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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEMS

7 FEBRUARY 1995

PRESENTATIONS

BY JUDGES FARLAM & SELIKOWITZ

SUBMISSIONS BY SELIKOWITZ AND FARLAM JJ

CAPE TOWN - 1 FEBRUARY 1995

CHAIRMAN: Ladies and Gentlemen, it is my privilege and pleasure to welcome our two guests here this afternoon, Judges Farlam and Selikowitz, and I would like to thank you very much for taking the time and trouble to give us the benefit of your submissions in writing, but also on very, very short notice of being here with us. We are very grateful for that. I believe that you are not only formally opening our activities in this Theme Committee, but you are in actual fact making history, because you are the first witnesses to be heard on any of the Theme Committees. I hope that the other Theme Committees will in quality also try and keep up to the standard that we are setting. Thank you very much for being here.

As far as the way that we will deal with the submission, and I would like to suggest to you - and I believe it is acceptable to you - that we will allow you perhaps 15 to 20 minutes to elaborate on your submissions and we will then allow questions and discussion following that. Thank you very much. Over to you.

SELIKOWITZ J: Mr Chairman, members of the committee, my name is Selikowitz, with me is Judge Farlam. It is quite foreign being witnesses, and knowing what we know about them, I feel somewhat apprehensive about a witness. I am not used to being on this side of the microphone.

We are going to split up the presentation, but before we start might I just - in order to clarify the position -

tell you that we are here in our personal capacities. I note in the documentation which we found in front of us that we are listed under "Organisations' submissions", described as "Judges Chambers, Supreme Court, Cape Town", which is the address on our letterhead, but we really belong in Group C under "Individuals' submissions", and please, we do not want to be regarded as speaking on behalf of the judiciary generally or, in fact, on behalf of anybody else other than ourselves. Judge Farlam will, in fact, begin our presentation.

FARLAM J: Mr Chairman, and members of the committee, we propose addressing you, as you will see from our memorandum, essentially two issues. The first issue, which we deal with second in the memorandum, but logically it comes first, is whether there should be a separate Constitutional Court. In other words, whether the present structure we have under the temporary interim Constitution, of a separate Constitutional Court, should be retained in the permanent Constitution. That is the first question we want to deal with.

We believe that it would be a mistake if there were to be a separate Constitutional Court in the permanent Constitution and we will try to explain why we think that.

The second issue we deal with is what we suggest should be the shape or structure of the Supreme Court in the new Constitution which the Constitute Assembly is busy drafting. I will deal with the first issue, with assistance I hope from time to time from Judge Selikowitz. He will deal with the second question, and I may feel called upon from time to time to try and help him. Then we will be happy to take questions and discussion as far as we can.

As far as the question of whether there should be a

separate Constitutional Court, which we say logically is the first question to be considered, we, as you will see, do not believe there should be. We want to point out that although the interim Constitution provides for a separate Constitutional Court in the structure which I will remind the members of in a moment, it is not necessary that that should be so in the new Constitution because the constitutional principles which have to be embodied in the permanent Constitution as set out in Schedule 4 of the present Constitution, provide in Principle No 7 that -

> "The judiciary shall be appropriately qualified independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights".

One way of doing that, of course, is to have a separate Constitutional Court structure, as we have in the interim Constitution. The other way to do it is the way we propose, and that is to have a unified system.

I would like to say at the beginning that we are the only country in the Commonwealth that I am aware of with a separate Constitutional Court. Though most countries in the Commonwealth have justiciable Bills of Right, and have the Constitution as the supreme law of the land, I am not aware of anyone - certainly I cannot think of any major Commonwealth country - with a separate Constitutional Court. The top court in those countries functions both as a Constitutional Court and as an ordinary court.

The idea of a separate Constitutional Court is something which is found mainly on the Continent of Europe. As far as I am aware, the first one was Austria after the First World War, and thereafter there was a separate

Constitutional Court, as you know, in Germany, there is one in Italy and Spain and Portugal as well - and Hungary, Poland and some of the other East European countries. But it is certainly not part of our tradition and it is not part of the Commonwealth tradition. The United States, the place from which we have derived many of our ideas in regard to the structure of the court which we suggest should be adopted in the new Constitution, also does not have a separate Constitutional Court. Its top court, the Supreme Court, functions both as a Constitutional Court and as an ordinary court.

There can be no doubt about it that a separate Constitutional Court is more expensive and it is more time consuming. That must be so. Because most cases which come before the courts which involve constitutional points, normally involve other points as well. There are ordinary law points, there are ordinary factual points. And if the case goes on appeal to the top court, it is unsatisfactory - I would not say it is unsatisfactory, I will deal with that in a moment - it certainly costs more money to have the case heard before two courts, argue twice, the advocate goes up to one court and argues the facts on the ordinary law and then, if necessary, goes to the Constitutional Court to argue the constitutional points or vice versa. So you have two hearings and obviously you have more time spent in doing it. So it is undoubtedly more expensive, it is undoubtedly more time-consuming.

