

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

8 AUGUST 1995

DEBATE ON DRAFT TEXT:

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UNKNOWN: Well put the retirement age 80.

CHAIRPERSON: Again we shall adopt the same procedure, and change then the chief justice for JSC with the - we'll note then the ...

UNKNOWN: And you say in consultation with the JSC?

CHAIRPERSON: Ja ...

UNKNOWN: Where after.

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CHAIRPERSON: After.

UNKNOWN: I would suggest that we marry 3 and 4, I mean I think they both the chief justice and President should be the same proposal and then we note the - at a new point.

CHAIRPERSON: We note your - the descending voice of the, the low descending voice.

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UNKNOWN: No well I will, I will produce a document which I want to included for the National Parties point.

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CHAIRPERSON: As an annexure?

UNKNOWN: No-no as part of the - as an alternative.

UNKNOWN: I think what we ...

CHAIRPERSON: We'll will talk about that at a later stage. Can we proceed to 5?

UNKNOWN: So have we now joined 3 and 4?

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UNKNOWN: Ja.

CHAIRPERSON: We joining 3 and 4.

UNKNOWN: What about then the deputy chief justice and deputy President.

UNKNOWN: Well we getting to that.

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CHAIRPERSON: We getting to 5 now.

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UNKNOWN: Aren't you getting there - aren't you going to have that the same as 3 and 4?

UNKNOWN: Not it's not.

CHAIRPERSON: No it's different.

UNKNOWN: The first part?

UNKNOWN: Only the difference is on the advice of (inaudible) ...

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UNKNOWN: Well (inaudible) ...

UNKNOWN: Now you coming right.

UNKNOWN: This brings - ja now this brings me to the point here. At the moment on the Constitutional Court we've got a formula basis with certain appeal, certain covered judges who are on, are we - jettisoning that?

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UNKNOWN: No.

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UNKNOWN: Because the advice that ...

CHAIRPERSON: I would like that ...

UNKNOWN: Ja.

CHAIRPERSON: It's good, to take it for ...

UNKNOWN: To have them in, yes.

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CHAIRPERSON: Is good.

UNKNOWN: Yes.

UNKNOWN: So we must reformulate that present balance I - is it four judges plus others.

UNKNOWN: Yes.

CHAIRPERSON: Ja.

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UNKNOWN: So that must come in?

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UNKNOWN: But can I just say I think the sense that we did get in Johannesburg is that we should do away with a distinction of saying four get appointed in a certain way and the others get appointed in another way.

And I think our proposal would be rather that one says a certain minimum number like four must be serving judges, without having a differential appointment procedure.

UNKNOWN: Yes.

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UNKNOWN: Because I think that was the concern that was raised there.

UNKNOWN: Come again sorry?

UNKNOWN: At the moment the four judges from the Supreme Court are appointed in one way and I think without public hearings, and we either six judges are appointed through a public process.

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I think the - the input if I remember from both is CJ and the President of the Constitutional Court was, and I think

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even the JC supported that there, people felt that, that was an uncomfortable way to distinguish and that if there is a need that we should rather just say that a minimum number should come from the existing judiciary.

But that all of them should go through the same appointment process.

CHAIRPERSON: Appointment process.

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UNKNOWN: And at the moment the way the judges get on to the Constitutional Court is by nomination by the ...

UNKNOWN: President.

UNKNOWN: The President - is it just by the President? Isn't it by the chief justice?

UNKNOWN: By the Premier.

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CHAIRPERSON: It's by the President after consultation ...

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UNKNOWN: After consultation ...

CHAIRPERSON: With the (inaudible) ... of the Constitutional Court. In consultation with the cabinet after consultation.

UNKNOWN: (Inaudible) ...

UNKNOWN: Yes.

CHAIRPERSON: Now the - I think the proposal is that a certain number 10 should be serving judges.

UNKNOWN: Ja but you know ...

CHAIRPERSON: There are two positions in fact - can I just explain it.

UNKNOWN: Okay.

CHAIRPERSON: The first one is that a certain number of the judges of the Constitutional Court should be serving judges. 20

UNKNOWN: Minimum number.

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CHAIRPERSON: Ja there should be I'm saying a certain number. We can put whatever X we want to put there whether 2, 3 or 4. That's the first point.

The second point that has been made is that we must change the method of appointment of them. That they must go through the same process. In other words on the recommendation of the JSC, appointed by the President on the recommendation of the JSC.

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Those are the two positions which are being put forward now for consideration. What are the views?

UNKNOWN: I don't know, assuming a whole lot of rubbish judges that you appoint through the process and then you scuff them up into the Constitutional Court.

CHAIRPERSON: Which process?

UNKNOWN: Yes sure.

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CHAIRPERSON: The only thing ...

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UNKNOWN: I didn't quite get you. Just repeat that again.

CHAIRPERSON: Okay. You have eleven judges of the Constitutional Court. At the present moment four of those - four of those were appointed from the serving judges, appointed by the President from the serving judges.

UNKNOWN: From the serving judges?

CHAIRPERSON: Yes, yes. Now the idea is that this is a good thing to do, let us retain something like that. May be it need not be four judges, may be it need to have three judges or four or five, whatever the number may be. 10

UNKNOWN: Seven.

UNKNOWN: Seven ja that's a good number.

CHAIRPERSON: Whatever the number may be, but the people you are going to appoint to the Constitutional Court must at least have been judges, they must be those have been judges, who have got an experience of what being a judge is. Right now ... 20

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UNKNOWN: You will get our support for that.

CHAIRPERSON: That's the first point.

UNKNOWN: (inaudible) ...

CHAIRPERSON: The second point is that they must not be appointed in the way that they have been appointed now. That they must be appointed in the same way as any other judge ...

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UNKNOWN: Yes.

CHAIRPERSON: By the JSC, by the President on the recommendation of the JSC. That is the second point.

UNKNOWN: Well that is where we fight of course and there was agreement, we reached agreement here as to the procedure and that is that - that they will be appointed by the President after the advice by the JSC and in consultation with the leaders of all political parties representing ...

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UNKNOWN: That was the agreement reached here.

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CHAIRPERSON: I am flabbergasted.

UNKNOWN: Yes, absolutely - and in the event of no consensus having been reached 70% of the, 75% of the members.

UNKNOWN: That was in a moment of weakness, and so you are now moving away from your weaknesses.

CHAIRPERSON: That's your proposal. That's still your proposal?

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UNKNOWN: That is still the proposal.

CHAIRPERSON: It has not changed. Firstly can we agree on the number, can we fix a minimum number of those who should be judges? Can I just add this, of the present judges now four, two, six, out of eleven, six people were nominated from the seven judges.

UNKNOWN: All right.

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UNKNOWN: Shall we increase that to seven?

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CHAIRPERSON: No.

UNKNOWN: It's , you know it's ...

CHAIRPERSON: We are saying a minimum number that does not exclude the others also from being considered. We are saying at least not more than two.

UNKNOWN: (inaudible) ...

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CHAIRPERSON: At least not more than three. Willie says I must say 33.

UNKNOWN: Not less than four, not less than four.

UNKNOWN: Make it - make five ...

CHAIRPERSON: Let's take four, let's make four. It's four now. Let's accept that four. It does not mean that others would not be consider. But at least there is a minimum number, four is the minimum.

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UNKNOWN: Is it not six at the moment?

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UNKNOWN: No it's four.

UNKNOWN: Four.

CHAIRPERSON: I think let's remain, let's obtain that four, agreed? Thank you - thank you for consideration.

The second question is again we note that there is no agreement, for now the judges of the Constitutional Court should be appointed - are you happy with other judges being appointed on the advice of the JSC?

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UNKNOWN: Ja.

CHAIRPERSON: Good, there's progress there, consensus.

UNKNOWN: Op nommer 5.

CHAIRPERSON: On the judges of the Constitutional Court will you put the position of the NP down. And then the rest of us there is consensus (inaudible) ...

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UNKNOWN: Now can I just ask you the deputy President of the Constitutional Court ...

UNKNOWN: As far as I understood and I thought that was also Duggie's position frankly and had been endorsed by the ideas, I mean by the meeting in Johannesburg, was that we should stick with what the Constitution provides at the moment which I think is for the JSC in respect of the six to nominate a panel of ten from which the President then I think has to select six.

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If he doesn't select six I think the JSC can nominate up to another three of which he then he has to accept, I think that was the, that's what it says in the Constitution and I think that Judge Ackerman which I did read up afterwards because some people disagreed with me last time, but that Judge Ackerman had made I think a fairly impassioned plea for us to retain that system. And I think he did get some support from other people.

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UNKNOWN: I understood that he was talking about these four judges.

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UNKNOWN: (Inaudible) ...

UNKNOWN: No, I'll show you the quote ...

UNKNOWN: That (inaudible) ...

UNKNOWN: Ja, well he couldn't be all that impassioned, he didn't make any impression to me at all.

CHAIRPERSON: Duggie before you go (inaudible) ... I want you to take us, 10
you Duggie, to take us through this rest of the, of this
section.

UNKNOWN: Okay I'll tell you what I am nervous about.

CHAIRPERSON: Point us what you are not happy with?

UNKNOWN: Can I'll tell you what I'm very nervous about.

