

2/4/5/8/3

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEM

REVISED

SCHEMATIC SUMMARY OF REPORT

ON BLOCKS 1 -4

24 MARCH 1995

DRAFT FOR DISCUSSION
(PREPARED AFTER MEETING OF 24 MARCH 1995)

THEME COMMITTEE 5
JUDICIARY AND LEGAL SYSTEM
SCHEMATIC SUMMARY OF REPORT
ON BLOCKS 1 - 4

INTRODUCTORY NOTE: This is purely a summary of the full report. The mention of current courts by name in this report does not entail that their current structure or designation is necessarily seen as final.

Constitutional Principle	Issue	Non-contentious aspects	Contentious aspects	Remarks
1. IV,V,VI	Legal system.		Two views: 1). One single national legal system. 2). Provincial courts to have final say on matters within provincial competence.	

2. IV,V,VI	Highest Constitutional Court.	The separate CC in the interim constitution to continue for its present term.	Two views: 1). Separate CC to remain highest court in constitutional matters; 2). After the present term of CC, a "two chamber" highest court should be created.	
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<p>3. IV,V,VI</p>	<p>Constitutional powers of Supreme Court.</p>	<p>The SC should have full constitutional power subject to two exceptions:</p> <p>(a) No powers in matters within exclusive jurisdiction of CC (e.g.: testing of bills before parliament);</p> <p>(b) Any ruling that national legislation is invalid may only take effect on confirmation by CC.</p>		<p>Account needs to be taken of large number of Acts that may contain unconstitutional provisions.</p> <p>In addition, some proposals distinguish between pre and post 27 April 1994 legislation.</p> <p><u>Query:</u></p> <p>Should the constitution and legislation be able to create exceptions to "suspension" rule in point (b)?</p> <p><u>Query:</u></p> <p>Should provincial courts have the power to test bills in provincial legislatures and declare provincial legislation invalid.</p>
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4. IV,V,VI	Constitutional powers of AD.	AD (or successor court) should have same powers as SC subject to appeal to CC.		
5.IV,V,VI	Constitutional powers of magistrate's court.	MC should have power to deal with constitutional matters but not to deal with the validity or invalidity of legislation (national or provincial) or subordinate legislation.		

6. IV,V,VI	Procedure for CC cases.	<p>Normally constitutional questions in cases will go to CC on appeal from AD with leave from CC.</p> <p>Provision for:</p> <ol style="list-style-type: none">1) direct access for matters within CC's exclusive jurisdiction (such as testing of bills before parliament);2) "by passing" in exceptional circumstances (such as issues of particular urgency) with leave from the CC.3) expedited proceedings where provincial court rules that legislation is invalid.		<p>A referral procedure must be developed for "direct access" cases.</p>
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7. IV,V,VI	Provincial Courts.	"Supreme" or "High" Court in each province or group of provinces.		<p>Currently subject of inquiry by Dept of Justice.</p> <p>To leave over until inquiry completed available.</p> <p><u>Query:</u> must this be in the constitution?</p>
8. IV,V,VI	Intermediate Courts.	Support for intermediate civil and criminal appeal courts between the present SC and AD.	There is contention as to whether or not this should be in the constitution.	<p>There are a number of different proposals on the structure of these courts.</p> <p><u>Query:</u></p> <p>Should these courts be final courts of appeal for questions of fact?</p>
9. IV,V,VI	"Split" judiciary.	A hierarchy of differentiated courts should be regulated by legislation.		<p>The constitution should not block reform on this aspect and should not mention the magistrates' court expressly.</p>

10. IV,V,VI	Community Courts.	The development of community courts should be recognised in the constitution.		
11. IV,V,VI	Special Courts.	<p>The constitution should not allow the establishment of special or extraordinary tribunal courts which would undermine the rule of law.</p> <p>The constitution should not prevent establishment by legislation of appropriate specialised courts (eg. labour, water, tax court etc).</p>		

12. VII	Appointment of CC judges.		<p>Views:</p> <p>CC judges should be appointed by:</p> <ol style="list-style-type: none"> 1) Parliament by same procedure as Human Rights Commission. 2) the President on the recommendation of parliament; 3) the President on the recommendation of the JSC; 4) parliament, the provinces and the JSC each appoint 1/3 of the judges. 	Different views reflect differing concepts of "independence".
13. VII	Appointment of SC judges.	President on the recommendation of the JSC.		

14. VII	Composition of JSC.		<p>Two views:</p> <p>1) retain present structure (with possibility of minor modifications).</p> <p>2) alter structure to ensure greater public participation.</p>	<p>Specific modifications proposed:</p> <p>1) Participation by AG's;</p> <p>2) Parliamentary and presidential nominations should ensure participation by non-lawyers.</p>
15. VII	Appointment of magistrates.	Body appointing magistrates must become more representative		<p><u>Query:</u> to what extent should this be dealt with in constitution?</p> <p>This issue will depend upon the resolution of item 9.</p>
16. VII	Qualifications to be a judge.	Constitution should specify "fit and proper";		<p><u>Query:</u> should constitution specify additional qualifications? Examples: Minimum age.</p>

17. VII	Accountability of judges.	<p>Impeachment procedures and powers in the interim constitution should be retained.</p> <p>In addition, JSC should deal with complaints against judges in "non-impeachment" matters.</p>		Term accountability covers two concepts: "accountability to the constitution" and "accountability to the legislature".
18. VII	Tenure of judges - Supreme Court.	<p>Security of tenure:</p> <p>SC judges to be appointed for life subject to retirement age.</p>		
19. VII	Tenure of Constitutional Court judges -	There must be continuity of judges in CC. Current CC judges should serve their 7 year period.	<p>Different views on tenure of CC judges:</p> <p>a) for fixed terms;</p> <p>b) for life, subject to retirement age.</p> <p>c) serving CC judges to retire after 7 years or have their terms renewed.</p>	System of tenure is related to method of appointment (issue 12).

20. V,VII	Access to justice.	<p>Broad agreement that:</p> <p>Access to justice a major problem that may undermine the effectiveness of the constitution.</p> <p>Extensive legal reform required to improve access to justice.</p> <p>Constitution should encourage and not hinder these reforms.</p>		<p>Language and interpretation to be dealt with in Block 7.</p> <p>"Right to representation" covered by TC4.</p> <p><u>Query:</u> should this be in the constitution?</p>
21. V,VII	Lay participation.	Lay assessors drawn from community.		<u>Query:</u> should this be in the constitution?