules, provision would have to be made for instances of this kind where there is no appeal pending by either of the parties (in which case the issue would doubtless be ventilated). In such circumstances, the Constitutional Court would be obliged to deal with the matter - raising an issue of fundamental public importance such as the constitutionality of a statute - by a system akin to automatic review. Doubtless the rules would make provision for the matter to be properly argued before the Constitutional Court in the absence of an appeal (for instance, by the appointment of *amici curiae* and the question of costs in this regard).

8. **Ad section 8 (Other Courts)**

It has to be observed that a curious consequence of the present draft is that while it is concerned to make no express provision for the magistrates' courts (despite the preponderance of views in support of their preservation), nor the proposed Intermediate Court of Appeal (despite the apparent acceptance of a pressing need for them), yet this provision creates - in peremptory terms - a constitutional obligation (enforceable by whom ? against whom ? in what way ?) to constitute undefined **"community courts"** and **"courts functioning in terms of a system of indigenous and customary law"**.

9. **Ad section 10 (Appointment of judges and judicial officers)**

(a) On the premise (exemplified by the provisions in this section) that **"judicial officers"** include judges, more appropriate terminology would in our view simply be **"appointment of judicial officers"** (or otherwise **"appointment of judges and other judicial officers"**).

(b) We are concerned to note that it is evidently considered that insufficient consensus **still** exists in relation to the critical aspects of the appointment of CC judges, and other judges. The recent constitutional crisis in Malaysia has brought forcibly home the fact that unless there is proper constitutional provisions relating to the appointment of judges, virtually any other form of constitutional protection can be undone.

(c) Once again, it seems to us that lip service alone is paid to constitutional protection by a provision as inherently meaningless as subsection (5):

"The appointment of acting judges shall be regulated by law"

10. **Ad section 11 (Removal of judges from Office)**

This marginal heading is inappropriate to the contents, particularly given the fact that the provisions relating to the protection of the conditions of service of judges has evidently been removed from section 1(7) of our draft, and now inserted here (as subsection 3). It is further to be noted that in any event, this provision should not relate only to "remuneration", but generally to **"all emoluments and conditions of service"**.

P. J. J. OLIVIER **J. J. GAUNTLETT SC**

Cape Town
14 June 1995