CHAIRPERSON: Yes - yes. 20

UNKNOWN: In Marks buildings everybody closes up, locks and pushes

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off. But I'm scared my office is going to be locked and my taxi comes there. I won't have my briefcase and other (inaudible) ... So unless I go and investigate my housekeeping I might be here for the weekend.

CHAIRPERSON: Oh! which is not a bad idea. But can you take us through what, after the - look we just left with three pages. I don't believe it. This is a real progress.

UNKNOWN:: Could we be sure that he'll come back here.

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UNKNOWN: (inaudible) ... I giving (inaudible) ... a bill of my power of attorney, he is the only one here that I trust.

CHAIRPERSON: Thank you. Otherwise you happy with the rest of the stuff? If it's not Timbaktou.

UNKNOWN: I have a - I have a vague trust for the judges.

CHAIRPERSON:: Thank you.

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UNKNOWN: Without prejudice.

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CHAIRPERSON: Thank you - thank you very much.

UNKNOWN: Thank you, I'm sorry I'm sort of running in and out as though I am ...

CHAIRPERSON: Okay.

UNKNOWN: Prima Donna ...

UNKNOWN: As far as 5 is concerned.

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CHAIRPERSON: Now - now Willie can you read us what the judge said.

UNKNOWN: Ackerman said I merely point that out - that out, but it seems to me that a great deal of thought and much constructive compromise was achieved in the appointing procedure in the Transitional Constitution, and taken in conjunction with seems to me the very in interpreted and creative way the functioning and structure of the JSC has been agreed upon that one should build on that.

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I agree with Willie that no distinction should be drawn

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between the other ten Constitutional judges. I don't understand the suggestion to be that one should do away with a proviso that four of the remaining ten should be judges of the Supreme Court of appeal or the intermediate court or of the high court. I think that is a sound principle.

CHAIRPERSON: I agree.

UNKNOWN: I think there is a very great merit and carefully worked out check and balance which has been achieved in section 99(4) and (5) of the Interim Constitution - and so on and so on.

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CHAIRPERSON: Having said that what are you saying Mr Hoffman in summary, just from a - from a ...

MR HOFMEYR: Well I - I think in summary our position is been all along that we should retain the provisions in the interim Constitution that deals with it. Obviously if one wants to bring the four other judges within the ambit as was suggested there, then one need to look at the relative numbers that are being, that is used in 99(4) and (5).

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CHAIRPERSON: Thank you, Advocate Danie.

MR SCHUTTE: The 5, in regarding the deputy chief justice and the deputy President of the Constitutional Court, one will have to in any case - well I would suggest that they should be selected from the serving judges. Otherwise you reducing the number of judges again.

CHAIRPERSON: Yes, yes. You know one would have thought that you are a judge the way you are defending the serving judges. 10

UNKNOWN: He's got aspiration.

CHAIRPERSON: You don't think about us who would be failed politicians after five years - (inaudible) ... want to be judges you know Danie, okay.

UNKNOWN: Okay Danie how do you want (inaudible) ...

CHAIRPERSON: The deputy chief justice and the deputy President he wants them to appointed from the serving judges. Let's not that ... 20

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UNKNOWN: If you don't do that ...

UNKNOWN: Shall be select from the judges serving in the Supreme Court of appeal or the Constitutional Court as the case may be?

UNKNOWN: Ja.

CHAIRPERSON: That is the National Party position. I think they should be just clear over that.

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UNKNOWN: What does the judge say about that, anything?

JUDGE OLIVIER: Well I think it's correct that the I think it is correct that the deputy CJ and the deputy President shall be elected from amongst the judges elected to that court or appointed to that court. He is just one of the judges there.

CHAIRPERSON: You see the other thing I mean it may still happen Judge that you want to groom a person. You know there's a good person at the TPD.

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JUDGE OLIVIER: Yes.

CHAIRPERSON: And you appoint your CJ from those who are serving the appellate division. Then you appoint somebody who is the judge President for example of the TPD. He's got wide experience - his got many judges, he's got all those things I mean it's one of the busiest courts is that.

So you bring him in as a deputy chief justice. The under status (inaudible) ... and you groom him up for the time being. Would there be any objections to that?

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UNKNOWN: No but why don't you appoint him as an ordinary judge of appeal and then make him the deputy chief justice?

UNKNOWN: The thing is if you look at the Constitutional Court there are eleven judges.

UNKNOWN: Ja.

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UNKNOWN: One is a part - one is the chief justice, the President of the court.

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UNKNOWN: President - it leaves ten.

UNKNOWN: So that leaves ten to be appointed in whatever way we decide. Now if you going to have another person appointed more or less on the same, in the same way that the President is appointed, then you only leave nine which could be appointed in the normal way, which I think is not ...

CHAIRPERSON: You see the difficulty again is going to be if we say the judges (inaudible) ... period. You see, and if for example when we start to say the present in the incompetence must all go at the end of seven years. You can't then effectively appoint a deputy President from the seven members, because there would be nobody whose serving at the time.

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UNKNOWN: Well the serving is perhaps not a good word, but from those appointed to the Constitutional Court.

CHAIRPERSON: Ja who (inaudible) ... that stands to reason with that Danie, that you can appoint somebody as a deputy ...

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UNKNOWN: No-no but the point is here that you shouldn't by appointing

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a deputy chief justice, a deputy President of the Constitutional Court make two appointments.

CHAIRPERSON: I see.

UNKNOWN: The one to the court and the one to the being the deputy President. That's the point. That's what it's about. I mean you can, if you want to appoint a guy as judge and then appoint him a deputy President, fine.

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CHAIRPERSON: Ja I think we can add that, I think that's normal. No sure I take the point.

UNKNOWN: Ja there's no ...

CHAIRPERSON: I take the point, no there's harm in it, sure. We can add it from the members, would be appointed from the members of the deputy chief justice and the deputy President.

UNKNOWN: Could I just remind you Mr Chairman of section 2(1) which says that court shall consist of a President, a deputy President and nine other judges.

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CHAIRPERSON: Oh!

UNKNOWN: Then I think it follows.

CHAIRPERSON: The point has been taken let's follows it then yes. Thank you judge, thank you judge. It's good to have you around.

Can we move to the next item no 6, no 6?

UNKNOWN: Right I think so.

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CHAIRPERSON: Agreed?

UNKNOWN: Well I'm, I'm slightly worried by the appointment of magistrates.

CHAIRPERSON: Yes.

UNKNOWN: We had very strong representations about that as well. If we leave at that what can be done with the appointment of magistrates?

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CHAIRPERSON: Why don't we meet Danie and look at the commission, the

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magistrates commission. We need to talk a little bit more about that, the magistrates commission.

UNKNOWN: Ja but I think it, I think there must be some, if we can, some reference to that, that magistrates must be appointed ...

CHAIRPERSON: I think there's quite a lot that needs to be said about that I'm sorry.

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UNKNOWN: There got ...

CHAIRPERSON: I am sorry to be - to be seemed to be involved in a dialogue. I think there is still quite a lot that will have to be debated about that.

UNKNOWN: All right.

CHAIRPERSON: About the composition of the magistrates commission, who must be in, who must be out. Shouldn't we just leave that to the act of Parliament and we will meet and talk about it as soon as possible?

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UNKNOWN: I, I would rather ...

CHAIRPERSON: We guarantee that we'll discuss it now whilst there's a Government of national unity.

UNKNOWN: Ja.

UNKNOWN: We - well, I would just like to ask the judge, I mean what does it mean if we got, I mean we've got one, two - it says that the court shall be independent and subject only to the Constitution of the law.

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But I don't know, I think we will have to attend to this again. There must be something further said about the appointments of magistrates.

CHAIRPERSON: Have we made any submissions in this regard?

UNKNOWN: There was a number of submissions yes.

CHAIRPERSON: No I'm saying from the you - political parties in terms of how the commission, the magistrates commission should be constituted.

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UNKNOWN: I'm not saying that there should be, we should say anything about the Magistrates courts commission. If we can just have a sentence to say that the magistrates shall be appointed by a body which shall be impartial or something or something like that. Which shall be constituted by an act of Parliament whatever, something like that.

CHAIRPERSON: Do you have any comments on that? Anybody any comment on that? Would you like to comment on that?

UNKNOWN: Think about it.

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CHAIRPERSON: Okay, do you want us to think about that?

UNKNOWN: Mr Chairman perhaps we can solve the problem now. Don't, why don't we think about something like this, the appointment of all other judicial officers shall be done in a representative manner and shall be regulated by an act of Parliament. Just to state the principle, if that is what - some word like that. I think Mr Schutte is looking just for a principle.

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CHAIRPERSON: Ja.

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UNKNOWN: And I think we can, we can think of that.

CHAIRPERSON: Let's think about it.

UNKNOWN: Yes okay.

CHAIRPERSON: Are you happy with that Danie?

UNKNOWN: Let's think about it.

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UNKNOWN: Think about it okay.

CHAIRPERSON: Think about it, all right - thinking about - think about.

UNKNOWN: You getting very tired.

CHAIRPERSON: Seven, no 7.

UNKNOWN: As it is at the moment.

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UNKNOWN: Our view is that - all right we must, we must look at this -
we must get a package as far as this is concerned. And we

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would like to consider stating or extend - well - at the end of the, of this, of the period of the present period of seven years, that half of the people then serving from the outset should retire.

CHAIRPERSON: At the end of this section?

UNKNOWN: No-no - ja at the end of this term.

