2/4/5/3/4

16 March 1995.

MEMORANDUM

TO: All TC5 Members

FROM: The Secretariat

RE: INTERIM REPORT OF THE TECHNICAL ADVISERS

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Enclosed please find a corrected copy of the above report. We apologise for any inconvenience caused by an administrative "virus" which was not detected before the report was distributed.

Enquiries: Noel Taft Tel: 245031 ext 278
Page: 468505 code 4714
Eunice van Eck Tel: 245031 ext 217
Fax: 241160

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5
THE JUDICIARY
AND LEGAL SYSTEMS

INTERIM REPORT

OF THE

TECHNICAL ADVISERS

(Second Issue)

ON BLOCKS 1 - 4 OF THE WORK PROGRAMME

PROF. P BENJAMIN

MS L GCABASHE

ADV JJ GAUNTLETT SC

THE HON. MR JUSTICE PJJ OLIVIER

16 MARCH 1995

TECHNICAL COMMITTEE 5

THE JUDICIARY AND LEGAL SYSTEMS UNDER THE PROPOSED NEW CONSTITUTION

INTRODUCTION

1. Theme Committee 5 of the Constitutional Assembly (henceforth "TC5") deals with the subject of the judiciary and legal systems under the proposed new Constitution.

2. The work programme of TC 5 has been divided into nine blocks. We have been advised that TC 5 is required to submit a report to the Constitutional Assembly by the end of March 1995 on blocks 1 to 4, comprising:

1. the structure of the court system;

2. the relationship between the different levels of courts;

3. the composition of the judiciary and the appointment of judicial officers;

4. access to the courts including lay participation.

3. Since our appointment as consultants to TC 5, we have attended two extensive weekend meetings in which we have considered the manner in which we would best approach the tasks set for us, debated the ambit of these topics, and set about analysing the representations made to TC 5. At an early stage, we also asked that we be supplied with transcripts of all submissions made before TC 5. There have been evident difficulties as regards the implementation of this request. Transcripts have only been supplied to us after considerable delay (which we understand to relate to the typing of the recordings), and at the time of furnishing this report, not all of us for instance had been furnished with the transcript of the workshop held in Pretoria on 27 February 1995. However, we were represented at the workshop by one of our members, who was able to summarise the various submissions, and we accordingly are able to deal with these below.

4. In terms of a schedule we had agreed with the supporting administrative staff, we were originally to meet for a further working weekend on 24 to 25 March 1995 to finalise our report. We were however advised earlier this week that an interim report was required, as a consequence of which we were obliged to make new arrangements, directed at the furnishing of this interim report. It is our understanding that although an interim report is required, apparently as a matter of some urgency, at this stage, TC 5 may continue to receive submissions and memoranda relating to the ambit of its inquiry. It necessarily follows that we are unable in the course of this interim report to deal with any such further materials and submissions which may now be considered by TC 5. This

report is accordingly submitted explicitly on an interim basis, and in the circumstances outlined above.

5. We have already (in paragraph 2 above) set out the first 4 blocks of the work programme of TC 5 which are required to be dealt with before the end of March 1995. The first part of this report will comprise topics 1 and 2, (that is to say the structure of the court system and the relationship between the different levels of courts), while the second part of this report will deal with topics 3 and 4 (the composition of the judiciary and the appointment of judicial officers; and access to the courts).

PART 1 - THE COURTS

6. It is evident from the materials and oral submissions advanced before TC 5, that the central question emerging in the debate relating to the future structure of the courts is this: how should the new Constitution deal with the question of constitutional jurisdiction of the Provincial and Local Divisions of the Supreme Court (in which we include the superior courts of the former TBVC countries) and of the Appellate Division ? Should the present system be retained, or should the role and place of the Constitutional Court (henceforth "CC") and of the other superior courts be redefined, and if so, how ? What role moreover should be accorded

to the Magistrates' Courts ? Is it possible to incorporate hitherto informal community courts in the process ?

7. It may be said at the outset by way of summary that the general view in the materials and oral submissions thus far submitted appears to be that the present system as regards constitutional matters suffers from many disadvantages: it is not clear how the CC will deal with factual disputes (e.g. what is, on a particular issue, justifiable in an open and democratic society in terms of section 33 of the interim Constitution); the CC will not have the benefit of a considered judgment of a lower court, or of distilled arguments; the role of the Provincial and Local Divisions is not clear; generally, the procedure by which a constitutional matter can be raised and taken to the CC appears to nearly all concerned to be uncertain, cumbersome and defective. An evident concern is that the cumulative effect will be delay and high costs. If a matter has to be removed from the ordinary course of litigation, and placed in the parallel constitutional track, it will in the ordinary course mean that the place of that matter on the civil and criminal rolls in the court of first instance will be lost; the matter will have to in turn be enrolled in a constitutional court already burdened significantly by work; once heard, and a judgment delivered (which itself inevitably gives rise to delays), the matter in many instances will have to be referred back to the original track, the constitutional issue resolved, to continue on its course.

8. Against this general background, the approaches adopted in the individual submissions and presentations for reform of the judicial structure under the interim Constitution can in our view be summarised as follows:

8.1 **The Chaskalson proposal**

(a) The CC is the court of final instance in respect of all constitutional issues.

(b) The Appellate Division is given jurisdiction to hear appeals from decisions of the Provincial and Local Divisions of the Supreme Court on constitutional issues, as well as the other issues within its present jurisdiction. This will not only enable the judges of the Appellate Division to contribute to the development of constitutional jurisprudence, but will also simplify procedures.

(c) The Provincial and Local Divisions of the Supreme Court are given a general jurisdiction to deal with constitutional issues, either on appeal or referral from the Magistrates' Courts, or at first instance, subject only to the following proviso. If the validity of an Act of Parliament is in issue,

the Supreme Court may uphold the validity of the legislation if it is of the opinion that it is consistent with the Constitution. But if it is of the opinion that the Act of Parliament is inconsistent with the Constitution, and that a final decision thereon is necessary for the purposes of the case before it, it may given such a decision, provided that such decision will not take effect unless confirmed by the CC. This will avoid the uncertainty and confusion that could arise if different conclusions were to be reached in regard to the validity of national legislation by different Provincial Divisions of the Supreme Court. It will ensure that only one order is made in regard to the prospective or retrospective operation of a declaration of invalidity of an Act of Parliament. It will also provide the CC with the benefit of the reasoning of the court referring the matter to it.

(d) Magistrates' courts are given jurisdiction to deal with constitutional issues arising out of the interpretation and application of the provisions of the Bill of Rights, other than issues relating to the validity of legisation. (We take it that legislation in this regard contemplates national and provincial legislation, not local government enactments such as municipal bye-laws. **cf. section 114 of Magistrates' Courts Act, 32 of 1944, as amended**). Issues

concerning the validity of legislation which arise in proceedings

in magistrates' courts, and which are necessary for the decision of the case, should be referred by such courts to the Supreme Court.

(e) Appeals from a decision of a magistrate's court on a constitutional issue within its jurisdiction lie in the first instance to a provincial or local division of the Supreme Court.

(f) Appeals from a decision of a provincial or local division of the Supreme Court on a constitutional issue, given either as a court of first instance, or on appeal from a magistrate, lie first to the Appellate Division, and thereafter, and with leave of the CC, to the CC.

(g) With special leave of the CC, a litigant may be permitted to approach the CC for a decision on a constitutional issue, or be allowed to appeal directly to the CC against the judgment of another court on a constitutional issue. (It is not clear whether this approach contemplates however the preservation of a discretionary power in the CC to grant direct access: section 100 (2) and regulation 17).

