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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

THE JUDICIARY AND LEGAL SYSTEMS

PUBLIC HEARING

15TH FEBRUARY 1995

PRESENTATION BY
GENERAL COUNCIL OF THE BAR: ADV WALLACE

CONSTITUTIONAL ASSEMBLY

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ADV WALLACE: ..... your principle concerns in talking about the structure and functioning of the courts, lie in the field of where in the constitution they should be dealt with and how they should be dealt with in the constitution. I make that remark because there are, obviously, very many areas of judicial administration, the structure of courts and so on where we have views that there are things that could and should be done, but if I don't canvass any that are relevant I would be very happy to deal with that later under questions.

In our view in looking at the constitutional role of courts and where they fit into a constitution, our starting point would be a very simple one of saying that the constitution should deal with the courts and the judicial system at the level of the broadest possible principle alone. Really what that means is that we should be looking at a broad concept of the judicial function of the State and of government, i.e. if you accept Montesque's (?) classic delimitation of the division of functions within the state, but beyond that the details of what courts, what judges, what authorities courts have, what jurisdiction, what powers are matters which we believe should broadly fall outside the constitutional realm. If we were to express a word of criticism about the interim constitution it would be that perhaps it has more detail than we would expect to see. It

is perhaps instructive to look back at the oldest constitution in the world and discover that it disposes of the judicial function in one sentence. That, "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", and that's it. A very simple one sentence.

The only other comment it makes is that the judges both of the Supreme and inferior courts shall hold their offices during good behaviour and happily shall be paid for it, which I think continues to be the attitude down to this day. We fortunately don't expect the litigants to pay them, although at least only 120 years ago in England in certain courts, the litigants did pay the judges.

So we would urge upon you simplicity in the approach, broad statements of principle leaving the detailed functions of courts, which courts, what their areas of jurisdiction should be to subsequent legislation viewed under the constitution. The particular danger we would highlight of a more detailed analysis is the complete lack of flexibility which it brings about.

Let me take an example. At present we have in South Africa, apart from the well known Constitutional Court, the Appellate Division, the Supreme Court, the Magistrate's Courts, we have a court in the labour field, the Industrial Court which is not a court at all but it is foreshadowed in the draft bill which has been announced by the Minister Mr Mboweni, that there are to be labour courts. There has been suggestions we should have Family Courts, we have Small Claims Courts, we have the Registrar of Patents, he is not just an official he is also a Court. Then we have odd

amalgams like the Water Court, the Income Tax Court. Now if you start trying to create your structure in your constitution, and you start defining it in too great detail, you end up with this problem that every time you decide hang on a moment it will be a good idea if we dealt with this matter not in the ordinary courts but in the labour courts, you have got to have a constitutional amendment. So it's really for those reasons we urge upon you a broad approach to the detail of courts, and not details right down to the lowest level.

In that regard in trying to identify the matters which you ought to be looking at, you obviously have to start at the top. In every country in the world in effect your court structures can most closely be described as a pyramid, broad at the bottom and working their way up to the top of the pyramid. In looking at a constitution however, one actually starts at the top. One identifies those uppermost structures and then you create the courts below those which are controlled by way of the process of appeal and review. That's the one side of it.

The other side of the matter is you have got to look at the judicial function. In a constitution which guarantees that the judicial power is important in a constitutional state. That you have the classic tripod of the executive of the Parliament and the legislative and the judicial function, the clear separation of those powers and as we have in the interim constitution and my council believes, I should just put this on record immediately, we should continue to have a power in the courts to test against a Bill of Rights or chapter of fundamental rights or whatever you want to call it. If you are going to have

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that power, then you need in your constitution to define the principles which enable the courts the fulfil that role, and then you are really talking about subjects which can perhaps broadly be put under the head of the Independence of the Judiciary, and how you secure that.

Can I then just try and deal with that in detail, being aware of time constraints. In looking at the upper level or upper reaches of the court system, what we have at present is a tree which sort of grows up and then goes off in different directions. You have the court structure with the Appellate Division as the final Court of Appeal on the one hand, dealing with the common law and broadly the criminal law and possibly depending upon how you interpret the chapter on constitutional of fundamental rights possibly administrative law, it's not clear to me that the present interim constitution didn't have the effect of moving all of our administrative law into the Constitutional Court, but I think Judge Chaskelson will be very wary of that result.

Then you have the Constitutional Court as your final court dealing with constitutional matters and the Appellate Division having no constitutional jurisdiction. The Supreme Court having some constitutional jurisdiction and the other courts having to sort of hop along and hope. We don't believe that's a particularly satisfactory structure.