CHAIRPERSON: Yes..

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UNKNOWN: Seven years.

UNKNOWN: Seven years, and half should then retire only after a further three years. And that - that - and that you don't refer to retirement age, that you only refer to a period which we would suggest is seven years, but that's not - that's not the greatest fight. We can talk about eight years or whatever. But that is just by way of a procedure.

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CHAIRPERSON: Danie I am tired now. We are ready to agree with you if you just, let's make it five instead of three.

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UNKNOWN: What do you mean five?

CHAIRPERSON: You said they must retire after three years. We he agree with you five must retire now, the rest must retire in five years time instead of three years. So just add two more years, what's two years then.

UNKNOWN: But if you do that, if you do that ...

CHAIRPERSON: What's three years between friends?

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UNKNOWN: No you can't do that. If you do that, if you do that you are then, there will be two lots appointed at the same time in the same sort of Parliament.

CHAIRPERSON: Sorry, sorry Danie ...

UNKNOWN: You are getting instructions from ...

UNKNOWN: If you go for five years you will then get two lots being appointed in the same life of one Parliament.

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CHAIRPERSON: No - no how do you - how do you get that?

UNKNOWN: If you go three years you will have that.

CHAIRPERSON: Yes, not five.

UNKNOWN: And this - this will go beyond two years.

CHAIRPERSON: Remember the first election now is going to be '99, they still
have two years to go.

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UNKNOWN: (inaudible) ... '99, all right?

CHAIRPERSON: Ja.

UNKNOWN: '99 okay.

CHAIRPERSON: There will be elections in '99.

UNKNOWN: But they will - they will go until when? They go until two
thousand and ...

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UNKNOWN: And one.

CHAIRPERSON: Into two thousand and something.

UNKNOWN: And one.

CHAIRPERSON: And then we just add three years there.

UNKNOWN: Whatever, I mean we, we're not ...

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CHAIRPERSON: It's not a bad idea ...

UNKNOWN: Flexible, we can be flexible about that, but I, we would like to suggest that retirement be by lot, not by age.

CHAIRPERSON: Oh!

UNKNOWN: And we then don't have a retirement age, we just have a period.

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CHAIRPERSON: Now if you have a period then is that how you start your panel system?

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UNKNOWN: Ja.

CHAIRPERSON: That's not bad, that's not a bad thing. I think let's just look at how it works in practice, because then it gives us the finer ...

UNKNOWN: And then you can have judges that's 79 years old, 78 years old if that's the position.

UNKNOWN: But we won't appoint them. 10

CHAIRPERSON: Yes that's the point. You don't appoint them in the fact ...

UNKNOWN: You don't think they going to do ten years, you not going to appoint ...

CHAIRPERSON: Did I tell you about the story I came across (inaudible) ... One body asked why is it that the Pope of Rome is not a revolutionary? 20

UNKNOWN: Why is the what?

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CHAIRPERSON: The Pope of the Roman Catholic Church is never a revolutionary.

UNKNOWN: Ja why?

CHAIRPERSON: And the answer is simple, that he never appoint a revolutionary to that position in the first place.

UNKNOWN: He may be - he may become one.

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UNKNOWN: And (inaudible) ...

CHAIRPERSON: And they die quickly if they do. No I think this gives us the panel that you talk about Danie. I mean Danie, this may just give us the (inaudible) ... and what are your views Judge?

JUDGE OLIVIER: Oh! I think it's ...

CHAIRPERSON: I think it's ...

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JUDGE OLIVIER: It's a good ...

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CHAIRPERSON: I think it's a good thing.

UNKNOWN: You will also remember in 7 we have written in not exceeding ten years or whatever. It means that the JSC can appoint Constitutional Court judge for three years of five years or whatever, shorter period. If you want to use him or her.

CHAIRPERSON: i think - I think judge let's be more specific, let's say five, from the present, the present once.

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UNKNOWN: Not exceeding five years?

UNKNOWN: No he's just saying that they can make a shorter appointment if they say which ...

UNKNOWN: Ja.

UNKNOWN: If a judge only wants to stay for six years they can appoint him for six ...

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UNKNOWN: Ja.

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UNKNOWN: So there is no need to appoint him for ten years?

UNKNOWN: No, you can appoint for less ...

UNKNOWN: You can appoint for seven years.

UNKNOWN: Yes seven years.

CHAIRPERSON: Oh! okay, ja.

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UNKNOWN: Now I think it's, we moving in the right ...

CHAIRPERSON: I think we've got the (inaudible) ... no it's good, it's good - good.

UNKNOWN: Ja.

CHAIRPERSON: Agreed, wonderful. So then go to 9.

UNKNOWN: And I would look we haven't, what have we now decided?

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UNKNOWN: On no 7 you'll have to ...

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CHAIRPERSON: What we have decided that we (inaudible) ... determine age.

UNKNOWN: Ja.

CHAIRPERSON: We decided that we will give the present, five of the present judges will retire after seven years ...

UNKNOWN: No-no what I'm saying is half ...

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CHAIRPERSON: Half?

UNKNOWN: Yes of those in - well - you see let's assume that one of them die now within the next year or so.

CHAIRPERSON: God forbid.

UNKNOWN: And or somebody goes overseas or whatever, whatever happens, and I don't think that, that the guy who is appointed in his place he should now stay for his whole term.

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UNKNOWN: What do you think?

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UNKNOWN: Just for the balance of ...

CHAIRPERSON: What do you think ...

UNKNOWN: I'm just saying that half of those people who in the year 2001 have served from 1994 will lay down their positions.

CHAIRPERSON: Sure, we agreed.

UNKNOWN: Not half period, he's saying that five should stay on, because 10
three may have gone and then you want another two to go.
I mean three may have died in the meantime.

UNKNOWN: No I'm not saying that, I'm not saying that. If two - if two of
them died in the meantime, it will only be four.

UNKNOWN: But that's very complicated, it's very complicated.

CHAIRPERSON: But I think the idea Danie - it is complicated, it's not easy,
but the idea is that at least half should retire at the end of 20
this term. And we prepared to extend by another five years.

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UNKNOWN: I think, I don't think five years. Five years is a long time. I think we should rather go for - you see if you, if you take the normal election time, the next election will be in 2004. So ...

UNKNOWN: It will be the same year.

CHAIRPERSON: What do you mean the same year.

UNKNOWN: Not a good idea. 10

UNKNOWN: How do you mean the same year?

UNKNOWN: The next election will also be in 2004.

UNKNOWN: I'm talking about the next election being in 2004.

UNKNOWN: And ten years will also be up in 2004.

UNKNOWN: Ja so I would ... 20

UNKNOWN: Ja, so I would then say you can't, you can't work with a five

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year period at all.

UNKNOWN: Well let's work with a four year period.

CHAIRPERSON: That's a good idea - but you see if the elections is beginning of the year, and this bloke (inaudible) ... it's not a bad idea.

UNKNOWN: But it may be vice versa.

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UNKNOWN: No-no ...

CHAIRPERSON: No but I mean ...

UNKNOWN: No I - I think it's a good idea if your Constitutional judges over span the change of Government if there is one, so ...

CHAIRPERSON: (inaudible) ...

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UNKNOWN: Ja.

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CHAIRPERSON: We change that.

UNKNOWN: Ja.

UNKNOWN: Do not ...

CHAIRPERSON: But the problem is, the problem Doc is this. If we increase the ten year for a five years, it's going to, and in fact by three years, you suggested that we stretch it by three years am I correct?

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UNKNOWN: Yes.

CHAIRPERSON: From seven to ten.

UNKNOWN: Then both the seven and the ten may fall in the next five year term of Parliament.

UNKNOWN: So then go for four.

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UNKNOWN: No we suggesting five, so it's nicely in the middle. And I think twelve years was suggested by a number of people as

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a term anyway from the judges. I don't think it's unreasonable to do it once off.

CHAIRPERSON: Ja once off, as a once off. As a transitional (inaudible) ... we can make it.

UNKNOWN: They want some of their judges there you see.

CHAIRPERSON: They'll still have them. There is no way we can do away with their judges.

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UNKNOWN: Ja for instance ...

CHAIRPERSON: We must have them - They're good judges.

UNKNOWN: That's Schutte.

CHAIRPERSON: Danie how about if we consider you for a position in Natal then.

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UNKNOWN: Hey Mr Chairman it's five past six come on let's get out.

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CHAIRPERSON: But what are your, what's your recommendation for this?

UNKNOWN: I think four is enough.

CHAIRPERSON: Four?

UNKNOWN: Four is already too much.

UNKNOWN: Ja let's go for four.

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CHAIRPERSON: Willie?

MR HOFMEYR: Four.

CHAIRPERSON: This is a negotiation by exhaustion. First pages four and a half. Going, going, gone four ...

UNKNOWN: Four years.

CHAIRPERSON: Four will give us eleven years. Okay we will agree subject
too ...

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UNKNOWN: Mr Chairman you have left me in a luge with a half retiring.
There are eleven So we must say five ...

CHAIRPERSON: Five falls.

UNKNOWN: Five goes and the other six stays.

CHAIRPERSON: Ja.

UNKNOWN: Five, now how are we going to ...

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CHAIRPERSON: That's the question.

UNKNOWN: Choose that five that must go?

UNKNOWN: By lot.