8.2 **Association of Law Societies proposal**

(a) The present court system of Small Claims courts, Magistrates Courts, Supreme Courts, an Appellate Division of the Supreme Court, a Constitutional Court and a number of specialised courts, should, save for the changes suggested below, remain as it is.

(b) The Magistrates Courts, Supreme Courts and Appellate Division should have jurisdiction in all constitutional matters falling within their normal areas of jurisdiction.

(c) The CC should preferably be a Chamber of the Appellate Division but may as such continue to function as a separate court, as it does at present.

(d) Access to the CC should be by way of the following routes:

1. matters referred to it by the legislature;

2. matters referred to it by the lower courts or resulting from appeals from the lower courts;

3. matters referred to it directly by the public,

subject in all three instances to the CC's acceptance of the

referral / appeal to it. (We interpose to note that this assumes that the CC does not have any exclusive jurisdiction. If we are incorrect in our assumption, then it would seem that the ALS proposal is inconsistent with section 22 of the interim Constitution, at least as far as applications are concerned).

(e) There should be, in place of the present Supreme Courts, a division of a High Court for each province, with as many local divisions of a provincial division as may be necessitated by circumstances.

(f) A provincial division of the High Court (and its local divisions) would exercise the jurisdiction presently exercised by the respective provincial and local divisions of the Supreme Court.

(g) All appeals from a provincial or local division of a High Court should be to an Appeal Court.

(h) There should be three Circuits of the Appeal Court, one each for three Provinces of the Republic of South Africa.

(i) For example the First Circuit of the Appeal Court could serve Gauteng, Northern Transvaal and Eastern Transvaal; the Second Circuit of the Appeal Court could serve the Western Cape,

Eastern Cape and Natal and the Third Circuit could serve the Northern Cape, Free State and North West.

(j) The Appeal Courts should have their own judiciary, who should be appointed from the ranks of the members of the High Court. They would, after appointment to the Appeal Court, cease to be members of the High Court Bench.

(k) The present Appellate Division should be renamed the Supreme Court and it will continue to be the Court of Final Instance in all matters except those referred to and accepted by the CC.

(l) As was said above there should be a CC operating on the same level as the Supreme Court.

8.3 **The Selikowitz / Farlam proposals**

The Appellate Division and the CC should be unified, so that the unified highest court in the country (whatever its name) will be the ultimate court in all types of cases. This unification can take place in the new Constitution with immediate effect, or only in the year 2001, when the term of office of the present CC judges expires and it is to be hoped, the legitimacy argument would have become passe. (Farlam J stated: "***In 2001 I venture to suggest that the Bench will not lack legitimacy.***

Most of the judges in respect of whom the criticisms were levelled that I have alluded to, will, I imagine have retired by 2001. And, in any event, we will have seven years of judges appointed by the Judicial Service Commission. In addition to that, we will have had seven years of a rights discourse proceeding in the courts - in fact a rights culture developing in the country - we will have [had] seven years of decisions by the CC and others, in which fundamental rights are applied and a South African constitutional law, based on the present Chapter 3 of the fundamental rights, will be very much in existence. So it will no longer be true to say that the existing judges have no experience of constitutional law, nor will it be true to say that the practitioners have no knowledge of constitutional law. And, in any event, there will be a number of very important leading decisions which will have been given by the CC in the meanwhile").

8.4 **The ANC proposal**

The ANC supports the idea of a specialised CC, but recognises the existence of problems such as isolation of the Appellate Division; the high costs of the present system (theoretically, there can be seven separate hearings after a matter is brought before a magistrate's court); and an overwhelming case burden on the CC. Therefore the ANC suggests that further options should be considered, for example

"***The present relationship existing between the CC and the other courts, including the Appellate Division, should be retained.***

The Supreme Court can be given jurisdiction to hear cases dealing with the constitutionality of parliamentary legislation, thereby easing the burden on the CC.

The Appellate Division could become a second tier for constitutional review, with the possibility of appeal to the CC.

A further possibility would be to regard the Appellate Division as an

intermediate court of appeal, with the CC being the final arbiter in constitutional matters, while the Appellate Division would remain the final court in all other matters.

A second chamber could be created in the present CC to deal with workload, as is the case in Germany".

8.5 **The NP proposal**

"The principle of a separate CC should be retained, as should the basic elements of that Court's jurisdiction as it is set out in section 98. Some of the procedural elements set out in section 102 will probably require re-visiting with a view to 'streamlining the road' to the CC and provide easier access. Also, and in a similar vein, the possibility of 'direct access' to the CC provided for in section 102(2) should be placed on a firm footing.

The provision which is made in section 35(3) for 'seepage' of the spirit, purport and objects of Chapter 3 to non-public law areas of the law (and thus to the 'private sphere' and private law), will result in the 'ordinary courts' being placed in a favourable position to enrich and improve those areas of the law by way of applying relevant aspects of Chapter 3. A similar method is followed in German constitutional law. In this way, the suspected negative consequences brought about by a 'split' judiciary will be softened".

8.6 **The Community Peace Foundation, UWC**

"Jurisdiction over constitutional infractions should be extended to other or select courts for purposes of attending to constitutional matters. This should only be where the CC cannot sit on the matter. Adjustment to reflect that that other court may sit as Adjuncts / Auxiliaries of the Constitutional Court should be inserted in the article on 'Engaging the Constitutional Court'.

8.7 Inkatha Freedom Party

"1. Provinces shall be the primary government of the people and shall exercise all those functions which have not been devolved upwards to the federal government.

2. Provinces shall have judicial functions with respect to all matters within their competence.

3. The provincial judicial system shall have its own Appellate Division and should exercise final instance jurisdiction on matters of provincial competence.

4. There could be recognition of first instance jurisdiction to be exercised by certain institutions of civil society with respect to the interests that they administer and regulate. This jurisdiction should be subject to appellate review of the provincial or the national judicial system depending on the respective areas of competence. Civil society jurisdiction could include tribal courts, professional associations, trade unions and universities.

5. The national constitution should limit its provisions to the organisation of the national judicial system leaving the organisation of the provincial system to the autonomy of provinces.

6. The Constitution shall provide for the possibility of appellate jurisdiction with respect to all cases and controversies handled by the judiciary.

7. The Appellate Division shall also exercise nomophiliac (i.e. ??) functions, such as ensuring the uniform application and interpretation of the law in the courts of first instance.

8. There shall be no special or extraordinary tribunal courts, which are often established for political purposes.

9. However, the Constitution shall make provision for military courts, specifying that during peace-time they have jurisdiction only over military personnel on active duty.

10. Within the ordinary court system, the Judicial Commission may create specialized sections for given subject matters such as labour, tax or family law and for matters which may require the participation of qualified experts to the administration of justice.

11. Traditional, customary and religious courts shall be constitutionally protected. However, their jurisdiction should not be exclusive but only concurrent and should be limited to those cases and controversies which are based on the application of traditional and customary law or religious rules respectively, as per the time when such cases and controversies are initially proposed".

5.8 **Nadel**

Nadel favours the retention of the present system, i.e. a separate CC. The Provincial Division and Local Divisions of the Supreme Court should, however, be given more effective constitutional jurisdiction, with an unfettered right of appeal.

5.9 **Lawyers for Human Rights**

Broadly speaking, the present court system can be retained, inter alia, a separate CC, but the Supreme Court must be given wider powers to hear constitutional matters but not in respect of national legislation. Access to the CC should be reviewed and a streamlined system must be developed.

5.10 **SA Law Commission Report on Constitutional Options and Models 1991, Chapter 22**

1. The Commission considered that a CC should form part of the

Appellate Division in all respects, so that all the rules of the law of procedure that at present apply to the Appellate Division would apply also to the CC. It is suggested that the Appellate Division should consist of two chambers, namely a General Chamber and a Constitutional Chamber. The latter would deal with all issues arising from the Bill of Rights, the Constitution and the field of administrative law.