What was said yesterday, I was privileged to be there, at the inauguration of the Constitutional Court, there was reference there to creating a climate of constitutionalism in this country. To creating a climate where there is respect for individual human rights and the human rights of the community at every level of government. Now at the end of the day with the best will in the world unless you have

a court system which can enforce those rights, which can create that climate it doesn't matter what kind of constitution you write.

I was reading in this topic a few days ago and the point was made that under a very generous constitutional regime entrenching human rights one managed to have the excesses of Stalin in the 30's and the murder of millions of people, all done in the name or under a constitution which protected human rights, and the reason for that was the inadequacy of the court structures and the ability of the society to enforce those rights.

One of the pleas which was made yesterday by the State President Mandela during his address at the inauguration was to the Appellate Division, to say to that court that we would like our criminal law and our common law to develop under the influence of the Bill of Rights and within the context of a culture of rights. It's very difficult as we see it for that to happen when the Appellate Division is told under the constitution that it has no jurisdiction in these matters, that they are not it's concern at all, and it must leave them alone. Indeed it's questionable again as to whether the Appellate Division has any entitlement to listen to the plea from the State President, because of that exclusion.

Now how does one deal with that? It would be our suggestion that the right way to deal with it is to look at what I called a pyramidical structure a moment ago and to bring the Appellate Division back into the main stream, so that one had in the ordinary courts, dealing with the ordinary civil and criminal law matters of the country, leaving aside the specialised courts, labour, matrimonial

and the like, that those courts one would have that natural progression from the magistrate's court to the Supreme Court, to the Appellate Division and then ultimately in a constitutional case to the Constitutional Court. Now to do that there have to be a number of changes from the present situation. The first is to limit the number of issues in respect of which the Constitutional Court has exclusive jurisdiction. We would suggest to you that there are in fact only two matters in respect of which it is necessary for the Constitutional Court to have exclusive jurisdiction.

The first is obviously a one off function in a sense, and that is its function under the interim constitution of determining whether the new constitution which you are in the process of drafting is in accordance with the, I think it's 34 constitutional principles which are in the schedule to the interim constitution. Clearly that is a function which can go nowhere else and should go nowhere else. But equally in the next constitution it will be a function which will have fallen away, so in a sense that is a short term problem.

The only other area we can see where there is a need to go directly we would think to the Constitutional Court is in the type of situation which sometimes arises in other countries, there was an example of it in Germany about a year, 18 months ago, where there was a debate in Parliament about the ability to send German troops to assist a United Nations peacekeeping mission, and the question was whether that was constitutional. While that issue was in Parliament, that is before any decision was taken, it was referred to the Constitutional Court. In other words for Parliament to be told, look you are wasting your time

debating this issue because even if you decide that it is not constitutional, or alternatively you are wasting your time arguing in Parliament that it's unconstitutional because it's permissible. We would see that there is scope for direct access to the Constitutional Court in respect of challenges from within Parliament whilst a matter is still in the process of discussion and debate, that is before decisions are taken, before legislation is passed, to be able to test the constitutionality of legislation. But those seem to us to be the only key issues.

If there has been no such debate in Parliament, or it has not generated sufficient warmth and fire to warrant somebody going off to the Constitutional Court, then it seems to us more appropriate to leave the question of the constitutionality of legislation to decision later when the issue properly arises in the community. We would therefore suggest that the present restriction on the Supreme Court having power to deal with all constitutional questions, including the validity of legislation is unnecessary.

If one looks at section 101(6) of the interim constitution it actually provides that parties who want to challenge the constitutionality of legislation can do so if they are agreeable, if both sides are agreeable to it. Now if A and B can agree that they are happy to test the constitutionality of the Copyright Act before a judge of the Supreme Court, it seems peculiar to say well if B doesn't agree it's got to go to the Constitutional Court, or to have this inherent problem. The judge is either capable of deciding the question or he isn't, he or she isn't. It seems inappropriate that the question of the court's power to deal with things should be dealt with by way of the

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consent of the litigants, and of course it is in general a principle of our law that consent of the litigants is not a ground for jurisdiction before the courts, it does not determine the court's jurisdiction.

So we would suggest the right approach to the matter is to say start at the Supreme Court level, let the Supreme Court test, save in the one instance I have mentioned, and let the matter then proceed through the process of appeal in the ordinary course. Now obviously a concern about that would be well, you have got a constitutional question, now you have got to drag your coat not only through the Supreme Court, but you have to do trail it to Braamfontein via Bloemfontein in order to get it decided finally.

Our suggestion as to the way to deal with that is this, where of course the case does not raise only a Constitutional Court issue or a constitutional issue, the rules which have been promulgated by the Constitutional Court are designed to stop it ever getting there, because they require all other issues to be decided first. So it seems appropriate if you have got, in any event, to decide a common law issue which has to go to the Appellate Division for final determination, to be able to go on the route.