UNKNOWN: I mean is it really - to choose judges by lot? You know on
the other hand you can't say the JSC must decide.

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UNKNOWN: Ja.

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UNKNOWN: How will they decide? Mustn't we just go by seniority, by age? The eldest five members will retire, full stop.

UNKNOWN: (inaudible) ...

UNKNOWN: 'Dan kyk hulle nou eers wat die ou se geboortedatums is'.

UNKNOWN: I think the indication in Jo'burg was that three are likely to go in seven year time and two in ten years time. That give you five judges within - would have retired or would have reached seventy by the expiration of ten years. So (inaudible) ... 10

CHAIRPERSON: Let's, can we adopt a formulation that at least the eldest five shall retire and not work on ...

UNKNOWN: No I'm not happy with that.

CHAIRPERSON: Okay give us another formulation Danie, come on Danie.

UNKNOWN: You see I, the proposal that we've got is based on the basis that it will be by lot. 20

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CHAIRPERSON: Lot, no but if they refuse and say no ...

UNKNOWN: You see that is the reason why we said, and somebody said no let's stick the seventy years is it applicable.

CHAIRPERSON: That's why you are accepting that seventy years is not applicable but you can't then say by law Danie, can you imagine the guys coming around and say okay who's going ...

UNKNOWN: No-no we must - I mean we must look at - at what - who's the best, not work on ... 10

UNKNOWN: But if some of them want to retire after seven years?

UNKNOWN: Well if they want to retire they can retire.

CHAIRPERSON: No I mean if those who want to retire then of course to take those ...

UNKNOWN: It makes it easier.

UNKNOWN: Solves the problem.

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CHAIRPERSON: It makes it easier and solve the problem.

UNKNOWN: 'Jy kan nie lootjies trek met die man nie, as hy nou werklik nie (onduidelik) ...'

UNKNOWN: The alternative if that is not acceptable then we must go for another formula.

CHAIRPERSON: Give us the formula Danie.

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UNKNOWN: They all ...

CHAIRPERSON: To consideration.

UNKNOWN: They all okay.

CHAIRPERSON: Lots no good. Now we've moved away from that. Now the issue is determination or retired. You don't like seventy, whereas seventy was going to be nice. You don't like the eldest. Why don't we use the ...

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UNKNOWN: The youngest.

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CHAIRPERSON: No physically disability like health.

UNKNOWN: I mean the men who retire.

CHAIRPERSON: I know - I would say, let's use genial based there.

UNKNOWN: And all the woman must retire.

CHAIRPERSON: Provided that only the white men shall retire. We got to
make a move - I'm tired now. I want us to move, I want us 10
to finish this thing.

UNKNOWN: Ja finish the rest of it ...

CHAIRPERSON: We must finish this thing now. It's just thirty minutes to go
and finish.

UNKNOWN: Ja.

CHAIRPERSON: Agreed, let's use this formulation the eldest. If and we 20
prepared to say if you think of something else by the time
it gets to the Constitutional committee we can revisit this

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matter.

In the meantime let's just put in the eldest. And we can put in a footnote that the matter is subject to be revisited. Agreed, Jonathan (inaudible) ... let's go, good.

UNKNOWN:

But can I say in terms of the formulation I think what there is at the moment although it may have to be reformulate slightly will cover us. If we use that principle that they will serve eleven years and or that they will be extended by four years if you then say all those who will be extended by four years except for those who will have reached 70, I think that will get the numbers right. I mean we probably will just have to check that.

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UNKNOWN:

Now what about seven (inaudible) ... some for seven (inaudible) ...

UNKNOWN:

What is the ordinary term of office of CC judges?

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UNKNOWN:

Ten years.

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UNKNOWN: Ten?

CHAIRPERSON: Ja.

UNKNOWN: Should we agree on ten, no?

CHAIRPERSON: We'll remove and t determined age of 70.

UNKNOWN: Yes I understand.

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CHAIRPERSON: And then we say full stop after years, ten years.

UNKNOWN: No-no we say seven years.

UNKNOWN: Is it still seven.

CHAIRPERSON: Obviously.

UNKNOWN: The whole family is crying out for a longer term.

UNKNOWN: We say ...

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UNKNOWN: Bugger (inaudible) ...

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CHAIRPERSON: Do you want us to go ten years?

UNKNOWN: The whole country is definitely not just (inaudible) ...

CHAIRPERSON: No.

UNKNOWN: He's gone against the whole country.

CHAIRPERSON: Should we have a referendum?

10

UNKNOWN: You know - you know it's a - in the other countries there are, there are other examples, I mean you furnished us with the situation I think in Italy and Portugal where the term of offices I can't help page quickly page through it, but it's about six years in the one instance and I think eight years may be in the other one. I remember one six for instance ...

CHAIRPERSON: And it's a - you know South Africa has got a restriction.

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UNKNOWN: But in any ...

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CHAIRPERSON: A very frail democracy (inaudible) ... South Africa has got a frail democracy.

UNKNOWN: Exactly.

CHAIRPERSON: You can't go chopping and changing the situation, there must certainly allow people to gain confidence ...

UNKNOWN: No for sure. It's nine years in Italy and it's...

10

UNKNOWN: Thirty years in the US. Where do these people (inaudible) ... in the United States.

UNKNOWN: And it's six years - okay let's take the difference between Portugal and Italy, the difference between six and nine. That's what I have here. I don't seem to have the German one be scripted in this regard. I think they - Judge Olivier should know.

JUDGE OLIVIER: Twelve.

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CHAIRPERSON: It's twelve.

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UNKNOWN: Twelve yes - okay it's twelve okay ...

CHAIRPERSON: (inaudible) and in Spain it's fifteen.

UNKNOWN: Okay let's take the average of twelve, nine and six and how's that, I haven't got a calculator.

UNKNOWN: Let's make it eight then.

UNKNOWN: Let's make it ten, there was (inaudible) ... agreement on 10
ten.

CHAIRPERSON: It's really not fair, honestly.

UNKNOWN: But apart from that if you have less than ten and too many of these judges are going to be appointed during the same term of Parliament ...

CHAIRPERSON: How many years have you been in Parliament now ...

UNKNOWN: Now - but you are doing this people a (inaudible) ... service. I mean just imagine they could retire after seven

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years and start a new career. Now they must carry on for ten years and then they going to old.

UNKNOWN: They can retire if they want too.

UNKNOWN: No really man you ...

CHAIRPERSON: No they are free too retire.

UNKNOWN: You aren't fair to these judges.

10

CHAIRPERSON: By the way we have agreed that this people won't be allowed to go back and practice in the Constitutional Court.

UNKNOWN: We'll do something else then. Start a business.

UNKNOWN: Sell second hand law books.

CHAIRPERSON: (inaudible) ...

UNKNOWN: 'Agt jaar'.

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CHAIRPERSON: 'Nee man dis nie waar nie'.

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UNKNOWN: 'Te lank - is dit te kort'.

UNKNOWN: 'Nee man te kort man'.

CHAIRPERSON: 'Te kort, min dae'.

UNKNOWN: Let's hear what the judge says - he is a judge and
(inaudible) ...

CHAIRPERSON: You should know this Danie. But this judge is appointed 10
for life you see, that is the difficulty.

UNKNOWN: He may - he may help us.

UNKNOWN: Mr Chairman I'm in favour of the term longer than seven
years, because I don't think a judge really gets experience in
seven years time. I mean I speak for myself, we only grow
into the job you come mature and you get confidence. So I
think somewhat longer than seven. Ten may be too long
although I think there's general feeling in the profession 20
that ten is right.

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But I would say why don't you settle for nine, keeping in mind Mr Schutte that it is terms not exceeding XX years. Some of the appointees will be too old and the JSC will say we only appoint you for five years or six years. I think the thing will sort itself out. Your more senior judges will be appointed for a lesser term.

So I think in the end it's not really very important whether it's seven or eight or nine or ten. But I would - I would say why don't you reach a compromise here on nine years? I think many countries have nine years.

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UNKNOWN: If that's acceptable.

CHAIRPERSON: I am - urge you ...

UNKNOWN: I don't mind adding a year to my eight years, I'll stick to nine years.

CHAIRPERSON: Well I suppose if we can't reach agreement on this matter we might adding another year make it eleven. If we can get consensus, can we get consensus - nine.

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UNKNOWN: Let's rule - put down nine - put down nine and say the whole thing can be revisited.

CHAIRPERSON: Okay good, good, good.

UNKNOWN: I think we have to look at the whole ...

CHAIRPERSON: Thank you for coming (inaudible) ...

UNKNOWN: Have you just finish?

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CHAIRPERSON: We made a break through.

UNKNOWN: Oh! made a break through, oh! wonderful.

CHAIRPERSON: Nine.

UNKNOWN: Another major concession.

UNKNOWN: Another major concession? Well the Lord bless you ...

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UNKNOWN: The Chairman was our compromise position so (inaudible)

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... a major break through ...

CHAIRPERSON: There is no problem with six on the removal of judges, we happy with all that.

UNKNOWN: Yes.

CHAIRPERSON: I would like to move to seven ...

UNKNOWN: No but wait, wait. What about acting judges, sub section 9 10
...

CHAIRPERSON: Ja this one, this was one was agreed.

UNKNOWN: Nine.

CHAIRPERSON: This was agreed with everybody. Everybody agreed that.