2. In an appeal before the Appellate Division the following procedure would apply: if, in the opinion of the Chief Justice, the only or main issue or issues are constitutional (i.e. they arise from the Bill of Rights, the rest of the Constitutional Act, the Constitution in the broad sense or the field of administrative law) the Chief Justice would place that appeal on the roll of the Constitutional Chamber to be heard by that Chamber. In all other cases the appeal would be placed on the roll of the General Chambers.

3. In exceptional cases it could also happen that the General Chamber has to rule on a subsidiary constitutional matter or that the Constitutional Chamber has to rule on a subsidiary general matter. This is, however, unavoidable but would not present any practical problems because each judgment would be a judgment of the Appellate Division. As is the case with the existing system of precedents, which would still apply in the future, such a judgment

would be followed in all subsequent cases, also by each of the Chambers of the Appellate Division itself, unless the Appellate Division were convinced that the previous judgment was clearly wrong.

4. The advantage of this sytem would also be that there would be no duplication of costs or waste of time.

5. As far as applications for leave to appeal to the Appellate Division are concerned the Chief Justice would refer the application to two Judges of Appeal of one of the two Chambers, depending on whether it was, in his opinion, mainly a general or a constitutional matter.

6. The Constitutional Chamber would be an integral part of the Appellate Division and for this reason it would not be possible to lodge an application with that Chamber directly, and each application, action or appeal would have to follow the normal course through the cisting structure of the courts.

9. **Intermediary or Circuit Divisions of the AD**

There are a couple of proposals favouring a court of appeal between the present Provincial Divisions and the Appellate Division, *inter alia*:

9.1 **The Association of Law Societies proposal**

This entails three Circuits of the Appeal Court, one each for three provinces of the RSA. (For details, see paras 8.2(h) to (j) above).

9.2 **SA Law Commission Report on Criminal Procedure, April 1994**

"***The Commission recommends that effect be given to the Chief Justice's proposal that a court of criminal appeal be established on the following basis:***

(a) Jurisdiction: That a court of ciminal appeal be established to hear the following appeals:

All criminal appeals from decisions of a superior court as the court of first instance or decisions of a provincial or local division as court of appeal, except -

(i) appeals in criminal cases where the death penalty was imposed;

(ii) appeals in respect of which the Chief Justice directed that they be heard by the Appellate Division without the intervention of the court of criminal appeal; and

(iii) appeals in respect of cases in which there was a reservation of questions of law.

With regard to appeals contemplated in paragraph (ii) the decision whether so important a question of law has arisen that the appeal should rather come before the Appellate Division should always rest with the Chief Justice and not with the court that granted leave to appeal. This court could, however, make a recommendation to the

Chief Justice when granting leave to appeal.

For the purposes of the Republic of South Africa Constitution Act, Act 200 of 1993, the court of criminal appeal will be regarded as part of the Appellate Division.

(b) *Circuit: That the court sit in two independent and separate circuits. The first, the "A" Circuit, will hear appeals only from the Transvaal Provincial Division and the Witwatersrand Local Division and will sit in Pretoria or Johannesburg. The other, the "B" Circuit, will sit in the various other centres, namely Cape Town, Port Elizabeth, Durban etc., and each session will be determined by the number of appeals emanating from the various centres. The various centres may for convenience also be combined, for example Bloemfontein and Kimberley.*

(c) *Composition of the court: That the court consist of a bench of at least three members, one of whom (the presiding judge) is a member of the Appellate Division, and is appointed ad hoc by the Chief Justice for the relevant session of the circuit in question. The other two should preferably be judges from the division served by the circuit in question. They will be chosen by the Chief Justice from a panel of five senior judges submitted by the judge-president concerned. This requirement may be made flexible so that when the "B" Circuit is in session in Cape Town and hears appeals from the Cape Provincial Division one or more of the members, except the presiding judge, may also be a member or members of one of the other jurisdictions served by the circuit in question, for example the Eastern Cape or Natal Division.*

(d) *The Chief Justice will determine when the panel of judges should be submitted to him and the period for which appointments to the panel will be valid.*

(e) *Duration of session: That the duration of sessions be determined by the Chief Justice according to need.*

(f) *Appeals to the proposed court: That appeals to the proposed court be prosecuted with the leave of the provincial or local division and that, if such leave is refused, with leave obtained by petition to the Chief Justice.*

(g) <u>Appeals from decisions of the court of criminal appeals</u>: Appeals from decisions of the court of criminal appeal may be made to the Appellate Division of the Supreme Court only with the leave of the Chief Justice if he is of the opinion that an important question of law has arisen which requires an authoritative decision by the highest court.

(h) If a court of a provincial or local division of the Supreme Court or a single judge of such a court, upon considering an application for leave to appeal or on reservation of a question of law for decision by a court of higher authority, is of the opinion that a question of law should be decided authoritatively by the highest court, a court or judge may recommend to the Chief Justice that the appeal or question of law should come before the Appellate Division without the intervention of the court of criminal appeal and the Chief Justice may, if he is of the opinion that the recommendation is justified on merit, other that effect be given to it. Alternatively, the Chief Justice may refer it to the court of criminal appeal.

(i) <u>Administration</u>: That the rules for the administration of the court of criminal appeal, the handling of appeals, case records, sessions, etc., for the efficient functioning of the court be drawn up by the Chief Justice".

9.3 **<u>Appellate Division proposals</u>**

It was also suggested (by two AD judges on behalf of the AD, at the Pretoria workshop) that a similar system be devised for civil appeals from decisions of a single judge. At present these appeals are heard by a Full Bench (2 or 3 judges) of the same division. This system has obvious disadvantages and does not always create confidence. An intermediary Appeal Court hearing all appeals from decisions of a single judge would take away from the Full Bench of the Appellate Division a large number of appeals which have no merit, but at the same time a

judge of the Appellate Division will oversee all appeals from a single judge decision. Further appeals from the intermediary Appeal Court can be dealt with as set out above.

10. **Nine Provincial Divisions of the Supreme Court**

There appears to be support for the idea of extending the federal or regional system, on which the present Constitution is based, to the structure of the Supreme Court.

Prof. Hugh Corder

(a) Favours retention of a separate CC, but has doubts whether it will still be necessary after seven years.

(b) The fact that the Appellate Division has been left out of constitutional jurisdictia is problematical. Thinks that the Appellate Division could be brought in by constitutional amendment as the final arbiter of non-constitutional and factual issues, which will free the CC to spend more energy and time on the constitutional issues for which it was set up.

(c) Thinks Magistrates' Courts must be given a constitutional role. They do perform an administrative and judicial function. Should be

given a degree of jurisdiction.

(d) Favours more independence to Magistrate by a way of promotion to the Supreme Court - perhaps involving Magistrate Commissioner and Judicial Service Commissioner. But he does not favour a closed single system, where one could only become a judge by working up from the lowest ranks of the civil service. Candidates from other branches of the profession e.g. advocates and attorneys, should be allowed to enter the system at various levels.

(e) He is not in favour of a jury system at all.

(f) He favours the idea of three Circuit Intermediary Appeal Courts.

Friedman JP

(a) The exclusion of the Appellate Division from constitutional work is a serious mistake - it will cause an overload in the CC; it could involve the CC in having to deal with factual issues; the CC will not have the advantage of an Appellate Division judgment which would refine the issues for it and which could often result in a shortening of the proceedings.

The exclusion of the Appellate Division means that it is sidelined as far as this important field of law is concerned and that two systems of law will develop - clashes may occur. It deprives the country of the talents of some of the country's finest jurists.