The one case where it is a waste of time and money is where you only have a constitutional question, and in those circumstances we would suggest that it should be open, it should be provided that the Supreme Court once it has decided the case and made its ruling on both the constitutional and any common law issues can certify that the case raises only a constitutional question, that's the first point, and secondly that the constitutional question is one of general public importance. We draw this

distinction, it is of general public importance if for example it raises the whole question of legitimacy of, let's just take an example from the Canadian jurisprudence of their drunk driving legislation which seems to be the major source of litigation before the Canadian Constitutional Court, that might be a matter of general importance. If it's just a question of whether this type of warning or that type of warning needs to be given before you can give someone a breathalyser test then we would suggest that's not a question of general public importance and it should follow the ordinary route, it doesn't need to get to the Constitutional Court. If you don't have those kind of checks and balances then you are simply going to end up with a Constitutional Court which will itself decide that it's not going to decide cases. In effect, as you have in the United States of America where the Supreme Court sits in Washington, and at the beginning of the term decides which cases interest it for this year, and we don't regard that as a particularly satisfactory system, it's not widely regarded as satisfactory in the United States, but you have thousands of cases, I am not sure if the current number, the last figure I read was 8,000 cases a year, get sent up to the Supreme Court in order for them to pick 60 or 70 which they actually sit and hear, the rest get thrown out. The basis is that four of the judges decide that they think they would like to hear the case. Well at the end of the day hardly surprisingly that decision by and large gets taken by the judge's clerks rather than the judges who don't want to wade through 8,000 cases in order to decide which 70 or 80 they are going to hear every year. We don't believe that's a fair process. We don't believe it's fair to the litigants

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and we don't think it's a good way of setting about establishing a constitutional jurisprudence.

So we will prefer the mechanisms we have suggested to you, that you start at the bottom, you flow right through the ordinary system, in other words you bring the Appellate Division back from the limb to which it was consigned by the interim constitution, and let matters flow through to there, they stop there if they are not constitutional, they go on if they raise a constitutional issue and the litigants wish to pursue it further.

So broadly once you have established that function we would see that as the appropriate way of dealing with matters. I should perhaps say this, when this was initially raised we were inclined to the view that the Appellate Division should simply be the highest constitutional court. It seems to us that a different approach has been taken and it would seem to us also that at this formative stage of our constitutional jurisprudence, you can't reverse that process and just waive the Constitutional Court away. You inaugurated it yesterday. It's a court which I think with the people on it, is well regarded and it should be there at the moment. We would suggest that whilst in the long term it may be possible to merge the functions, the Constitutional Court and the Appellate Division, that is not something that can be achieved in the short term process which you are engaged in at the moment. So we would suggest that the pyramid going up to the Constitutional Court is a better one.

Then if I can turn, just at the end, to the question of the independence of the judiciary, that's very easy to state. In the interim constitution it's done quite simply

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in one way, but you have to ask these questions. First of all what are we defining as the judiciary? As we understand the interim constitution it is in effect defining the judiciary as being those who have hitherto borne the title of judge and obviously the title is neither here nor there, Shakespeare said a "Rose by any other name", etc. would I the smell as sweet or be as reprehensible I suppose in relation to judges. The question is how far down do you go, where do you go to? There is at present a world of difference between people who are appointed to judicial office after a relatively public process of interviews, by an independent body, containing a blend of politicians, lawyers and representatives of the public and who once they are appointed can only be removed on the grounds, and I quote here "misbehaviour, incapacity, or incompetence". I understand that "incompetence" is used in special sense, it's not merely the irritation of many lawyers and the abilities of the judges they have to appear before. There is a world of difference between that type of person and a person who applies for a post, the availability of which is determined by the Public Service Commission, who on getting the post provided the work is in accordance with the whims of the superiors for the time being they might go up the ladder of the civil service to higher posts, and higher echelons and all of that is subject to a disciplinary code to be dealt with under whatever statute governs the public service and even with the new Labour Relations Act, one assumes there will be some kind of disciplinary in at least the public service sector which is specially defined in the statute.