UNKNOWN: No, no when did we decide on that?

CHAIRPERSON: Yes you know in Johannesburg.

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UNKNOWN: No I wasn't there.

CHAIRPERSON: We agreed on this thing, it was agreed, everybody said
(inaudible) ...

UNKNOWN: But there was no - Mr Chairman with all due respect there
was no agreement there. We didn't - I mean I didn't open
my mouth.

UNKNOWN: You weren't even there.

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UNKNOWN: No I was there for a period, but I didn't open my mouth,
because it was specifically agreed that we would not
negotiate there. Now as far as that is concerned our
proposal is that acting judges shall be appointed by the
Minister of Justice on the recommendation ...

CHAIRPERSON: (Inaudible) ...

UNKNOWN: On the recommendation of the President of the
Constitutional court, the chief justice of appeal, the judge or
the judge President of the appropriate division from a panel

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of acting judges compiled by the JSC.

CHAIRPERSON: Sorry - sorry I didn't hear you.

UNKNOWN: We don't have a problem with a panel of acting judges.

CHAIRPERSON: No man this thing it's here. No it can't be by the JSC the chief justice actually said so.

This matter was raised last time and the chief justice said
sometime we don't make, that you don't get the JSC to seek
for four or three months ...

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UNKNOWN: But we are saying that there should ...

CHAIRPERSON: And you need, you need then that is instance to appoint a judge - somebody dies there is a workload, judge Berman died here in the Cape Province on Monday. You going to need now to appoint a judge.

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Invariably the Minister appoints that after consultation the judge, the President (inaudible) ... gets recommendation

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from the judge President. Even judge - Judge President Eloff said the same thing.

UNKNOWN:

Well we are, you see we believe that the power can be appointed. But as far as the Constitutional court is concerned I mean we can talk about the other courts. But as far as the Constitutional Court is concerned this will have to be considered. That's the least that we go through.

CHAIRPERSON:

I know this thing was there - I know. But there is finality we did discuss this matter. Judge Eloff was very, very kind of dispute. You remember judge on the appointment of acting judges.

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UNKNOWN:

Yes Mr Chairman yes there is no doubt that the general feeling of the judges there in Johannesburg was that the appointment of acting judges should be a speedy and easy method. And it must be appointed by the president of the CC, the CJ of the judge President as the case may be.

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What Mr Schutte proposes is just to add a panel from which the appointments may be made if I understand him

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correctly.

Now the idea is attractive. But let us consider the ramifications. Let's take the Constitutional Court. If you want to have a panel of possible acting judges in the Constitutional Court, it means that you will have to get a number of candidates there for interviews, because there must be a panel.

You must now appoint five or six or seven, how many on the panel. You must go through the whole procedure of interviews.

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UNKNOWN: Why (inaudible) ...

UNKNOWN: They may never be used.

UNKNOWN: Why?

UNKNOWN: From a ...

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UNKNOWN: Ja where will to get the panel from when you need them.

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UNKNOWN: I mean it's a panel appointed by the JSC.
How will it appoint a panel if ...

UNKNOWN: The JSC can as far as the courts are concerned, the Supreme Courts are concerned, you just look we are prepared the judge President can decide that all the SC's for instance in the Transvaal.

We believe should be on the panel if they have at least got a year or two years experience or whatever.

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UNKNOWN: Mr Chairman but that is with respect, take a small problems Province like the Free State. One of the judges now had to go into hospital quite suddenly, on an emergency. Not one SC in the Free State was available to take an appointment. They had to bring in someone from outside. And to say all SC's, I mean judges are appointed from the SC's. So if you panel is just senior counsel it doesn't mean ...

UNKNOWN: I will give you an example there can be senior attorneys as well. But ...

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CHAIRPERSON: What is the danger that Danie you are running away from?
Maybe I can understand you.

UNKNOWN: Well let's talk about the Constitutional Court first. I'm not
so very concerned about this, but I think on the
Constitutional Court there is no limitation here.

CHAIRPERSON: There's a limitation in the ...

UNKNOWN: I mean a guy can go on acting for ever. That's another 10
thing that we must address.

UNKNOWN: But let us address that then.

UNKNOWN: Now our proposal would be that acting judges shall not act
for a longer period than six months at a time - you can
make it four months I don't know. And may not act for
more than a total period of one year in a period of two
years - instead of a period of two years whatever.

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CHAIRPERSON: That's the position in the Constitutional Court (inaudible)
... being right now, isn't it. That amendment cannot be

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longer than six months.

UNKNOWN: Ja something like that.

UNKNOWN: So that's fine and that's not a problem.

CHAIRPERSON: Then can we obtain this?

UNKNOWN: Well I would like to - us to consider the question of
Constitution Court.

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CHAIRPERSON: No I'm saying Constitutional Court is six, then the JSC must
appoint somebody. Don't want to have a acting appointment
for longer than six months. They must find somebody for
six months.

UNKNOWN: So you would suggest that as far as the Constitutional Court
is concerned we should say a person can't act for longer
than six months?

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CHAIRPERSON: That's correct.

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UNKNOWN: Okay.

UNKNOWN: Ja sure.

CHAIRPERSON: Then we'll leave it as it is. Thank you Duggie. Can we then talk about no seven, and jumped no six.

UNKNOWN: Yes.

UNKNOWN: Why jump no six?

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CHAIRPERSON: There's no problem with it.

UNKNOWN: Why, why in 6.1 - gross must - misconduct and gross incompetence why not just misconduct or incompetence?

UNKNOWN: No Mr Chairman if I may say that, that was a request of Judge Ackerman and supported by others in Johannesburg. That this deals with the independence of the judiciary.

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In other countries you have the formulation that judges can be impeached only on the basis of serious crimes or

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misdemeanours.

Otherwise if you just have misconduct or incompetence you will be able to hound the judges. What is - what is - incompetence and what is misconduct? You will subvert the impence of the judiciary if the level is too low. And that is why we would rather put the level very high.

Otherwise you will be able to launch impeachment because the judge has misconduct him. Drunken driving coming Saturday night from a party, one 'dop te veel'. Is that misconduct? May well be, but it's not gross misconduct. Things like that.

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UNKNOWN: Okay I will, I hear what (inaudible) ... say and ...

UNKNOWN: But we would - we would also delete I think the words or gross incompetence. Delete that totally.

CHAIRPERSON: You must point out (inaudible) ...

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UNKNOWN: Incompetence.

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UNKNOWN: Just incompetence?

UNKNOWN: No delete the words or gross incompetence.

UNKNOWN: Leave gross misconduct.

UNKNOWN: Just gross misconduct.

UNKNOWN: And incapacity?

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UNKNOWN: Yes on the grounds of incapacity or gross misconduct.

UNKNOWN: So you keep incapacity and gross misconduct?

UNKNOWN: Yes.

UNKNOWN: And we leave gross incompetence?

UNKNOWN: Yes.

UNKNOWN: Why - why (inaudible) ... Mr Chairman through you - why
- why take out gross incompetence because do you think
that if you've got incapacity there that it will catch - catch

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up with gross incompetence?

UNKNOWN: Yes I think the gross incompetence is just a symptom of either incapacity or misconduct. If you retain it as a separate category once again you can persecute judges.

If he gives a judgment that the government does agree with, is that gross incompetence? May well be in the eyes of some.

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UNKNOWN: That's gross competence.

CHAIRPERSON: Yes Mr Hofmeyr.

MR HOFMEYR: Chair I agree with Judge Olivier that the careful balance has to be struck here. But I'm just more worried from the other side, that in the public mind that there should be able to be a perception that a judge is there who is grossly incompetent and he or she is there for life and cannot be removed.

So I don't think anybody would like you know this to be used that the test should be so low that one has a kind of continual stream of complaints or if attempt to be

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impeachment.

But I would, I mean I would hesitate about taking out a gross incompetence, because I think it goes further than gross misconduct. I think most gross misconduct has a sort of element of wilfulness about it. But I mean you could just be grossly incompetent because you are grossly incompetent.

And that would not mean that you are necessarily incapacitated or I think in the sense that one would normally use the word that you've become (inaudible) ... unable to fulfil your duties.

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So I must say I'm - I'm quite happy to add the words gross there, but I'm not persuaded that we should remove the gross incompetence.

CHAIRPERSON:

I think let's agree, I think just list it as incompetence (inaudible) ...

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UNKNOWN:

All right.

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CHAIRPERSON: Good, that's a good compromise, can we go to no 7.

UNKNOWN: Shall we amend just so it's misconduct ...

UNKNOWN: No ...

CHAIRPERSON: Gross - gross misconduct.

UNKNOWN: Gross misconduct?

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CHAIRPERSON: It's not just one problem, must be ...

UNKNOWN: Okay and/or incompetence.

UNKNOWN: Gross, incompetence.

UNKNOWN: Gross incompetence.

CHAIRPERSON: Gross incompetence.

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UNKNOWN: But if you incompetent you know I can't see that you can be gross incompetent. I mean hell if you incompetent you're

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incompetent.

UNKNOWN: No that's not true with respect.

UNKNOWN: I'll argue about this.

UNKNOWN: I consider many of my colleagues to be incompetent - only two or three to be grossly incompetent.

UNKNOWN: Okay.

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UNKNOWN: 'Frik het baie meegevoel gehad met die een dop te veel argument'.