(b) **Proposal**

Give full constitutional jurisdiction to Provincial and Local Supreme Courts; appeal to Appellate Division; and then right of appeal from Appellate Division to CC with the leave of the latter court as is the case in the USA, because otherwise frivolous appeals could find their way to the CC.

(c) **Split judiciary**

No advantage to change the present system. But is in favour of better training for magistrates and the appointment of advocates and attorneys as senior civil magistrates.

Adv Wallis SC (on behalf of GCB)

(a) Is in favour of a simple, unified system eventually - see for example the

Constitution of the United States of America where the constitution simply provides "***The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish...***" In due course, the Appellate Division and CC converge, but not at the moment.

(b) The Appellate Division must be brought back into the main stream, and the CC would have exclusive jurisdiction on two matters only.

(i) testing the new Constitution by the 34 Constitutional Principles;

(ii) challenges from within Parliament whilst a matter is still in the process of discussion and debate.

(c) The Supreme Court (Provincial and Local Divisions) must have full jurisdiction also in constitutional matters (save in relation to 2(a) and (b) above).

(d) If the Supreme Court is of the opinion that the case involves a constitutional point only and that it is of general public importance, direct access to the CC must be provided for, i.e. bypassing the Appellate Division.

(e) The system of appointing judges by the JSC is, in principle, a good idea.

(f) He emphasized that the Appellate Division is already inundated with work. One answer is to have more judges appointed to the Appellate Division.

Magistrate's Commission

Much statistical and other material was presented (by Van Dijkhorst J and Magistrate Peckham) directed at establishing the standing of magistrates in civil proceedings; their training generally; and the law incidence of judgments - civil and criminal - being overturned on appeal or review. An increase in the existing civil jurisdiction from R20 000,00 to R200 000,00 (would match the upper limit of a regional court to impose a fine) was proposed.

The Commission did not support the proposal advanced by committee member Mr J de Lange for a single judiciary (in effect, collapsing the Supreme Court and Magistrate's Court). Van Dijkhorst J proposed instead (expressly as a personal opinion) an increasingly specialised judiciary, with "***a criminal side with a criminal appeal court, a civil side with a civil appeal court***".

Magistrate Peckham also expressed his own opposition to the proposal of a collapsed judiciary. He pointed to serious practical problems of

administration which, he said, militated against that approach.

11. As already indicated, we have unfortunately not yet been furnished with transcripts of the important workshop held in Pretoria on Monday 27 February 1995. We were however represented at the workshop by one of our members, and we would accordingly summarise the contentions advanced at that workshop relevant to this aspect of the committee's work as follows:

11.1 **Structure of the court system**

Should there be a separate CC or should there be an Appellate Division with two chambers ?

The vast majority of submissions favour the retention of a separate constitutional court as the highest court of the land for constitutional matters.

11.2 **Arguments in favour of separate CC**

11.2.1 The CC is more representative of the South African population than any other court.

11.2.2 It is necessary to have a single court with the final say at the apex of the court structures.

11.2.3 Constitutional adjudication has many differences from adjudication in ordinary cases (although there are similarities).

11.2.4 Constitutional adjudication has a greater impact on the social and political life than other forms of adjudication.

11.2.5 A separate CC is appropriate in a country that was moved out of a repressive regime and is struggling to establish a human rights culture.

11.2.6 A separate CC was created by the interim Constitution.

11.2.7 It may be appropriate to use different methods to appoint judges of a CC.

11.2 **Arguments against separate CC**

11.2.1 This structure will involve duplication, delay and unnecessary expense.

11.2.2 The structure is divisive.

11.2.3 It will be the only such structure in a Commonwealth country.

There is extremely limited support for the creation of a "two chamber" Appellate Division at the end of the term of office of the CC. Arguments in support are however that it would avoid drawbacks listed under the arguments against the separate CC.

11.3 **What should be the Constitutional Jurisdiction of the Appellate Division?**

There was broad consensus that the Appellate Division should have a full constitutional jurisdiction. Subject to appeal to the CC the Appellate Division's constitutional jurisdiction would be the same as that of Provincial Divisions of the Supreme Court.

Arguments for:

11.3.1 The absence of constitutional jurisdiction would prevent members of the Appellate Division developing expertise in constitutional law.

11.3.2 The absence of constitutional jurisdiction undermines the status of the Appellate Division and downgrades it as an institution.

11.3.3 Its absence deprives the country of the expertise of members of the Appellate Division.

11.3.4 Its absence will place an increasingly unmanageable workload on the CC.

11.3.5 It will negatively impact on the ability of the Appellate Division to deal with a number of areas of law which are explicitly regulated in the Constitution - for instance, administrative law and criminal law. What will emerge will be two jurisdictions, in effect, in areas such as labour law and administrative law, which are partially constitutionalised.

11.4 **Arguments against**

11.4.1 There was extremely limited support for the contrary view that the Appellate Division should have no constitutinal jurisdiction until a two-chamber Appellate Division is created. The arguments in support of this view were:

(a) the Appellate Division cannot be meaningfully integrated into the system of constitutional jurisdiction created by the interim Constitution;

(b) the workload of the Appellate Division is too great to allow it to be given constitutional jurisdiction.

11.5 **What should the Constitutional Jurisdiction of the Supreme Court (including the Appellate Division) be ?**

11.5.1 There was overwhelming support for the view that the Supreme Court should have a full constitutional jurisdiction subject to the exception that it should not be able to strike down national legislation and these cases should be referred to the CC. (Some proposals distinguish between pre - 1994 legislation - in respect of which the court should have full jurisdiction - and subsequent legislation).

11.5.2 It would be inappropriate to have a situation in which legislation was valid in some provinces and not others.

11.6 **Arguments against**

This will create unnecessary delays in litigation in the Supreme Court.

11.7 **Should the Magistrates Court have constitutional jurisdiction ?**

There was overwhelming support for the magistrates' courts to be able

to rule on constitutional matters (other than the validity of legislation).

11.8 **What should the procedure or appeal to the CC be and should the court have the discretion as to what cases it hears ?**

There is a general support for the view that cases should go to the CC via the Appellate Division. In addition, however, there should also be "by passing" procedures that would allow certain matters to go directly to the CC. Cases that would proceed directly would include those where the constitutionality of national legislation has been challenged. There is agreement that the CC should determine what cases it will hear.

11.9 **Should there be an intermediate court of appeal between the provincial divisions and the Appellate Division ?**

11.9.1 There is great uncertainty in the current system of appeal.

11.9.2 Currently appeals are dealt with by colleagues of the judge who has presided in the trial.

11.9.3 This would liberate the Appellate Division from having to deal with dispute of fact.

11.9.4 It would assist to deal with the problems created by the

workload of the Appellate Division.

11.9.5 This will ensure that all persons have a "right to appeal" as set out in section 25 of the interim Constitution.

11.9.6 There is also support for a separate Criminal Appeal Court.

There are two suggestions as to how an intermediate court of appeal should be composed:

(a) it should consist of an Appellate Division judge sitting with two provincial judges;

(b) it should be a separate institution.

11.10 **Should the current 'split' between a Supreme Court and Lower Courts be retained ?**

11.10.1 There was majority support for view that a "two-tier" judiciary should be retained but that the division should be made less severe.

11.10.2 This could be achieved by granting greater independence to

the magistrates, allowing them advancement into the higher court judiciary, increasing the general pool from which magistrates are appointed and improved training.

11.11 **Should each province have its own "Supreme / High" Court?**

There was majority support for this.

12. **Community organisations**

Messrs F. Kobese (Acting President of SANCO (Eastern Cape Region)), Mr M. Monyela (Community Mediator of the Joe Modisa Quatro Camp, Gauteng) and Prof. D. Nina, National Manager (Research) of NICRO made representations from the viewpoint of certain community organisations.