In general a system of promotion within the judiciary

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is undesirable. It is undesirable that you should have people who because I will get more money if I become an Appellate Division judge or if I move up the ladder, one. That seems to us to provide the wrong approach. The proper approach to court should be that all judges are judges, they are merely allocated to perform specific functions. The only reasons which might justify differentials in salary would be either a greater administrative burden as one has at the moment with Judges President, the Chief Justice, Deputy Judges President or perhaps a locational problem which tends to affect the Appellate Division. But otherwise there should not be that kind of incentive to judicial advancement in monetary terms nor should there be the means of procuring advancement in the judiciary by pleasing someone outside the judiciary, by pleasing head office in Pretoria, by pleasing the Minister. Let's just give a practical example. The Minister announces in Parliament that there is to be a clampdown on crime. The response in the civil service magistracy is well we will up the sentences. Or the Minister has expressed concern about bail and therefore that affects the next bail application that comes before the Bail Courts on Monday, that is in our view, utterly undesirable, but it is the consequence of a civil service judiciary, and in that regard I need only point, and this is the experience of my members to the unhappy past history of this country. It was apparent to all that advancement within the ranks of the magistracy to a very large measure at least dependent upon not upsetting the ruling party. I wouldn't like to go so far necessary as to say pleasing the ruling party. That might be said to be going too far, but it could well have been the case, but certainly anybody who upset the ruling

regime was not likely to progress terribly far in the ranks of the magistracy. So we have our own horrible examples in the past to bear in mind in the future. (Tape cuts out.....)

....system of appointment in principle the Judicial Service Commission is a good idea. It's in it's early days yet. It could no doubt be approved. We would see the area where there could be the most improvement in the need for greater research, the need for the more searching examination of candidates to assess that we are getting the right people on the Bench. By that I want to make very clear that the right people is a bench which is acceptable to the whole of South Africa which is reflective of its population in regard to race and gender and as well as that is composed of people who can administer justice fairly and have the requisite legal skills. It's very tough finding them, but that is the task the Commission has to make. Thank you.

CHAIRPERSON: Thank you very much Advocate Wallace. We are now open to questions if anybody wants to kick the ball. Mr Gibson.

MR GIBSON: Mr Wallace I listened with a great deal of interest to his suggestion that the constitution must deal with the courts in broad outline only and we must avoid going into detail. Could I ask him whether his first advice to us doesn't contradict his second advice where he tells us that one has to guard against the independence of the courts being undermined. Because some of us have had a lot of years in public life, experiencing parties with large minorities who assume a cloak of infallibility and the longer they rule the greater the corruption of power, and

some of us suspect that the same might happen to subsequent parties who are in power in South Africa. Isn't the way, where you have a constitutional state, isn't the way to go to spell out in the constitution in quite considerable detail measures which will enable you to protect the independence of the courts and guard the country against incursions into the powers by a government which might be there for a long time.

ADV WALLACE: I think there are two issues involved and I tried to identify them. Your issues in regard to guarding the independence of the judiciary have to be in your constitution and there's nothing inimical to that in my first comment. My first comment in regard to detail related particularly to the structure of courts. It is you should avoid defining in the constitution more than the uppermost portion of the court, a Supreme Court which will consist of the Constitutional Court, the Appellate Division and such other courts as are specified by law would be adequate, in that sense. Without the detailed going on, if you can have jurisdiction over that, you can have jurisdiction over that and certainly questions below that echelon, magistrate's court, labour court, matrimonial courts etc should have no part in the constitution, that's the one side.

In regard to your measures to protect independence, the constitution is the only place to do so because that in itself meshes in with the existence of the Constitutional Court as the ultimate protector of those rights.

CHAIRPERSON: Mr Schutte?

MR SCHUTTE: Thank you Mr Chairman. If I could just get some clarity on the jurisdiction aspect. You have argued in favour of only two exclusive jurisdictions for the

Constitutional Court, and then the way I interpret it, is to have an appeal on all other constitutional matters as of right, as long as you can show general applicability relevance, or am I wrong.

ADV WALLACE: General public importance was the expression I used, yes.

MR SCHUTTE: Ja right, fine. And is that only from the Appellate Division?

ADV WALLACE: No that would go, no. Perhaps I haven't made myself clear. In the ordinary course you would go to, let's say the case started in the Supreme Court. You would go to trial there, you would have a judgment in that court. Your ordinary rout of appeal is to the Appellate Division. We say that route should be there and should be there whether the point you want to raise is constitutional, common law or a mixture. We rather predict there will be a lot of mixtures. And then ultimately you can go from the Appellate Division to the Constitutional Court on a constitutional point alone. What we suggested to meet the problem that a litigant may only have a constitutional point, there is nothing else in the case, it is clear, one constitutional point. If that is appointed of general public importance then it ought to go to the Constitutional Court. The litigant wants to appeal, and of course the litigant doesn't want to appeal, there is nothing we can do to compel them to go there, if the litigant wants to appeal there should be a process of certification which would enable him to go directly to the Constitutional Court, in other words avoid the extra step of the Appellate Division. Taking it from an English example which the late A P Herbert wrote many years ago, one of his articles, Why is the Court of Appeal, he

said that you don't usually go to a doctor and get an opinion you should have your appendix out, then go to three doctors who say it should stay in, then go to five doctors, three of whom say it should come out and two of whom say it should go in, and therefore there is a need for the intermediate appeal. There is a need for the Appellate Division, otherwise you take the Appellate Division out and the Constitutional Court becomes the Appellate Division that's the merging function. But there may be certain cases of such importance, but there is no need to go through the interim stage, you can go round and that's what we are suggesting as far as that's concerned. It's to save the litigant costs and so on, I appreciate that people always look cynically at lawyers who say that they try to save costs, but we are not that bad.

