**DEMOCRATIC PARTY SUBMISSION TO THEME COMMITTEE 5
OF THE CONSTITUTIONAL ASSEMBLY**

THE JUDICIAL AUTHORITY AND THE ADMINISTRATION OF JUSTICE

19 May 1995

1. Background

1.1 Controversy has arisen concerning competing drafts of Chapter One dealing with the courts and the administration of Justice.

1.2 In addition to a first draft prepared by the Technical Experts, Judge P Olivier and Adv J Gauntlett SC, an alternative draft was prepared by the Government Law Adviser. The Technical Experts were instructed to prepare a second draft, combining their first draft and the alternative draft.

1.3 Members of the drafting committee of the Core Group of the Theme Committee agreed to prepare a critical examination of the second draft and state which aspects were acceptable and which required redrafting.

1.4 This submission represents a preliminary response by the Democratic Party (DP), which may in due course make further submissions.

2. Preference for first draft

2.1 The DP does not care for the second draft. It shares the view of the Technical Experts that the first draft is infinitely preferable.

2.2 We are concerned about the ignoring by the drafting committee of the specific advice of the Technical Experts to the effect that the revised second draft, which they drew but do not like, should be compared with the first draft and that the second draft should not be preferred. The drafting committee has chosen to proceed by ignoring the first draft and using the second draft as the working document.

2.3 We reiterate the earnest advice of the Technical Experts as contained in pages 6 to 9 of their Revised Draft Chapter. Apart from certain rather personal references to the author of the alternative draft prepared by the government legal adviser, their criticism appears to us to be well-founded.

2.4 In particular, the DP draws attention to the statement of Judge Olivier and Adv Gauntlett in which they warn that any further watering down of the basic principles in their second draft may well result in a seriously flawed chapter.

2.5 The second draft should, in the view of the DP, be rejected and replaced by the first draft. Matters in the first draft which are contentious or which have not yet been agreed should be identified and negotiated.

3. Second Draft

3.1 If other parties insist on proceeding with the second draft, against our advice, we state that

the draft is reasonably acceptable as it stands, but certain issues need to be amplified, highlighted or negotiated.

3.2 The DP considers it necessary for the jurisdiction of the Constitutional Court and of other Courts to be detailed at some length. We are aware of the views of some other parties which would stress brevity and flexibility at the expense of constitutional entrenchment and certainty. Because South Africa is a constitutional state, important provisions cannot be left to the whims of Parliament. If a consensus approach is sought, it must be understood that any attempt to remove jurisdictional questions from the Constitution and to substitute a formulation which would place this and certain other fundamental judicial mechanisms and procedures under ordinary laws of Parliament, will be resisted by the DP.

3.3 In our view, jurisdictional questions are inadequately dealt with in this draft. In particular, it was our understanding that all Courts would receive some jurisdiction in respect of constitutional matters; the provisions of clause 13(2), relating to Magistrate's Courts, are confusing in that they appear to contradict the proposition that those courts should have partial jurisdiction.

3.4. We consider it fundamental that the basic Court structures, within a hierarchy of Courts, should be detailed. Room should be left for the creation and operation of certain specialist courts, such as the income Tax Court and the Labour Court, and for certain experimental courts, such as Community Courts, but the Magistrates Courts should be created in the Constitution as should all of the Superior Courts. In this regard, it is urgently necessary that the present lack of agreement on the hierarchy of courts should be resolved to ensure an efficient drafting process and an acceptable final product.

Decisions on this could affect numerous other questions and agreements arrived at on other issues may well have to be reviewed if no satisfactory constitutional formulation of this question is arrived at.

3.5 The DP would prefer a restructured draft which proceeds logically from subject to subject, rather than dealing separately with each of the Courts as does the present draft. In this regard, we commend the structure of the first draft which is, in our view, much clearer; it also improves the coherence of each subject and facilitates precise and unrepetitive drafting.

3.6 We would argue that it is essential for the institution of Intermediate Courts of Appeal so that the present Appellate Division can assume the additional function of hearing constitutional matters (in common with other courts). A decision on this matter needs urgent attention.

3.7 We are of the opinion that the unresolved question of the appointment of judicial officers, to the Constitutional Court and other courts, makes the completion of the draft problematic. At the root of the protection afforded the individual should be the certainty that judges, at least, are independent and that their appointments cannot be manipulated for political or other reasons.

We caution against the notion, fashionable in some quarters, that judges should be chosen by Parliament. We believe that it is unhealthy for Parliament to choose the guardians of the constitution because the Constitutional Court, for example, will be able to adjudicate and strike down Acts of Parliament.

We must emphasise that South Africa must avoid a situation where the appointment of judges becomes part of the political spoils of office with each political grouping feeling entitled to the appointment of its own candidates as judges, either of the Constitutional Court or of other courts.

If one party dominates Parliament there is a real risk that judges, instead of providing one of the most important checks and balances, will merely become another arm of the ruling party, without the vigour and independence which a proper separation of powers demands.

In our opinion the Judicial Services Commission has made a good start and there seems to us to be no compelling reason why the present provisions should not be re-enacted in the new constitution.

3.8 The DP is unhappy with the provision contained in section 4(7) of the draft which relates to the constitutionality of Bills before Parliament or a provincial legislature and which requires a petition by at least one-third of all the members before the Constitutional Court exercises its jurisdiction. The present factual situation is that this important check on the legislative arm is nullified because the governing party already enjoys a two-thirds majority in certain legislatures and could feasibly obtain such a majority in Parliament. The required number of members should be lowered to 5%. Any minority party abusing this right, or bringing frivolous applications could be subjected to a costs order by the Constitutional Court.

To us it is fundamental that if a party, even a small party, feels aggrieved and believes that the majority is acting unconstitutionally in Parliament, that party should have effective access to the Constitutional Court and not be thwarted by an artificially high threshold.

4. The DP will make further submissions in the light of the representations which other parties make.

Douglas Gibson MP
19 May 1995