Those aspects perhaps relevant to this area of TC 5's work related to the use of dispute resolution mechanisms in communities, and the possible future use of community courts. No clear proposals were however advanced as to how either mechanism could be incorporated in the proposed new Constitution.

13. **Evaluation**

13.1 In most of the submissions and during the Pretoria symposium the debate seemed to centre around the dealing with constitutional matters by other courts than the CC.

13.2 There were some suggestions that eventually we should have one Supreme (highest) Court in the land, dealing with constitutional and all other matters. This court could possibly consist of two (or more) chambers. The majority view, however, clearly favours the retention of the CC as a separate court. The arguments in favour of this view appear from our summary of the proceedings of the symposium of 27 February. It would appear therefore that general consensus exists that the continued separate existence of the CC be accepted and that that serve as the departure point for the future.

13.3 It was also evident from the vast majority of opinions that the CC should not be the only court to deal with constitutional matters. Many speakers warned of an overload of work on the CC, which might affect the quality of the work and lead to long delays in the finalisation of cases. By 1986 there was a delay of 10 000 cases in the Indian Supreme Court, and by 1994, over 5 000 in the European Court. This may in turn lead to

undesirable "sifting" mechanisms, such as the USA certiorari procedure, which is, in the context of our constitution (with a right to appeal stressed by many participants), unacceptable.

Furthermore, the overwhelming majority of proposals and speakers consider the exclusion of the Appellate Division from the constitutional jurisdiction as unworkable and generally undesirable. We have summarised the views expressed at the symposium above and these do not require repetition.

The only two substantial arguments against giving the Appellate Division constitutional jurisdiction in the new Constitution appear to be:

(i) The workload of the Appellate Division is too great to allow it to be given extra responsibility in the form of constitutional appeals; and

(ii) If appeals on constitutional matters are allowed from the Appellate Division to the CC (which seems to be inevitable if the Appellate Division is given constitutional jurisdiction), it will reduce the status of the Appellate Division; it will cease to be a highest court; etc.,

As far as (i) is concerned two suggestions have been put forward. The one is to appoint more Appellate Division judges and the other is to create intermediate (circuit) Courts of Appeal.

The option of appointing more Appellate Division judges seems to be attractive superficially, but it has many disadvantages. The more Appellate Division judges there are, the higher the chance becomes of conflicting judgments, the one bench not knowing what the other is doing at the same day or that another bench has taken a decision on a similar matter a day or two before, etc.,

The option of intermediate (circuit) Courts of Appeal in both criminal and civil matters seems to be favoured by many respondents and speakers. We have referred to some of the arguments put forward at the Pretoria symposium. The basic advantage is that it will take away the "in-house" full bench appeals and at the same time alleviate the workload of the Appellate Division. The cases that will go to the Appellate Division will then deal with matters that should properly go to the highest court, e.g. indicate legal questions, question of legal policy, matters of public interest, etc.

One of the advantages of this proposal is that a system for the creation of an Intermediate Criminal Appeal Court has been worked out in fine detail by the SA Law Commission in conjunction with the Chief Justice. Draft legislation giving effect to this scheme is in the hands of the Minister of Justice and the system could be adapted immediately to cover civil matters as well, and it can then be implemented by Parliamentary legislation.

As far as objection (ii) is concerned, we do not think that questions of vested status etc should stand in the way of necessary public, need. The Appellate Division should rather welcome being brought back into the mainstream of jurisprudence and it should accept the opportunity to show that it can deal with constitutional matters in a way which will enhance its legitimacy and credibility.

For these reasons it would seem that the general view that the Supreme Court, including the Appellate Division, be given constitutional jurisdiction is to be supported for sound reasons.

Various proposals have been put forward on how to implement such a system.

13.4 There seems to be general consent that magistrates' courts should not be isolated from constitutional matters. These are the courts where most litigants come into contact with the law and it is essential that their constitutional rights should be protected at that level. There seems to be some doubt whether a magistrate should have the power to strike down legislation (whether national, provincial or local) and the general view seems to be a system of referring such cases to the Supreme Court (akin to the present section 103(2)).

13.5 According to the general view, Provincial and Local Divisions of the Supreme Court must have the jurisdiction, as courts of first instances, to deal with all constitutional matters, including the validity of national legislation.

The spectre of two Provincial Divisions holding opposite views on the validity of a statute need not stand in the way of implementing such a system. A number of proponents have proposed that if a Provincial or Local Division strikes down national legislation, the order will not take effect until it is confirmed by the CC. This seems to be a sensible solution and will also solve the problem of conflicting provincial divisions.

13.6 The majority view then proceeds to hold that from a decision of a provincial or local division, there should be an appeal, in the ordinary course of procedure, to the Appellate Division. Provision must be made, however, for bypassing the Appellate Division in some cases and to pursue the appeal directly to the CC.

The following examples have been mooted as cases warranting a direct appeal to the CC from provincial or local divisions:

(i) Where national legislation is struck down;

(ii) In the case of conflicting constitutional decisions in all other matters, e.g. executive acts.

(iii) In urgent matters of general public interest.

(iv) Where the constitutionality of pending legislation is assailed.

(v) Where, in the exercise of its discretion, either the provincial or local division or the CC grants leave for a direct appeal.

In all other cases the appeal goes to the intermediate Courts of Appeal and then to the Appellate Division, subject to the existing rules pertaining to leave to appeal.

The majority view is then that the Appellate Division has full constitutional jurisdiction. On constitutional matters there is a further appeal to the Appellate Division with leave of the Appellate Division. If such leave is refused by the Appellate Division, a petition can be directed to the President of the CC who can give leave to appeal to the CC.

13.7 The question of the legitimacy of the requirement of leave to appeal from one court to another has been debated. The minority view is that such a requirement is unwarranted, and that the right to appeal is to be

unfettered. The majority view rejects this as historically incorrect, contrary to the interim Constitution and previous laws and practice, and totally unworkable. We consider that there is a serious danger that the higher courts will be flooded with unmeritorious appeals and the procedure will be abused to nullify decisions of courts and to play for time. In no country in the world is there an unlimited right of appeal, and our present system works perfectly well. The constitutionality of the requirement of leave to appeal has been enshrined in section 102(ii) of the present Constitution and should be retained.

13.8 There seems to be strong support for the employment of lay assessors in the lower courts. The debate centres round the way of selecting assessors for a particular case: should this be done by the presiding magistrate; or by the community (and if so, how ?); or by working on a fixed list. The greatest need, however, seems to be the implementation of the provisions which already exist in this regard.

13.9 There were various proposals for dealing with community courts, traditional courts, street committees etc., It is evident that the debate has just started and no concrete proposals have as yet developed.

14. **Recommendations**

In the two proceeding sections of this part, we have summarised the oral and written submissions advanced before TC 5, and then presented our assessment, as technical advisers to the Committee, of their implications, and demerits.

We advance these recommendations in the understanding that our function is not purely stenographic (thus, simply to record submissions to the Commission), but also, having presented an evaluation of strengths and weaknesses in individual presentations, to seek to distil those elements in the various materials laid before TC 5 which in our view would most effectively serve South African society by being incorporated in the proposed new Constitution.

1. As a matter of approach, we believe that the Constitution is best served by the laying down of only essential provisions or characteristics relevant to the structure of the judiciary and the legal system in the Constitution itself. The interim Constitution contains many other more detailed provisions, which have inevitably given rise to what are effectively amendments to the Constitution. The consequence is an undesirable detraction from the centrality of the Constitution, and the danger of unconstitutionality if changes are made, but not by recourse to the prescribed procedures for

amending the Constitution. In contrast, it may be noted, the United States Constitution provides in one sentence,

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish".