MR SCHUTTE: There is a dispute as to the, whether it's of public, what is the word that you used, public...?

ADV WALLACE: General public importance.

MR SCHUTTE: General public importance, where would that be determined?

ADV WALLACE: Well there are two ways of doing it. You can either deal with it, get the certification from the judge, or three ways of doing it. You can either get the judge himself to satisfy in the first instance that it is, or you can ask the Constitutional Court to decide that it is, or you can have a blend of the two. Get the judge to certify in the first instance and the Constitutional Court to sanction it. There are always problems with that. One judge may be very sure of his or her talents and abilities and think everything is easy. Another may think everything is difficult, and you know, you get those sort of dilemmas,

but ultimately it's got to be one or other of those levels of courts or both of them. But if the judge has certified and it goes to the president of the Constitutional Court, two judges there look at it, or three judges there look at it and say this isn't of general public importance, the answer comes back no. Or they say yes it is and then it proceeds to the Constitutional Court.

CHAIRPERSON: Mr De Lange.

MR DE LANGE: I want to touch a few issues. The first one is for lack of sophistication on my behalf is what I call the privatisation of the courts, which is the last issue you touched upon that you somehow get a budget from Parliament and you give it to the courts to run in the way that they think fit, obviously within the parameters of the law. I mean surely that spells out enormous dangers? All the problems you have talked about of unaccountability of politicians and so on which very well may be so, the same thing can happen with judges. They are not infallible in any way and they then start making the rules and regulations of how people come to court, when they will come to court and start running the courts in the way they want to. So maybe I misread it, but if you could just tell us how one then creates some sort of accountability, not in the narrow sense of the word of you being accountable to a politician or to politics in general, but accountable to society more broadly seeing as there is the separation of powers. Then also if you can just give us some examples, where this has taken place, so that one can just read a bit further on this matter.

Then the issue of the exclusive jurisdiction. Let me say from the outset, I am very much in favour of, if one

wants to create a culture of human rights, a culture of democracy, then you do not do it selectively in parts of your society. If you want it to permeate every part of society then it needs to be dealt with all the levels of society it possibly can. Therefore all the courts must be ...(indistinct) with human rights issues etc, so that that becomes part of our everyday living, so I don't have a problem with that. What I do have a problem with though is that the way that you have dealt with the direct access to the Constitutional Court it seems to me to really be a very strong braking mechanism on real issues of importance, getting to the Constitutional Court in a speedy and decent possible way that one can do so. My problem is, for example, I mean we have lived under, we know 350 years of colonialism, apartheid, there are enormous problems in our society at every level, on top of that we have now put this whole Bill of Rights that has given people tremendous rights and so on, our whole legal system doesn't have that kind of culture, and therefore practically, legally, morally, all these issues are going to be thrown up. Now for to have a narrow bottleneck situation that trickles through to the Constitutional Court seems to me to not be what we want to happen, because what you are doing is, is that the judiciary that exists now, whether perceived or not perceived or real, has very serious legitimacy crisis and what you are doing in this model of yours, it seems to me, you are locking constitutional cases into that old court system and it will be very difficult to get matters much more quickly and in a way that will not start getting this public to start doubting the legal system and they are going to achieve what they want to achieve. By that I am of course not negating

the things you are saying. I have got big problems with the way the American system works, that it is basically clerks that decide what is important in society or not, I already know about those things and I don't have any of those problems. So clearly one needs to avoid that as well in the process. But it does seem to me that there must be more of what I call also again, because of a lack of sophistication a leap frogging provision that the Constitutional Court can call matters to it, not which are certified by any other court, but what it decides should get there more quickly.

The third point is I am a big proponent of trying to take away what I call these artificial barriers and very much a part of our old British heritage of a split Bar number one, but also a split judiciary/magistracy. Most of those divisions to me are artificial and do not serve a modern society. On the other hand of course, by that I am not trying to in any way say that our magistracy is not free of fault, I think all the things you have mentioned and three thousand others, can be added to the kind of problems one has, so I am also aware of that kind of thing. But what does worry me a bit is the way that you have explained what I will call the single judiciary. This type of judiciary is used in many parts of the world and some, Dr van Heerden there would know we were together in Germany for example, in those countries, Germany, Holland and so on, I have found that the judiciary in those countries have tremendous acceptance, higher than I found in America or in Britain in the populous and just generally the legal profession, and that's exactly what they work on, the basis of a single judiciary. They don't have the split judiciary/magistracies

as many of the Commonwealth countries have. So I am just interested to know what your experience and your comparison are of those situations because they seem to work so exceptionally well. There are other things but maybe other people I could raise them later, but those are some of the issues I would like to raise. Thank you Advocate Wallace.

