

214/5/7/14

**D R A F T**

**26 JUNE 1995**

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

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

**REVISED DRAFT CHAPTER**

**(26 JUNE 1995)**

Added to previous draft.  
 ← (7)

All matters relating to the functioning of the judicial system shall be dealt with only by national legislation..

### The judicial system

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

#### [Footnotes]

2. Advisers' comment: The creation of 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...").

# 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.<sup>1</sup>
- (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.

(v) Magistrates' Courts<sup>3</sup> and other courts presided over by a magistrate.

(vi) Such other courts as may be established by law.<sup>4</sup>

## 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,<sup>5</sup> and shall be appointed in such a manner as may be prescribed by law to ensure that no less than five new judges shall be appointed every five years.<sup>6</sup>

#### [Footnotes]

3. Advisers' comment: We have been asked to note that the position of the Magistrates' Courts is still contentious.
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: Still to be resolved.
6. Advisers' comment: This entrenches the principle but leaves the exact mechanism to be worked out.

### Jurisdiction of the Constitutional Court

4. (1) The Constitutional Court shall have jurisdiction to decide any issue arising from the protection, interpretation or enforcement of the Constitution.<sup>7</sup>
- (2) The Constitutional Court only shall decide:
- (a) the constitutionality of a Bill before the National Assembly, the Senate or a provincial legislature;
  - (b) constitutional disputes between the national and provincial governments or between provincial governments.<sup>8</sup>
- (3) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.
- (4) The final decision as to whether a matter falls within its jurisdiction lies with the Constitutional Court.
- (5) (a) If the Constitutional Court finds any law, executive or administrative act to be inconsistent with the Constitution, it shall declare such law or act<sup>9</sup> invalid to the extent of its inconsistency.
- (b) The Court may make such further order as it may deem just and equitable, including whether or to what extent any declaration of invalidity is to have retrospective operation.

#### [Footnotes]

7. The NP has suggested the addition at the end of this provision of the words "<sup>or</sup> of any right, obligation or duty created by such provision". The Advisers believe that this is redundant.
8. This also needs to be dealt with in the section dealing with provincial constitutions.
9. "Law" perhaps to be defined to include any provision thereof, and "act" to include omission.

- (c) The Court may suspend a declaration of invalidity for a specified period to allow the competent authority to correct the defect, and impose such conditions as it may decide.
- (6) If any other court holds a national or provincial statute or any executive action of the President<sup>10</sup> to be inconsistent with the Constitution, such finding shall have no force or effect unless confirmed by the Constitutional Court on appeal to it, or on application to it by any person.

#### Access to and procedures of the Constitutional Court

5. (1) A matter within its jurisdiction may be brought before the Constitutional Court
- (a) by way of an appeal from the Supreme Court of Appeal with leave of that court or with special leave of the President of the Constitutional Court;
- (b) by way of direct appeal from any other court presided over by a judge only with special leave of the President of the Constitutional Court;
- (c) by way of direct access where the interests of justice so require but only with the special leave of the President of the Constitutional Court, or where it is within the exclusive jurisdiction of the Constitutional Court;

#### [Footnotes]

10. This is a new proposal for consideration, given the constitutional importance of executive actions vested in the President.

(d) at the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature acting on the request of XXX members of such Assembly, Senate or Legislature<sup>11</sup>;

(2) The granting of special leave to appeal and direct access to the Constitutional Court shall be regulated by national legislation or the rules of that court.

## SUPREME COURT OF APPEAL

### Composition of the Supreme Court of Appeal

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

### Jurisdiction of the Supreme Court of Appeal

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

#### [Footnotes]

11. Still to be determined.

12. 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<sup>13</sup>

### 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 from all courts presided over by a judge within its area of jurisdiction as provided for by law and whether of civil, criminal, constitutional or other nature.
- (2) An appeal shall lie from a decision of an Intermediate Court of Appeal to the Supreme Court of Appeal with the leave of that court or the special leave of the Chief Justice.

#### [Footnotes]

13. **Advisers' comment:** Still to be determined. There appears to be general acceptance in TC 5 that the current burden on the present Appellate Division is extremely heavy, and that in the light moreover of its acquisition of a new constitutional jurisdiction as well, intermediate courts of appeal are required. It is indeed 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 AND OTHER COURTS PRESIDED OVER BY A JUDGE

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

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

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

11. (1) A division of the High Court shall have the jurisdiction as a court of first instance, to decide all matters, whether of civil, criminal, constitutional or other nature, within its area of jurisdiction as regulated by law.
- (2) A division of the High Court shall have the <sup>not</sup> jurisdiction to decide all appeals and reviews from all courts ~~presided over by a magistrate or other judicial officer of similar status~~ <sup>judge</sup>, within its area of jurisdiction.
- (3) The jurisdiction of other courts presided over by a judge shall be regulated by national legislation.

- (4) An appeal from any division of the High Court or any other court presided over by a judge shall lie to [the Intermediate Court of Appeal or the Supreme Court of Appeal<sup>14</sup>] with the leave of that court or with the special leave of [the Judge-President of the Intermediate Court of Appeal or the Chief Justice<sup>15</sup>].

## MAGISTRATES' COURTS<sup>16</sup>

### Composition of Magistrates' Courts

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

### Jurisdiction of Magistrates' Courts

13. (1) A Magistrate's Court or other court presided over by a magistrate shall have jurisdiction to hear and determine all civil and criminal matters arising within its area of jurisdiction and subject to such limitations as are provided by national law.
- (2) A Magistrate's Court or other court presided over by a magistrate shall have no jurisdiction to pronounce any national, provincial or subordinate legislation [~~or any executive or administrative action~~] inconsistent with this Constitution.

#### [Footnotes]

14. Advisers' comment: Depending on whether an Intermediate Court of Appeal is established.
15. Advisers' comment: Depending on whether an Intermediate Court of Appeal is established.
16. Still to be resolved.

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

## OTHER COURTS

### Composition and jurisdiction of other courts

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

## 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]

17. 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....<sup>18</sup>
- (4) Appointment of other judges.....<sup>19</sup>
- (5) 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 judge from office.
- (2) A judge who is the subject of an investigation may be suspended by the President in consultation with the Chief Justice pending the finalisation of such investigation.
- (3) The emoluments and pension and other benefits of judges and acting judges of the Constitutional Courts, High Courts and Supreme Courts of appeal shall be prescribed by law and will not be reduced during their continuation in office.

#### [Footnotes]

- 18. Still to be resolved. First broad option: section 99 of the interim Constitution. Second broad option: section 110.
- 19. Modelled on section 104(1) of interim Constitution. NP wishes age limit.

**OTHER MATTERS****Procedural Matters**

17. (1) The rules of procedure in the courts of law in the Republic shall be published in the *Government Gazette* and shall be made by:
- (i) the Chief Justice and the President of the Constitutional Court in respect of the rules pertaining to the Constitutional Court;
  - (ii) the Chief Justice in respect of the rules pertaining to the Supreme Court of Appeal and the Intermediate Courts of Appeal;
  - (iii) the Judge President of each division of the High Court in respect of such division;
  - (iv) by the Minister of Justice acting on the advice of the Magistrates' Commission in respect of the Magistrates' Courts;
  - (v) by the Minister of Justice or other responsible Minister of State acting on the advice of the Chief Justice in respect of all other courts.
- (2) All rules of procedure in the courts of law shall be submitted to the Judicial Service Commission for its recommendation and advice.

**Seats of Courts**

18. [TC 1 must report]

**Language**

19. [TC 1 must report]

**Attorneys-General**

20. [TC 1 must report]