Perhaps a via media may fit South Africa; we would however caution against overly detailed provisions in the Constitution itself.

2. The reach of the Bill of Rights can only be enhanced by a generally integrated constitutional jurisdiction. Otherwise put, all courts should in principle exercise a general constitutional jurisdiction (as they generally do, and as has been demonstrated to work, in countries such as Botswana, Canada, Lesotho, Namibia and the United States).

3. It would however be inappropriate for the constitutionality of legislation of any kind to be determined by Magistrates' Courts. A referral mechanism (along the lines of the current section 103(2)) should be devised: at the end of proceedings in the Magistrate's Courts (save in exceptional circumstances), in the event of an issue of constitutionality of any legislative enactment being determinative of the matter, this should be referred to the Supreme Court. In other respects, the Magistrate's Court should exercise a general constitutional jurisdiction.

4. Provincial and local divisions of the Supreme Court (more appropriately described as the High Court) should have general constitutional jurisdiction, with the capacity to declare legislation (including legislative enactments of Parliament before and after April 1994) unconstitutional. Such a declaration of unconstitutionality would be subject in all cases - even in the absence of the noting of an appeal - to confirmation by the Constitutional Court, and until so confirmed, would not take effect.

5. The Appellate Division (to be called the Supreme Court, or Court of Appeal) should by general consensus now be granted a general constitutional jurisdiction, including the capacity to declare Acts of Parliament (pre - and post - April 1994) unconstitutional.

6. The Constitutional Court would discharge firstly its essentially extra-curial functions (contemplated by the present section 98(2)(d), a dispute over the constitutionality of a Bill before Parliament; a dispute of a constitutional nature between organs of central or provincial governments; and further provisions such as the present sections 82 (1)(d) and section 160(4)); secondly, its functions as the court of final instance in all constitutional matters; and thirdly, in special circumstances and by the special leave of the Constitutional Court, to act as a court of first instance (for instance, where a matter raises only a question of constitutionality, and this is considered by the CC on application to it to be such that direct access should be granted).

7. A system of intermediate circuit appellate courts should be adopted in both criminal and civil matters, to accelerate the hearing of appeals and to enhance the standard of appellate justice. These might be presided over by a judge of appeal (i.e. of what is now termed the Appellate Division) sitting with two High Court judges (or it may be constituted as a separate court. As already indicated, we believe it to be inappropriate and unnecessary for provisions of this kind to be laid down in the Constitution itself).

8. We have proposed that a change in the description of the courts be achieved. We do so because we believe the current descriptions ("Supreme Court" for a court which is <u>not</u> "supreme" and "Appellate Division" for a court which is only formally a "division" of an entire system of courts) is misleading and confusing to the people the courts must serve. We suggest that the nomenclature found appropriate in neighbouring countries such as Botswana, Lesotho, Namibia and Zimbabwe be adopted: the lower courts be called magistrates' courts; the next tier be designated the High Court; the appellate level the Supreme Court (or Court of Appeal); and the Constitutional Court, if retained as a separate court at the apex of the structure, keep that name. We believe that in this way, too, a fresh start for the judiciary will be signified, and perceived problems of legitimacy attaching to the old judicial structure, removed.

PART 11

THE COMPOSITION OF THE COURTS AND THE APPOINTMENT OF JUDICIAL OFFICERS

11. APPOINTMENT

11.1 Appointment of the Chief Justice and the President of the Constitutional Court: the general consensus is that s97 (1) and (2) of the Interim Constitution are acceptable.

11.2 We recommend the retention of the present system.

12.1 APPOINTMENT OF CONSTITUTIONAL COURT JUDGES

Four options are raised here:

(a) That Constitutional Court judges should be appointed by Parliament, on the basis of a 2/3 majority vote. Interviews would be conducted by the Standing Committee. The JSC would play a role in screening candidates.

(b) That the President, possibly in conjunction with the Cabinet, appoint CC judges on the recommendation of the JSC. Consideration must be given to the appropriateness of the current constitutional provision in terms of which the JSC plays a role in respect of certain judges only.

(c) That a portion be appointed by Parliament; the Provinces; and the JSC.

(d) That the JSC appoints judges.

Arguments for option (a)

- parliament is seen as a more representative and legitimate forum for appointing judges mandated to uphold the values reflected in the Constitution;

- the court will be determining matters of a political nature. Thus it is appropriate that parliamentarians participate in the appointment debate.

- this can incorporate certain aspects of JSC process.

Arguments for option (b)

This format is more likely to assure impartiality and independence and an appropriate sifting process to ensure judicial qualities.

Arguments for option (c)

- Ensures impartiality and independence;

- Ensures greater provincial input and balance.

Arguments for option (d)

- Ensures independence and impartiality

12.2 We hold differing views on these options. We consider them an important aspect which we would like to develop in oral submissions

13. APPOINTMENT OF SUPREME COURT JUDGES

13.1 There is overwhelming support for the view that the President appoint Supreme Court judges, on the recommendation of the JSC.

Arguments in favour of this

- Current process works well (especially now that all hearings will be public);

- In utilising JSC, some uniformity with regard to all judicial appointments can be assured;

- The JSC's role is only advisory, President takes ultimate decision.

13.2 We recommend in principle the retention of the present system (subject to alterations in the composition of the JSC, dealt with in the following section).

JUDICIAL SERVICE COMMISSION

14.1 An important issue raised in submissions relating to appointment of Supreme Court judges is the composition of the JSC.

14.2 There are two basic approaches to the JSC.

(i) That it be left in more or less its present form (with the possibility of some changes to its composition.) Consideration should be given to participation by the Attorneys-General and to ensuring greater participation by non-legal practitioners (see the present S.105 (1) (h) and (i)).

(ii) That it be restructured to ensure greater public participation.

14.3 Participation by the legal profession and law schools - 3 predominant views:

- (i) current role sufficient

- (ii) too many lawyers

- (iii) too few lawyers.

Participation by the public - 2 predominant views:

(i) Greater public participation to be recommended, not only at hearings (public transparent proceedings) but on the JSC/MC to infuse these bodies with the representivity/legitimacy they are perceived to lack.

One argument for this is that lawyers are not necessarily representative of the public interest and/or public values and the public can play an important role on appointment bodies.

(ii) Limited public participation - as it is really lawyers who are competent to assess the appropriateness and competencies of judicial officers.

15 MAGISTRATES' COMMISSION

15.1 There are two options:

(a) Retain the MC, and possibly decentralise this structure through the establishment of Provincial Commissions;

(b) Restructure the JSC to incorporate the functions currently the preserve of the MC.

There was general consensus that whatever option is adopted, the membership of the commission should be altered, as currently it is dominated by the Department of Justice.

Arguments for (a):

- There is a draft bill dealing with the restructuring of the Magistrates' Commission which streamlines the functions of the Commission.

- The magistracy is composed of a large personnel force. It might be too large a structure for the JSC to deal with effectively.

- There must be a testing mechanism with respect to appointment and promotion of individual magistrates. The Magistrates' Commission is best able to serve these needs.

- The greatest need for transformation in the legal system is at the Magistrates' Court level. It is thus important to have a structure that will promote and serve the needs of a career magistracy.

- The pool from which members of the Commission are drawn can be extended to include attorneys, advocates and academics; the number of civil servants on the Commission should be reduced.

- At a practical level, the functions of the MC are much wider than those of the JSC, and will paralyse the JSC.

Arguments for (b)

- In line with putting a lesser emphasis on the distinctions between lower and higher court judicial officers, serious consideration should be given to establishing a single structure. This structure can then set up mechanisms that ensure uniformity in appointment yet allow for the specialist nature of lower courts.