ADV WALLACE: Well if I can respond in the order in which you raised the Mr de Lange. You got privatisation, that is a suggestion, I agree with you, there are problems, may I add another one to your fears about it, and that is my problem as to whether judges are necessarily good administrators. So I hear and understand your problems. It is a suggestion to explore. It is done in the United States of America to some degree as far as I am aware, certainly in regard to the Supreme Court's budget, that that is negotiated between the Supreme Court, between the Chief Justice and Congress and then is not in effect debated before Congress at all and then is entirely administered in the Supreme Court as I understand it and I stand open to correction. There have also been endeavours in Canada over some 15 years to raise this level of financial independence. I can't give you any exact idea of how far it has gone. It's a difficult situation. On the one hand you are trying to secure the independence of courts from the type of financial constraint and threat which one has and which they have in many many countries in the world. This whole business of cut off the budget. Just simply sit there and say judges' salaries never get put up, we won't provide you with resources. I mean I have dealt with countries to the north of us where very simply, I had a case out of Nigeria a couple of years ago, it was very easy they hadn't printed

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any law reports for 15 years. I mean you cannot function in a constitutional state in that situation I regret to say. So you know it's a balancing exercise. I am suggesting it as an option which should be explored, but I am grateful to you for using the word privatisation because it raises a fear which we have in talking about courts you have got to bear in mind who needs the courts. It is very easy to say the people need the courts. That's right, of course the people need the courts. Anybody may need the courts. All we are really looking at, we are looking at those who come before the courts in say today later in written form. Can we start in (Tape cuts out)

_____:(?) ....as the people we appoint as judges. now we have had suggestions made to us that it may be desirable in the constitution to set out slightly more comprehensive criteria than one has at the present in terms of a fit and proper person when it comes to the appointment of judges, and as has happened to some extent with the Constitutional Court judges already. So I would like your comment on that.

Secondly, I think you suggested that it's important that the constitution should guarantee in fairly concrete terms the independence of the judiciary. But I don't think that I really picked up more than one or two specific suggestions as to how one does that. What are the kind of provisions that one needs, that you would suggest we need in the constitution to achieve that aim?

The last, the third question that I wanted to raise was I think arising from what Mr De Lange had said, and I wasn't sure if I understood your answer correctly, but I thought it was not perhaps not answered completely, but I think that

there certainly is going to be a need if one retains the present distinction between the Constitutional Court and the Appeal Court. At least in the short term I think there is going to be a need for the Constitutional Court or for somebody, but I think the Constitutional Court would be most appropriate to make a decision about cases that are important and that in a sense should leapfrog the AD on the constitutional issue, even though it may involve factual issues as well. I share the concern that he raised that if you have a system as we have at present where essentially the lower courts just pass appeals upwards, that you may find the Constitutional Court get really bogged down in many less important cases, and not necessarily dealing with the more important ones.

ADV WALLACE: Again if I may if I can deal with those in the order in which you raised them. I think your difficulty in requiring what is required of a judge beyond the hallowed expression "fit and proper person" which goes back to the book of Exodus as far as I am aware, and the adjunctions to Moses to take fit and proper persons from the people to act as judges, the difficulty is to define what are the qualities you look for in a judge. You are looking for what is usually described as a judicial temperament. Now how do you define that in a statute. It involves a person with a balanced temperament. It involves a person who doesn't just give the appearance of being impartial, but us genuinely impartial. For me the criterion I would attach to it is, is that person capable of deciding a case contrary to their own viewpoint. For example, if one was looking at a Constitutional Court judge today, the Constitutional Court is hearing argument on the validity of

the death penalty, one of the questions I would be asking about judicial temperament is whether any person sitting there as a judge and faced with that issue who felt strongly in favour of abolition or against abolition, could come down the other way. It's just a good way of looking at the situation. Someone like myself who is, and has been for many years utterly opposed to the death penalty, could I sit there, weigh up arguments and then write a judgment which said constitutionally it was legitimate, because that ultimately is the test for impartiality, it's a very difficult test to satisfy. Not everybody can manage it. They also have to have personal qualities, the ability to sit and listen and there are far too many judges who don't have that ability at all. The ability to form a view, because any halfway decent lawyer will have a view of the case once they have read the papers, but the ability to change that view in the light of evidence and argument. You are looking for a person who has understanding of the human condition and let me be quite blunt, it's a concern we have. I think the Judicial Service Commission properly has, and the general concern about the historic composition of the Bench in South Africa. Can a Bench which is predominantly white and predominantly male overall have that understanding of the community needs. Now at the end of the day you are only going to get one judge there. You may just that day get a judge whose white and male and he has got to do the best he can to understand the community. Or you may get a judge who is black and female and you are sitting there saying I want you to understand my traditions and customs, so it's the ability of the person to do it is important.