UNKNOWN: 'Ja ek kan jou verseker dit was hoor, ek was tot dusver gelukkig'.

CHAIRPERSON: Number 7, 'nommer 7'.

UNKNOWN: I must say that gross incompetence still strucks me. You know a guy can be incompetent as long as he is not grossly incompetent.

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CHAIRPERSON: No I think this comes from the grounds of judicial review.

UNKNOWN: Review ja.

CHAIRPERSON: What are the grounds, you don't just want to review everything. I mean you don't want somebody because he is, he is incompetent and you rush to come to Parliament and say you know this judge he's sentence six people to death and six sentences of death have been ...

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UNKNOWN: Overturned.

CHAIRPERSON: Overturned by the AG and therefore we find him to be incompetent, he's not a good trial of facts and so forth. You know those things, you don't want to do that. You must give some protection to the judges.

UNKNOWN: I think we'd agree with that.

UNKNOWN: It doesn't, it doesn't look good.

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UNKNOWN: Okay.

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CHAIRPERSON: Okay, now can we go to seven. This is the compromise which came out of Johannesburg. And this is the current Section 105.

UNKNOWN: So this, no this is the current Section 105 full stop, isn't it?

CHAIRPERSON: Yes, except it has been made possible that the Minister can be represented by his or her nominee. That the Professor of law also can send somebody. Am I correct?

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UNKNOWN: No.

CHAIRPERSON: Only the Minister can have a nominee.

UNKNOWN: Yes.

UNKNOWN: Well is that new?

CHAIRPERSON: Ja the nominee is new.

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UNKNOWN: Ja I think there was an argument in general for some sort of system of a alternate to be allowed in Jo'burg if I am not

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being mistaken.

CHAIRPERSON: Ja it was.

UNKNOWN: In that beyond just the Ministers and the Premiers were ...

CHAIRPERSON: We need to alternate.

UNKNOWN: That was - that was proposed for sub sections (a) CJ, (b) the President and the Minister ...

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CHAIRPERSON: No - no judge we can't agree the CJ is the chairperson of the JSC.

UNKNOWN: Oh yes, ja he is the senior. But what happens if he is incapacitated?

CHAIRPERSON: The President of the Constitutional Court is the deputy ...

UNKNOWN: Deputy, all right so they can't be nominees, representatives?

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[END OF VOLUME IV]

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CHAIRPERSON: I don't think you should say nominees.

UNKNOWN: And if they are both.

UNKNOWN: Alternates.

CHAIRPERSON: The CJ and the President of the Constitutional Court they are both chair and deputy chair of the JSC.

UNKNOWN: (inaudible) ... but if both of them are not able to attend 10
such a meeting which they have been invited to ...

CHAIRPERSON: Then we postpone the meeting.

UNKNOWN: Or the meeting will choose it's own chairperson ...

CHAIRPERSON: The meeting is postponed.

UNKNOWN: Okay, thank you.

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UNKNOWN: Yes I have nothing more to add Mr Chairman.

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CHAIRPERSON: All right ...

UNKNOWN: I just think that, ja the general I think the advocates and the attorneys they also raised the issue. I think there it turns on what the Constitution exactly means whether the designated means if it's always the same people even if they are overseas or not. I think that's the current thing - it tends to be the current interpretation.

But you know I think there is a, I mean I don't think we're
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against the idea of allowing sound system there of them being able to designate others. But I also don't think one wants a whole string of different people coming to these things the whole time.

So if we are to consider alternates I think that they need to be a designated alternate in a sense, you know so that they not, you don't have a range of new people coming.

UNKNOWN: Mr Chairman isn't the question of designates and alternates
20
rather left to legislation?

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CHAIRPERSON: Yes ...

UNKNOWN: Like at the moment in the complimentary CC act

CHAIRPERSON: I think so, I think we should do that. Let's not - let's not complicate matters with the balance. We found a balance now - and after very, very (inaudible) ... circumstances let's please not temper with it ...

UNKNOWN: Yes we just want to replace the Senators with the National Assembly. 10

CHAIRPERSON: Unfortunately we can't - it's - that's impossible.

UNKNOWN: You know we change the Constitution, it's easier to do it.

UNKNOWN: Although we've got a two-thirds majority in the Senate, so ...

CHAIRPERSON: All right, functions of the JSC are we going to do that? Seats of the courts, we'll come back to that. Can we talk about the Attorney's General. We don't have to talk 20

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(inaudible) ...

UNKNOWN: What about the attorney-general in the JSC?

UNKNOWN: That's what I just want to ask, what about the AG's?

CHAIRPERSON: No - this - the problem is we have not agreed on the Attorney General. If you have no problem with the national AG's sure.

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UNKNOWN: But it doesn't matter sir Mr Chairman whether we agree or whether we don't agree, at least then put in a senior AG or whatever.

CHAIRPERSON: No.

UNKNOWN: In the JSC.

CHAIRPERSON: No, if we say that one we say the Attorney-General put in that the Attorney-General, then it implies that is a national AG. If we say one of the senior AG's, it implies that there will be no national AG. So until such time that you have

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resolved the matter.

So far let's leave this balance as it is. We can review this when we do that. And in any event we won't have to report about ...

UNKNOWN: No but we can just put in one Attorney-General designated by the other Attorney-Generals.

CHAIRPERSON: Again it implies that we are not agreed about the national AG. 10

UNKNOWN: Well we won't agree.

UNKNOWN: We'll put in the national AG, put it that way.

UNKNOWN: A national?

UNKNOWN: No the.

CHAIRPERSON: The national ...

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UNKNOWN: A national ...

CHAIRPERSON: The national Attorney-General.

UNKNOWN: And they (inaudible) ...

CHAIRPERSON: Or we can - we can we don't have to say national I think we just say the Attorney-General.

UNKNOWN: Ja.

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CHAIRPERSON: Are happy with that?

UNKNOWN: Well I go along with the Attorney-General, but just delete the with a. This is just a slightly you know it's just, it's so easy to reach a compromise here.

UNKNOWN: But they may - they may accuse us of ungrammatical language if we say a ...

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UNKNOWN: (inaudible) ...

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CHAIRPERSON: Can we go back to chapter paragraph one, 1.7. 1.7 reflect ...

UNKNOWN: Is there a new formulation?

CHAIRPERSON: There was a formulation ...

UNKNOWN: A new one?

CHAIRPERSON: Yes there was a new one, it's just that we wanted to think
it over.

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UNKNOWN: The latest one?

CHAIRPERSON: Willie circulate it please.

UNKNOWN: No is not (inaudible) ...

CHAIRPERSON: Was is this, it is here?

UNKNOWN: (Inaudible) ...

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CHAIRPERSON: Didn't you have it typed?

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UNKNOWN: 'Ja'.

CHAIRPERSON: 'Meneer waar is dit'?

UNKNOWN: 'Dis waar jy rondloop'.

CHAIRPERSON: (inaudible) ... circulate it, give it to the people.

UNKNOWN: I am going to make copies.

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CHAIRPERSON: It read as follows.

UNKNOWN: You must be transparent, and give it out to all the parties.

CHAIRPERSON: The Constitutional jurisdiction ...

UNKNOWN: Ek kan (onduidelik) maak.

CHAIRPERSON: The Constitutional jurisdiction of all courts and the jurisdiction of the Supreme Court of appeal shall only be determined by this Constitution; the ordinary jurisdiction of all other courts shall be determined by an act of Parliament.

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UNKNOWN: That's right that's what we have discussed.

CHAIRPERSON: Was not (inaudible) ... discussed ...

UNKNOWN: 'Dis korrek ja'.

UNKNOWN: 'Ja dis die een wat ons oor besluit het ja'.

CHAIRPERSON: No, yes Advocate.

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UNKNOWN: No but that's not in line with the other decision.

CHAIRPERSON: Which decision?

UNKNOWN: The Magistrates court.

UNKNOWN: On the Magistrates court.

CHAIRPERSON: Yes that's what I'm saying now let's look at this in the light
of what we have said in the Magistrates court. What do we
then say? The Constitutional jurisdiction of all courts except

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...

UNKNOWN: Mr Chairman let's break up 7 into an (a) and a (b).

CHAIRPERSON: Yes.

UNKNOWN: Let's say (a) the Constitutional jurisdiction of all courts shall only be determined by this Constitution say that the Constitutional jurisdiction of the Magistrates court shall be determined by an act of Parliament. Something like that. 10

UNKNOWN: Chair can I just, I'm not actually sure if we, now that we've moved away from the principle, I'm not sure if the principle is still worth stating. Because we do specify the Constitutional jurisdiction of the other courts comprehensively.

CHAIRPERSON: That's right.

UNKNOWN: So it cannot be amended by, added or subtracted to by 20
normal legislation I don't think.

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UNKNOWN: It can.

UNKNOWN: What could you add?

UNKNOWN: You could amend it by, oh! yes, by Constitutional amendment you can ...

UNKNOWN: Ja no that's what I mean, but that - you see I'm not sure that now that we have moved away from that idea whether we still can need to state the principle which I think worth the principle when went a bit of vagueness around the Magistrates courts jurisdiction.

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But for the higher courts we actually had, we specify what we have and we specify what they do not have.

CHAIRPERSON: Yes.

UNKNOWN: So nobody can amend that except by changing the Constitution in any way.

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UNKNOWN: He is quite right. So we can just as well delete ...