- The JSC would recommend appointments to the Minister of Justice as it not appropriate for magistrates to be appointed as an administrative act.

- This structure will more readily allow for and promote the appointment of qualifying Magistrates to the Supreme Court bench (promoting the concept of a professional judiciary).

- More transparency and input from the general public assures a more effective appointment structure.

15.2 We believe that the interests of justice would best be served by option (a). It is clearly impractical for the JSC to perform the functions that the MC performs in respect of the magistracy. This will also be determined by the issue of the split judiciary.

16 RE-APPOINTMENT OF JUDGES

16.1 Should there be a procedure for the re-appointment of judges appointed before April 1994?

(a) Predominant view - No useful purpose will be served by this.

(b) Alternative view - to ensure the legitimacy and acceptability of the judiciary consideration should be given to introducing a mechanism to process re-appointments. It has been suggested that the current procedures of the JSC could be used.

16.2 We agree with view (a). Any real concern or difficulty with a serving judge can be dealt with through the accountability mechanism discussed below.

17 QUALIFICATIONS/ATTRIBUTES REQUIRED FOR APPOINTMENT AS A JUDICIAL OFFICER

General consensus - the s104 requirement of a "fit and proper person", suffices for all appointments of all judicial officers when read with the s99 (5) (d) which requires representivity in the judiciary. There is an argument for the detail of specific qualifications to be dealt with outside the Constitution. Examples of guidelines felt by some to be relevant include:-

- whether an LLB is a basic requirement - there are differing views on the

relevance of legal qualifications, the minority view preferring a broader approach in which non-lawyers are not excluded.

- what constitutes "merit" is highly contentious and "technical qualifications" should not be the exclusive standard. Life experiences, some argue, are as important.

- a related contentious matter is the suggested need to accommodate magistrates' qualifications if the JSC is responsible for all appointments.

18 ACCOUNTABILITY OF THE JUDICIARY

(a) One view is that the judiciary should be more accountable. The question is what mechanisms should provide for this.

(b) The other view is that s104 (4) and (5) of the Interim Constitution are adequate. With regard to the Magistrates' Commission, the view is that it has mechanisms to ensure accountability.

Argument (a)

Arguments in favour premise their call for either complaints procedures, Judicial Councils or impeachment proceedings etc. on the need for transparency,

accountability, and the commitment to a new human rights culture and work ethic.

It is argued that the JSC or other bodies could adequately execute this function. However, a duplication of hearings, as currently reflected in the wording of S 104 (4) should be avoided.

There is however also the view that the functions of the JSC should not include that of disciplining errant judges. Thus under "accountability", one view is that an independent structure exercise this function, should the cost considerations of a new structure not militate against its establishment.

18.2 We recommend that the JSC (or a sub-committee of JSC) be empowered to consider public complaints relating to the conduct of the judges and to bring cases that may merit impeachment to the attention of Parliament. By accountability, we understand accountability to the constitution.

19 TENURE

19.1 CONSTITUTIONAL COURT -

One option is that judges should be appointed to serve for a non-renewable term of 7 years or a longer period.

In addition, it is suggested that there should be two panels of 6 judges to

ensure continuity.

This proposal does not detail how, practically, the phasing in and out of panels (including current CC judges) is expected to work.

The alternative approach to the panel proposal is to allow for natural attrition due to age or ill-health to determine the phasing process.

In either case, the problem of the transition between the existing and a new constitutional court will have to be addressed.
Other than this, S104 (4) and (5) should be retained.

19.2 SUPREME COURT

As set out in S104 (4) - (ie: life-time appointment subject to a retirement age).

19.3 MAGISTRATES

The magistrate's association has proposed that the appointment, tenure removal, remuneration be included in the constitution. As already indicated, we do not consider this to be appropriate.

20 GENERAL - SOME CONSIDERATIONS THAT CONTRIBUTED TO THE DEBATE ON QUALIFICATIONS/ATTRIBUTES

20.1 Role of Career Judicial Officers

One proposal is that judges, through specialised training as occurs in Germany, should be given the opportunity to become career judicial officers. In our view this requires further and careful investigation in view of important differences which exist between our legal system (and its resources) and Continental system.

Magistrates are regarded as career judicial officers, and a proposal is that they be allowed to qualify to be appointed to the judiciary.

20.2 Training

Continuing legal education for the judiciary and magistracy is recommended, but should not to be included in the constitution.

20.3 The extent to which judicial qualifications and attributes detail of this requirement should be spelt out in the constitution depends on whether one prefers the minimalist or maximalist approach.

On the basis of representations made, the minimalist approach of requiring a judicial officer to be a "fit and proper person" with the ability to be impartial, independent and competent, is in our view adequate. What guidelines should be used by the JSC/MC is a matter best left to these bodies to finalise, using the submissions to this Theme Committee as a basis for this determination.

21. SUMMARY OF CONCLUSIONS

Preface

This summary is premised on the opinion that the essence of the points of disagreement in relation to the composition and appointment of the judiciary, turn on matters of policy. In many instances the matter may be influenced by the deliberations of Theme Committees 1 to 4.

21.1 APPOINTMENTS

It will have to be determined whether Constitutional Court judges, being judges of a constitutional order, should be appointed through a different mechanism to that of the other judicial officers. This is clearly an important area of division in points of view advanced before the committee. The extent of parliament's role is the issue to decide ultimately.

The matter of provincial government's competency to appoint Constitutional Court judges, where the decentralisation of this court is not envisaged, will be a matter more readily determinable once the "character of state" inputs have been carefully considered by all parties.

With regard Supreme Court judges, the most contentious point is the composition of the Judicial Services Commission. The solution must ensure that JSC enjoys public confidence. Underlying the different approaches to the appointment of judicial officers and the composition of the appointing bodies themselves, are different views on the meaning of "independence".

PART III

ISSUES OF ACCESS TO JUSTICE

INTRODUCTION

21.1 Submissions made to the Theme Committee indicated general consensus that access to justice is a major problem in South Africa. This was expressed in a number of ways:

a) the majority of South Africans have no or extremely limited access to justice;

b) access to justice amongst South Africans is extremely unequal.

21.2 The term "access to justice" was used in an extremely broad sense in submissions and was not confined to access to the courts or the conventional forms of legal assistance. It was understood to refer to access to a wide range of institutions (both formal and informal) which could provide for the just resolution of problems.

FACTORS LIMITING ACCESS TO JUSTICE

22. In the course of submissions and evidence the following were listed as limiting access to justice:

a) The high costs of litigation and legal advice.

This was cited in a high proportion of the submissions received from individuals;

b) The long delay in resolving legal disputes and court cases;

c) The approach to the regulation of legal costs (in which an unsuccessful litigant bears the costs of a successful party) limits access to legal proceedings by individuals;

d) Many South Africans live long distances away from courts. This is particularly true of the Supreme Court which is only located in certain major centres. In addition, many people living in rural areas do not have effective access to lawyers to seek legal advice;

e) The limited availability of legal aid in South Africa, particularly in civil cases. This adversely affected the position of individuals who have legal disputes or potential disputes with large corporations. Persons in this position include employees (without the backing of a trade union), consumers, etc. The major part of the legal aid budget is spent on criminal defences;

f) The high proportion of accused in criminal cases who are not represented and the high number of unrepresented accused who are convicted and serve prison sentences. (In 1993 there were 595 042 unrepresented accused in criminal "trial" matters. This was approximately 88% of all accused. A total of 150 890 unrepresented accused were sent to jail by the lower courts. The Legal Aid Board's estimate of the cost of representing all the accused in criminal cases (calculated at a figure of R700/trial) is R451 million and of representing all accused who are sent to jail by lower Courts R105 million. In 1993 Legal Aid Board provided for the defence of 53 267 accused which is roughly 7% of the total accused. A total of