It will be nice for judges all to be polite. I can't

say it's a universal quality. I don't think you can enforce it by statute. There is a minimum level of legal qualification and skill, an ability to work with legal materials. It's very difficult to define that level, and that's always been broadly the advantage of the historical approach in South Africa of saying well we take our judges from the ranks of those who have proved they have the legal skills. I immediately add that that was no true in the 50's or the 60's of many appointments, with all due respect to them. They were not chosen for that reason. We saw the unseemly business of silk today and judge tomorrow to fit political whims. But I don't know that you can actually define those, that's why I think the best way of dealing with it is an independent appointment body which has a balance of viewpoints within it and is able to assess those qualities, but that's why I talk about research. The Judicial Service Commission has virtually no research facility. It calls for nominations. It publishes a short list. I calls for comment on them. To the best of my knowledge the only bodies that actually provide comment are the general counsel of the Bar and the University of the Witwatersrand. I am not aware of any other body that makes a practice of actually assessing. When you compare that with say the American Bar Association, which has a standing committee which vets every single judge, they are told in advance they can conduct hundreds of interviews, they rate judges as either being, well qualified, very well qualified, qualified or unqualified. They make those ratings public and they are based on broad based interviews. Analyses of the background, looking at the writings of judges, looking at their records as practitioners. If you are going to have

a really, not only an effective system you have got to have that somewhere and maybe that's a question of resources rather than anything else. We try to do our best on it with the resources available, but we are in starting process as far as that is concerned. So I think my answer to your question is, I don't think you can arrive at a more detailed specification. You are looking for the judicial temperament combined with the legal qualities, and you are getting the best possible blend of those.

In regard to the independence of the judiciary can I perhaps highlight four points which you need to bear in mind. The first point in independence is appointment and that's where the Judicial Service Commission comes in. It's designed to lift the appointment process out of the purely political behind closed doors process. That probably means it's got to be as public as possible, it also has to have the facilities I have mentioned in the last few minutes.

The second protection for independence and the aim of the appointment process is to get independent minded people there. Secondly, is the protection against dismissal, financial detriment, intimidation and abuse. I am not saying criticism where appropriate is unacceptable. Obviously they should be subject to criticism, but the criticism must be at the level of the quality of their work as judges. Where you have a serious question as to whether a judge is crooked or incompetent or drunk or something of that sort that sort of serious question, you have either got to have enough evidence to say they are incompetent and impeach them or that's got to be left. I don't like and I don't think the GCB likes the idea of, or we can stand up and make these allegations in Parliament or the legislative

assembly/...

assembly and then just let it drop there, sort of stain the judges character and hope for the best.

The question of implementation of the court's orders is fundamental to their independence and we have seen in so many countries that if the court's orders are not carried out then it doesn't matter how independent or how good it is. Certainly there are historic examples, there are examples in America of Abraham Lincoln just disregarding the orders of the court and just telling people well you won't carry it out, so it doesn't get carried out. But you have got to look at implementation and independent control of implementation to some degree, that strengthens the independence of the judiciary.

That leads me to the fourth point I raised. I accept it's an undeveloped thought as will have appeared in the debate with Mr De Lange, the financial independence. So those seem to me the major elements in securing independence.

Then the Constitutional Court the AD, the leapfrog, our suggestion of course did involve a leapfrog. There may be other cases for it, I am perfectly happy to accept there may be other cases for it. I am concerned though about the ability of the Constitutional Court because a couple of judges have read in the newspaper that Lawyers for Human Rights have said they are going to launch a case and they think heck it would be a nice to do a free speech case this term that they can summon it out of the depths of the Sunday Times or Beeld or the Weekly Mail to the hallowed portals of the Constitutional Court, and I am worried about the evidential issue. The current rules say they will not hear evidence. If that's the case they can't decide a lot of

C. cases/...

cases.

In regard to the Constitutional Court, the AD their relationship, a matter I mentioned during the tea adjournment, perhaps I should put on record formally, another approach would be of course to make the Constitutional Court and the Appellate Division parallel chambers of the same Supreme Court. At the moment separate, but with the facility under ultimately one Chief Justice for that Chief Justice to have constitutional judges sit in the Appellate Division and vice versa where appropriate. I mean certainly going there and seeing judges like Judge Chaskelson, Judge Didcott, Judge Kriegler, Judge Goldstone, Judge Mahomed, any of them could equally sit in the Appellate Division and some of them have. Some of them excluded for reasons we know only too well.