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UNKNOWN: That first part of 7, I think this, the ordinary jurisdiction.

CHAIRPERSON: Then it means we go back to the original 7 with the exception of the Constitutional jurisdiction.

But let us hear what my Learned Friend and colleague has to say in this matter.

UNKNOWN: Now I got great sympathy for what Willie has said all along.

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UNKNOWN: I am getting nervous here.

UNKNOWN: Perhaps we should bite the bullet. Perhaps we should bite the bullet and decide what Constitutional jurisdiction we want to afford the Magistrates court.

UNKNOWN: No in the Constitution, I'm tired.

CHAIRPERSON: We heard Danie, we spent the whole afternoon trying to do that and we a break and we came back with the compromise. We've bitten the bullet and we're have told that no ways. We don't know want that question of

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jurisdiction for you guys, but we will consider it.

UNKNOWN: Well if we decided (inaudible) ... with jurisdiction fine, then we say that.

CHAIRPERSON: Sorry?

UNKNOWN: Then we say that they've got no Constitutional jurisdiction, but I'm worried ...

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CHAIRPERSON: But we saying no-no ...

UNKNOWN: I'm worried about the fact that the argument of Frik here - and that is you've got a courtly case in the Magistrates court, there's bound to be a Constitutional point for decision and then you say no I am fired I would now first of all take that point to the Supreme Court.

UNKNOWN: The argument Danie is that we can deal with those difficulties in legislation rather than in the Constitution.

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UNKNOWN: Right, but it's not an elegant way of doing things because

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then in actual fact then it's possible that you can in actually in fact give the Magistrates court more Constitutional jurisdiction than for the in, for the other courts. I mean that's (inaudible)

CHAIRPERSON:

You know, you know Danie what the difficulty is all of us are sympathetic to your argument and you know that.

All of us who want the Magistrates to have some, some sort of say in Constitutional matters.

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The difficulty that we have had for the last four months is actually to define what say we ask - we talking about. We have never been able to actually in concrete terms say we want the Magistrates to be able to pronounce upon the validity of administrative acts or this or that or that. We have not been able to do that. Now, now wait a minute I know you are going to say it's all right.

Now you want us having spent the whole day when we are tired to come back and say look at this difficult subject, and say look let's now try and define it. We can't Danie, we have

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not been able to do that.

The formulation that we have agreed to which I thought was eminently reasonable was this is an evolving matter. And therefore because it's an evolving matter let's give the jurisdiction to Parliament to consider the matter and as time goes on as we begin to interpret the Constitution.

As we ourselves are gaining experience of this issue, we can then grant that jurisdiction to the Magistrates court as time goes on. That is the formulation that we have come up with.

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I don't know if that formulation is not in fact eminently reasonable.

UNKNOWN:

Frik.

UNKNOWN:

Mr Chairman you know I agree with you that -we are in a difficult situation. The point is that we all agreed on the necessity of getting of disposing of with our report. We all agree on that.

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We also all agreed on the necessity of looking very cautiously at the situation concerning the Magistrates courts.

But now what I am asking myself is whether we should really, shouldn't we then at least not indicate that we would like to revisit this issue? We understand - there is no difference between us, we are agreed on many things, oh! well on most things, on all things in that, in this regard.

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But we should at a later stage revisit the whole issue.

CHAIRPERSON: I think ...

UNKNOWN: But we don't revisit 7, 1.7. I would, I am very happy with 1.7. I think we were all happy with 1.7. We should rather say let 1.7 stand and let's say we revisit the jurisdiction of the Magistrates court.

CHAIRPERSON: Okay, all right. I think - I think that will give us sufficient time to think this matter. So let's not rush into it.

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UNKNOWN: Ja.

CHAIRPERSON: I think I agree with you let's not rush into it now. You are not going to persuade me otherwise.

UNKNOWN: Yes.

UNKNOWN: Is it 1.7 as amended, the Constitutional jurisdiction of all courts and the jurisdiction of the Supreme Court of appeal shall only be determined by this Constitution. The ordinary jurisdiction of all courts shall be determined by an act of Parliament. Is that the one that you (inaudible) ... ? 10

UNKNOWN: No-no but what, we have something else. We had ...

UNKNOWN: I thought that we reached agreement ...

UNKNOWN: But that was ...

UNKNOWN: '(onduidelik) ... daai ene Danie'. 20

CHAIRPERSON: That's the one, that's the one.

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UNKNOWN: Just read that again.

UNKNOWN: The Constitutional jurisdiction of all courts and the jurisdiction of the Supreme Court of appeal shall only be determined by this Constitution. The ordinary jurisdiction of all other courts shall be determined by an act of Parliament.

UNKNOWN: Ja.

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CHAIRPERSON: We're putting in a footnote because this is an inconsistency when it comes to 3.2 somewhere there, when you come to the Magistrates court.

UNKNOWN: Okay.

CHAIRPERSON: That is a inconsistency we recognised hence we will reconsider that once we have cleared our minds in this matter.

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UNKNOWN: That concludes the business of the day.

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UNKNOWN: No.

CHAIRPERSON: We have dealt with ...

UNKNOWN: Just agree on the AG's quickly then we can go.

UNKNOWN: (Inaudible) ...

CHAIRPERSON: Yes Danie what is it?

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UNKNOWN: Know I, what - I want certainty about my position on the appointment of judges.

CHAIRPERSON: Your position on appointment of judges has been noted. I will be noted, and will be submitted as a minority report ...

UNKNOWN: No well but I want it (inaudible) ...

CHAIRPERSON: You are a minority ...

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UNKNOWN: I want it as an alternate.

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CHAIRPERSON: That it comes from a minority ja sure.

UNKNOWN: Whatever the situation is I want it there.

CHAIRPERSON: Sure - we'll put it in.

UNKNOWN: But where do I, I mean where do I get the opportunity to see whether it reflects my position?

CHAIRPERSON: What we would - so when are we getting the report. I think 10
let's put the minority view, this is the sufficient consensus.

UNKNOWN: No there's no sufficient consensus here, you are joking.

CHAIRPERSON: Firstly ...

UNKNOWN: Well let's vote on that.

UNKNOWN: Who not?

UNKNOWN: To (inaudible) ... the sufficiency.

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CHAIRPERSON: We'll get in (inaudible) ... all right.

UNKNOWN: Will Mr Schutte please give me a ...

UNKNOWN: No I'm quite prepared to put my point of view in writing.

UNKNOWN: And I'll add that (inaudible)

CHAIRPERSON: As long as you are going to put it in brackets, in brackets
and say this is the point of you of the National Party. 10

UNKNOWN: As a footnote.

UNKNOWN: Not a footnote, not a footnote.

CHAIRPERSON: Which has not been ...

UNKNOWN: Not a footnote, it's an alternative (inaudible) ...

UNKNOWN: The National Party is just a footnote and just ... 20

UNKNOWN: All right that's the one thing, on what - we had another

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aspect on which there wasn't agreement. What is there?

CHAIRPERSON: I think the notes are there they'll reflect that Danie. The minutes are there, now I don't want to go through those minutes point by point, to the extend that we have registered your ...

UNKNOWN: Well yes and what is your point on 3(b) now?

UNKNOWN: 3(b) of what?

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CHAIRPERSON: Of what?

UNKNOWN: 3(b).

CHAIRPERSON: What (inaudible) ...

UNKNOWN: 3.2(b), or 3 ...

UNKNOWN: Page 3.

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UNKNOWN: 3, ja page 3 the bottom there.

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UNKNOWN: If your position is, the position as put forward by Judge Olivier and our position is the same except that we say that Parliament should pass this.

CHAIRPERSON: Ja.

UNKNOWN: If your position is that you are reverting your previous position then our position is that we are reverting to our previous.

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UNKNOWN: No-no, no that can't be acceptable. I mean we either make a compromise or we don't make a compromise.

CHAIRPERSON: That's what we are saying.

UNKNOWN: We've made a compromise ...

UNKNOWN: A compromise, we only make the compromise if it's a compromise. And that's it, and I say we can't make a compromise and you then say no that's not acceptable to us.

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CHAIRPERSON: But - but Danie ...

UNKNOWN: But we still hold our - that one point.

CHAIRPERSON: That applies to all of us.

UNKNOWN: Ja.

CHAIRPERSON: We are saying to the extend that Judge Olivier has tried to bring the parties together, we appreciate that here. The only difference now between us and the other parties is whether the bill should be passed or not passed before it's referred. And we are saying we want it to be passed before it's referred. That is the difference between us and the rest of the other parties. And we prepared to go along with that. But if you are saying ...

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UNKNOWN: You prepared to go along with what?

UNKNOWN: With that statement.

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CHAIRPERSON: With that statement. With that statement ...

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UNKNOWN: With (inaudible) ... proposal?

CHAIRPERSON: No.

UNKNOWN: With that problem statement there.

CHAIRPERSON: With the statement that the disagreement between us is whether the bill should be passed before it's referred ...

UNKNOWN: Ja - no-no that's not good enough, sorry but ...

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CHAIRPERSON: Well it's not good enough I agree it's not good enough because we want it passed.

UNKNOWN: Ja.

UNKNOWN: Okay can't we Mr Chairman then have the proposal by Judge Olivier as well as our position and then your position? I think - why not?

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CHAIRPERSON: No you can't have your cake and eat it. If you want to say it's the ANC that is ...