110 000 accused were represented by practitioners in private practice, approximately 50% of these being funded by the Legal Aid Board);

g) The language in which legislation including the constitution, is drafted makes the law inaccessible to citizens;

h) The movement of criminal trials away from the areas in which the accused lived hampers access to justice both for the accused and for complainants;

i) There is a lack of access to justice for complainants and victims of crime. This is a result of both their limited participation in trials and the absence of adequate forms of compensation for victims of crime;

j) The inequalities between the standard of justice received in the Supreme Courts and the Magistrates' Courts further accentuates inequalities in access to justice as the vast majority of cases are dealt with in the Magistrates' Courts. A number of factors place additional work pressures upon magistrates, and delay cases. These include the fact that many regulatory offenses of a minor nature are heard in the Magistrates' Courts; the administrative burden imposed upon magistrates is a further cause of delay. Problems experienced by women in obtaining maintenance payments was cited in several of the

submissions of individuals;

k) The adversarial nature of our legal system hampers access to justice;

l) The quality of interpretation of court proceedings may create injustices as these often do not reflect the evidence given in Court. (This will be dealt with further in Block 7).

m) Restrictive rules of audience in courts which limit the right to represent others in courts to qualified (or practising) attorneys and advocates.

23. Evidence was given of a range of recent developments which have improved the access of citizens to justice. These emanate both from the State and civil society. Among the most significant developments are:

a) The emergence of institutions of popular justice and dispute resolution in communities. These include community courts, dispute resolution centres and anti-crime committees. These institutions have developed without state assistance and, in many instances, are in opposition to official structures of justice. Witnesses conceded that many of these structures have been or are controversial, particularly because of abuses in the past. Witnesses pointed out that in contrast many communities had operated systems of popular justice highly

successfully for many years. The successful projects had not received equivalent publicity to the abuses that had occurred. Legal reform should build on the positive experience of popular justice. Communities who have developed these structures outside the formal justice system now wish that they be accorded some form of "recognition". The different forms that this may take are discussed below.

b) The emergence of non-governmental organisations providing legal services to the indigent and the emergence of a large number of legal aid clinics and paralegal staff. These organisations have operated without legal funding from the state;

c) A feature associated with the emergence of legal service organisations has been the growth of "paralegals" working in legal clinics. Evidence from the paralegal association indicated that it had among its members 1 200 clinics employing 2 000 trained community-based paralegals. Although these persons give extensive advice and have considerable expertise in particular areas of the law they have no rights of legal representation.

d) The Small Claims Court is seen as an important innovation which has served to improve access to justice for many citizens for certain disputes. Among its advantages are simplified procedures, no legal

representation, the speed with which disputes are resolved, and sittings in the evenings. Its major disadvantage is its extremely limited jurisdiction (claims of R2000 or less);

e) The development of appropriate alternative dispute resolution mechanisms and the recognition of these forms of dispute resolution in legislation. Examples cited of laws recognising alternative dispute resolution include the draft Labour Relations Bill published in February 1995 and the Short Process in Certain Civil Proceedings Act. The growth of alternative dispute resolution encompassed both methods of achieving settlements (mediation) and expedited and simplified forms of adjudication (arbitration).

f) There have been considerable increases in the budget of the Legal Aid Board. This has been increased from R63 million in 1994/95 to R188 million in 1995 - 96. In addition, the Legal Aid Board is seeking to achieve methods of supplying funding to non-governmental organisations that offer legal representation and advice to indigent persons. (Evidence was given that this is a more cost-effective way of providing legal aid than the "judicare" system in which the Legal Aid Board pays the fees of private practitioners.) Changes in the composition of the Legal Aid Board have led to the organisation gaining enhanced legitimacy.

g) The system of automatic review of certain decisions by Magistrate's Courts gives accused persons improved access to Supreme Court justice. (The figures for South Africa show that a relatively low level of decisions are changed on review - approximately 1%). In homelands such as the Transkei where there has been inadequate training of magistrates in recent years, up to 10% of decisions are reversed on review. The value of the review system was undermined by delays. This destroyed much of the value of the system, as sentences may in some cases only be reviewed after the accused has spent a considerable period in jail.

h) The provisions of the Interim Constitution dealing with the right to a trial, and in particular Section 25 (3)(e) which gives the right to "be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at State expense" stop. The practical effect of this provision on the right to legal representation in criminal trials will be determined by the decision of the Constitutional Court.

i) The Constitutional Court rules allow for groups with an interest in the issue before the court to submit arguments ("amicus curiae").

LAY PARTICIPATION

Lay participation in the courts was viewed as a mechanism that could

enhance access to justice. There is widespread support for the use of lay assessors to assist presiding officers. Systems of nomination and election should be introduced to ensure that the lay assessors were drawn from the community in where the case is held. There was little support for a re-introduction of the jury system.

COMMON THEMES

A number of common themes can be seen as emerging from the submissions:

1 Access to justice is a central issue in ensuring that the majority of South Africans benefit from the rights protected in the constitution and that these rights are enjoyed broadly in society;

2 Access to justice is closely linked to the legitimacy of the judicial system. This reflected in two ways: Political transformation and changes in the judicial system have led to certain limited improvements in access to justice. Improved access to justice will in turn enhance the legitimacy of the judicial system.

3. The approach of the Constitution to access to justice will be determined primarily by the Chapter on Fundamental Rights and the extent to which it entrenches rights of representation and access.

4. Improvements in access to justice will require extensive legal reform and reform of judicial and legal institutions.

5. Improvements in access to justice are dependent on an allocation of adequate resources for this purposes. Methods of achieving this in the most cost-effective way will have to be investigated.

HOW SHOULD THE CONSTITUTION DEAL WITH ACCESS TO JUSTICE?

There is widespread consensus that extensive reforms will be required to our legal system to enhance levels of access to justice. It is accepted by all that these reforms cannot be spelt out in the Constitution in great detail and only broad principles should be included. In addition, the Constitution should be drafted in such a way that it enables and does not obstruct reforms of this nature.

THE "RECOGNITION" OF POPULAR JUSTICE

The "recognition" of popular justice as a mechanism for improving access to justice requires special discussion. The "recognition" of this development would represent a fundamental shift in our legal system that should be reflected in the Constitution. Representatives of organisations active in this area argued for the "recognition" of these systems by the official justice system. Recognition could include:

i) state funding of community-based justice and dispute

resolution systems;

ii) legislation to define the jurisdiction and functions of these systems;

iii) systems of referral and supervision of these institutions by Courts and judicial authorities.

However, these institutions would, in order to retain their effectiveness, have to remain rooted in the community and be based on genuine community participation through election of officials etc.

The process of recognition may take different forms in respect of different institutions and therefore cannot be regulated in any detail by the constitution. However, it must not be obstructed by provisions in the constitution. Further, the emergence of these forms of popular justice as a positive expression of the desire for access to justice should be recognised in the Constitution. In order for this to be achieved, the constitution must recognise that a wide range of institutions offering justice are required in society. These would range from the Supreme Court and Constitutional Court on the one hand, to the less formal popular justice institutions which offer "simple justice for ordinary people".

CONCLUSION

Improved access to justice will require extensive investigation and should be implemented through legislation. The constitution should support this process and we accept the validity of the criticism that the Interim Constitution does not adequately do so. Ideally, this shortcoming should be remedies in the final constitution. However, we do have difficulty in recommending precisely how the final constitution should do this. Our difficulties lie in the enormity of the problem and the fact that proposals for legal reform are not yet in an advanced or detailed form.

Paul Benjamin

Leah Gcabashe

Adv. J Gauntlett

Judge PJJ Olivier