CHAIRPERSON: Thank you. I see one of the further questions have left us, is there anybody else.

_____: Advocate Wallace from the general thrust of your presentation sir, it is very clear that you advocate a restricted area of operation or jurisdiction for the Constitutional Court, I think you mentioned just one or two areas that they should confine themselves to. Now it is common knowledge and you know and I think you have underlined this very adequately as well that the present Appellate Division is inundated to such an extent that they can barely cope with just a fraction of the cases that are referred to them. Inevitably now by virtue of the fact that the Constitutional Court is going to restrict its activities we will have an addition to the already burdensome load of the AD. Now I would like to know you know can you devise some mechanisms that we could use to

alleviate this situation sir?

ADV WALLACE: I would love to be able to, it's a constant concern and it's not confined to South Africa, it's an international concern that the workload on the courts is resulting in proceedings stretching, I gave the example, 1914 case from publication of the defamation to the Appellate Division hearing three months. I am in the Appellate Division in two cases next month, both of them the judgments were given at least 18 months ago. You know so they are going to take three to five years and cases can take five, seven years. We are nowhere near as bad as most European countries, England, the United States of America, Canada, so on and so forth, we are nowhere near as bad, yet, but it is a problem.

The usual answer is you need more resources. That's, I am afraid the principal way of dealing with the it. The Appellate Division sits most days during term. It has three courts and sometimes four sitting, two Benches of five and one of three and sometimes one of five and three of three or something of that sort. You know they sit every day during term. They take the one day where they have conferences about their judgments. They work over weekends. They actually work quite hard. The only way to get more work out of them is to have more judges there, that means more money I am afraid. It's a physical restraint.

_____: Advocate I just wonder you know instead of then restricting the activities of the Constitutional Court would it not be a proposition then to you know rather extend the jurisdiction and allow them to listen to every case that has some kind of constitutional content in it. After all you know you argued that the judges would be qualified to

sit in both the courts.

ADV WALLACE: I think your difficulty in doing that is we don't even have a grasp at the moment of the scope of constitutional litigation in this country. As I said to you one of the problems is under chapter three. It may be that the whole of our administrative law is now within the exclusive jurisdiction of the Constitutional Court. Everybody who says I wasn't given a fair hearing I mean you know that alone, I mean if we simply took our administrative law out of the Supreme Court, gave it to the Constitutional Court, we would never get another constitutional case decided. But again there is a limit to the resources. You have got to look at a more effective use of resources. I think this problem is actually not a constitutional problem to be quite frank. I think it's a question of resources on the one hand and it's a question of procedures on the other hand. It seems to be a pernicious influence that every endeavour to make proceedings simpler or procedure simpler, actually makes them longer, but this is true in other courts. In England they said well let's get rid of evidence-in-chief, just hand the witness's statements over. The end result they found that what happens is that everybody has to dot every "i" and cross every "t" in the witness statements. They take weeks to present. Instead of having had a witness give oral evidence for a morning and then be cross-examined you have now got a witness statement of 25,000 pages so you start at the beginning, the cross-examinations go on for ever. Now this was a genuine endeavour to simplify things. The end result is it's made things more expensive. But you have got to simplify procedures particularly in the easier cases, what I would

call the debt collecting cases, the monies lent in advance, goods sold and delivered cases, the running down cases. There are ways of simplifying those procedures and I don't think we have addressed those very well. Big complex cases will always take a long time. Regrettably your important constitutional cases are big complex cases I am afraid. So it's an overall, but I am not sure it's a constitutional problem at the end of the day.

CHAIRPERSON: Thank you very much. Are there any further questions? I don't see any. I think you have had a very easy ride here. I think we would like to thank our guests very much for having taken the time and trouble to travel to Cape Town and to address us on this issue. I think we are all on a learning curve at the moment and we have certainly learnt a lot from what you have had to say. I am not sure if we are going to agree with everything that you have had to say but that we will come to later. But allow me again to thank you on behalf of the whole committee.

ADV WALLACE: Thank you very much, and if we can be of further assistance we would be very happy to do so as your deliberations progress.

CHAIRPERSON: Can I just make one or two announcements on procedure.

Discussion continues with theme meeting.

OORSKRYFSTER SE SERTIFIKAAT

Ek, die ondergetekende, sertifiseer hiermee dat die vocrafgaande, tot die beste van my vermoë en sover dit hoorbaar is, 'n ware en juiste afskrif is van die oorspronklike getuienis wat deur middel van 'n meganiese opvangtoestel opgeneem is in die saak van:

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