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UNKNOWN: Well that's what you want to do.

CHAIRPERSON: Let me finish, no - no. If you are saying it's the ANC that is being in transit here but at the same time you are not happy with the proposal by the judge.

I mean you can't, you can't do that. You should either say you rejecting, you should say upfront that you reject the proposal by the judge, that is this compromise position which seems to becoming out. You reject it completely. In this case we revert to the positions as they were.

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UNKNOWN: No-no.

CHAIRPERSON: All of us.

UNKNOWN: No I think, I think I just want to ...

CHAIRPERSON: You want to tie us now to the concessions that you have made without you making any concessions?

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UNKNOWN: No-no listen, listen no we said ...

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UNKNOWN: That is actually what ...

UNKNOWN: Okay, okay.

UNKNOWN: I am still prepared to make concessions. I'm prepared to accept Judge Olivier's situation, but I am not prepared to make concessions in the air which are not accepted.

CHAIRPERSON: Like ...

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UNKNOWN: Listen Mr Chairman we are prepared to accept Judge Olivier's suggestion.

CHAIRPERSON: Yes.

UNKNOWN: But then you must also accept it.

CHAIRPERSON: No, that as far as we are concerned ...

UNKNOWN: Well no sorry then it's ...

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CHAIRPERSON: Our position is (inaudible) ...

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UNKNOWN: Then I (inaudible) ... Then I think I will also put our position as (inaudible) ...

CHAIRPERSON: You put your position?

UNKNOWN: Ja.

CHAIRPERSON: Then we'll put our original position.

UNKNOWN: Okay.

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CHAIRPERSON: You don't want that thing in the Constitution at all?

UNKNOWN: No it's as simple as that.

CHAIRPERSON: You don't think that belongs to the Constitution and it must be out. That is ...

UNKNOWN: That whole (inaudible) ...

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CHAIRPERSON: The whole section?

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UNKNOWN: The whole section yes.

CHAIRPERSON: The whole section. Thank you sir.

UNKNOWN: Sir can I just ask you - as far as the judicial service commission is concerned and as far as ...

CHAIRPERSON: Just a minute.

UNKNOWN: As far as the judicial service commission is concerned, can I just have a footnote that I would like to have the Attorney-General mentioned there as a member of the judicial service commission. 10

CHAIRPERSON: No, no let's not do that. We getting to the Attorney-General. We are still ...

UNKNOWN: But I want it - just don't forget it.

CHAIRPERSON: We are still discussing the question of the attorney general and you may well reach agreement on that question. 20

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UNKNOWN: All right, just not forget it.

CHAIRPERSON: When we deal with the Attorney-General let's resolve the Attorney-General position first. And then once we do that - okay.

UNKNOWN: When do we meet again?

CHAIRPERSON: Thursday afternoon.

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UNKNOWN: (Inaudible) ...

CHAIRPERSON: Can we meet Thursday afternoon?

UNKNOWN: I can't be here.

UNKNOWN: No you can (inaudible) ...

UNKNOWN: No we don't need that.

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CHAIRPERSON: No you don't need to come.

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UNKNOWN: You don't need me, thank you very much.

CHAIRPERSON: You don't need to come judge. We appreciate your contribution very much thanks. Thanks and for the sacrifice that you have made, Danie.

UNKNOWN: Yes.

CHAIRPERSON: Can we meet on Thursday on two o'clock - three o'clock?

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UNKNOWN: We've got a thing on Thursday. So it won't be possible, if we meet Thursday earlier.

CHAIRPERSON: You've got something? We need to go to our caucus. We have a caucus meeting on Thursday. We need to go and report what - how much we (inaudible) ...

UNKNOWN: We can meet between eight and ten.

UNKNOWN: On Thursday.

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CHAIRPERSON: We can't make it, can't make it. Can only make it in the

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afternoon. We need to look at the document. The document will only be typed on Thursday.

UNKNOWN: All right I am very happy that we do that.

CHAIRPERSON: No I'm saying the document will also not be available by Thursday morning.

UNKNOWN: Oh!.

CHAIRPERSON: Because it's going to be working time.

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UNKNOWN: Thursday afternoon is impossible.

CHAIRPERSON: It's going to be typed only in the morning, so ...

UNKNOWN: Is that good enough ...

UNKNOWN: Otherwise ...

UNKNOWN: (inaudible) ... the CC on Friday?

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CHAIRPERSON: Ja.

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UNKNOWN: We have to, we don't have a ...

UNKNOWN: They distributing the documentation on Thursday morning.

UNKNOWN: Friday morning?

UNKNOWN: Thursday morning.

CHAIRPERSON: The CC is on Friday.

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UNKNOWN: Ja well it's not going to (inaudible) ... if it's not possible, it's not possible.

UNKNOWN: I am sure Eunice is looking forward to typing tomorrow.

UNKNOWN: Would you agree if it's distributed ...

UNKNOWN: Well we can - we can - I don't know when - when can the judge ...

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UNKNOWN: Ja.

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UNKNOWN: I'll tell you what I can do. If I write it tomorrow, all the faxes are closed tomorrow.

UNKNOWN: You can fax my home now.

UNKNOWN: I beg your pardon?

UNKNOWN: You can fax my home if you want to.

UNKNOWN: Ja but Bloemfontein.

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UNKNOWN: Bloemfontein. oh! dear.

UNKNOWN: So perhaps what I can do, is to write it tonight, if - if one of you will take me to the airport at six o'clock, I can hand the document to you their.

UNKNOWN: No you can leave it at the hotel, I'll pick it up.

UNKNOWN: At the hotel.

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UNKNOWN: Leave it there.

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UNKNOWN: I'll leave it at the hotel.

CHAIRPERSON: You mean you are not going out tonight.

UNKNOWN: I haven't got a son here and a daughter in law and a grand child, I haven't got them here. No I want to visit my children of course, I'll just go and say hello but I'll do it.

UNKNOWN: Well the alternative then is Thursday - is Thursday evening.

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UNKNOWN: Evening ja.

UNKNOWN: Don't say ja.

CHAIRPERSON: What time - what time on Thursday.

UNKNOWN: Five o'clock.

CHAIRPERSON: What time?

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UNKNOWN: 4:30.

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UNKNOWN: 4.

UNKNOWN: Thursday evening - you know Mr Chairman he wasn't aware
we are tied up ...

UNKNOWN: Are you having your anti (inaudible) ... on Thursday.

UNKNOWN: Is it on Thursday or is it the next day?

UNKNOWN: No I must first consult with the other gentleman to make 10
sure we there so.

CHAIRPERSON: (inaudible) ... give us the time.

UNKNOWN: Thursday afternoon two o'clock, thank you very much.

CHAIRPERSON: We can do it without the National Party, if the Freedom
Front is there.

UNKNOWN: What about lunch hour on Thursday is that ... 20

UNKNOWN: From twelve o'clock - twelve - between twelve and two.

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CHAIRPERSON: No - no.

UNKNOWN: Half past twelve.

CHAIRPERSON: No w have the other issue (inaudible) ...

UNKNOWN: Have you got a clean copy for me then I can just work on it?

UNKNOWN: Between one and two, I actually just (inaudible) ... 10

CHAIRPERSON: Ja we've got our caucus, the ANC caucus.

UNKNOWN: Well they are in serious trouble they need to caucus.

UNKNOWN: Surely nobody else ...

UNKNOWN: If it's from ten to one, we can talk from eight to ten, or from - or from 12:30 to 2:00.

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CHAIRPERSON: No we need to talk, we need to get mandates.

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UNKNOWN: We can't talk now, we must talk with the mandates. Then I know when we go to the CC, the results of this won't be kicked out.

UNKNOWN: Now - now listen, if you are going to get a mandate please don't leave out the whole question of the appointment of judges, because we know that we've got the support of the ANC caucus in this regard.

CHAIRPERSON: Super.

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CHAIRPERSON: You just don't mention it as - don't keep it under the table, but please mention it there.

CHAIRPERSON: Okay, I'll do that, I certainly do that. Okay thanks, thanks very much. We meeting Thursday lunch time.

UNKNOWN: What time?

UNKNOWN: What time is it 12:30?

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CHAIRPERSON: Ja okay let's try that.

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UNKNOWN: 'Kan ons nie so 4:30 of vyfuur maak nie'.

UNKNOWN: 'Ek kan nie, ek moet 'n toespraak hou by 'n ander plek net voor agt'.

UNKNOWN: 'En ek moet gaan hande klap so' ...

CHAIRPERSON: We are not agreed on this time.

UNKNOWN: 'Wat van sesuur in die oggend'?

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CHAIRPERSON: No it's all right ...

UNKNOWN: The alternative is we just tell the CC we haven't got it ready.

UNKNOWN: Ja.

UNKNOWN: Why all these ...

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UNKNOWN: 'Dis heeltemal reg, ons het (onduidelik)' ...

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UNKNOWN: Tell the CC it's not really.

UNKNOWN: The draft.

UNKNOWN: Ja.

CHAIRPERSON: No the draft is ready, no it must go to the CC.

UNKNOWN: 'Julle is bang nè'.

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CHAIRPERSON: No man, it must go to the CC.

UNKNOWN: The Chairperson will stop Parliament there then.

UNKNOWN: Can I not sit with Danie (inaudible) ...

[END]