I think, however, I would be naive if I were to pretend that there were not good reasons why the negotiators at Kempton Park regarded it as necessary at this time in the life of our country to have a separate Constitutional Court.

To some extent there must be speculation as to the reasons for a separate Constitutional Court, but we also know there were statements made in the reports of the Technical Committee, there were other statements made in other quarters from time to time. The major issue, as I understand it, was there was a perception - whether it is right or wrong I am not here to discuss - but there was a perception that the existing courts lacked legitimacy.

There was also a perception, which obviously had substance, that the existing judges did not know anything about Bills of Rights - and certainly not justiciable Bills of Rights - because it was not part of the law that they practised, it was not part of the law that they had applied on the Bench. And what envisaged was a whole new form of juridical thinking involving a rights discourse, involving new concepts which came from elsewhere in the world which our judges - and indeed our profession at that time - did not have much experience of.

Some of us had appeared in cases in Namibia and in Lesotho and some of the surrounding territories, so some of us had some experience of it. But certainly the vast majority of people did not. And so it was believed for various reasons - but particularly because of the belief that the existing courts lacked legitimacy and because it was believed that the existing judges lacked the expertise, certainly from the very beginning, to apply a Bill of Rights properly - it was considered necessary to have a separate court which would deal with constitutional matters separately. The German procedure was followed and the Spanish procedure was followed. Particularly the German one I think was the major source of inspiration.

The Germans of course had a problem when they introduced their basic constitution in 1950, that most of the judges had been appointed under the Nazi regime and while they could not replace them wholesale, they certainly did not want to entrust them with the application of their basic Constitution and what amounted to their Bill of Rights.

They had a similar problem in Spain. When there was a proper Constitution introduced in Spain the judges had been appointed by the Falangists, the party of which General Franco was the leader for many years, they did not want to entrust the Falangist judges with enforcing their Bill of Rights, so they had a separate Tribunál Constitusionál. They have a similar dichotomy there to the one we have in our system.

So we are not here to argue that there should not be a separate Constitutional Court in the interim arrangements. We understand why there is one, we understand why, certainly from the point of view of certain people, there had to be one. In this regard I can mention there was very powerful criticism of the performance of certain members of the Appellate Division during the period of the state of emergency which is dealt with by Prof Elmond in his book on the subject. That also, I imagine, formed the perceptions which led to the acceptance of the fact that there had to be a separate Constitutional Court.

The question we have to consider is whether it is necessary as part of the permanent Constitution. It is a mistake, if I may say so, in a Constitution which I takwe it is designed to last for centuries, to build into the Constitution something which will be quite an important

part, which is really designed to deal with a temporary problem, which I suggest by the time the new Constitution comes into operation as far as the courts are concerned, will be a matter of the past.

You will remember the United States Constitution has already lasted for two centuries. It is likely to last at least another one. And the Constitution that you are called upon to draw will, I hope, last for as long, if not longer.

The reason we say that the need for a separate Constitutional Court will fall away is the following. As you know, under the existing Constitution, the present Constitutional Court members are appointed for a non-renewable period of seven years, so unless the new constitutional text provides otherwise - that is section 99(1). So the existing Constitutional Court, which was appointed in 1994, is due to go out of office in 2001. Whatever the new system is, it is going to really start operating from 2001.

In 2001 I venture to suggest that the Bench will not lack legitimacy. Most of the judges in respect of whom the criticisms were levelled that I have alluded to, will, I imagine have retired by 2001. And, in any event, we will have seven years of judges appointed by the Judicial Service Commission. In addition to that, we will have had seven years of a rights discourse proceeding in the courts - in fact a rights culture developing in the country - we will have seven years of decisions by the Constitutional Court and others, in which fundamental rights are applied and a South African constitutional law, based on the present Chapter 3 of the fundamental rights, will be very much in existence. So it will no longer be true to say that the

existing judges have no experience of Constitutional Law, nor will it be true to say that the practitioners have no knowledge of Constitutional Law. And, in any event, there will be a number of very important leading decisions which will have been given by the Constitutional Court in the meanwhile.

There can be no doubt about it, at the moment we are paying a price - or will be paying, we have not started paying it yet because the Constitutional Court is only going to start sitting as you know on the 15th of this month - but there is no doubt about it, we will be paying a price for having a separate system. The price will be the price I mentioned, delays and expense.

Perhaps it will be helpful if I were to give a reminder to the members of the way the system works at the moment. At the moment, as I have said, we have two courts at the apex, the Constitutional Court which hears all constitutional cases at the top level, and the Appellate Division which hears all other cases, including cases which involve constitutional points but it has to keep away from the constitutional points and send the case to the Constitutional Court.

Below that we have the provincial and local divisions. I will just call them provincial divisions for brevity for the moment. They can hear constitutional cases, subject to an exception that I will mention in a moment, and appeals from them on constitutional points go to the Constitutional Court and on other points go to the Appellate Division. The exception is that our provincial divisions have not the jurisdiction to enquire into the constitutionality of Acts of Parliament, old Acts of Parliament and new Acts of

Parliament. So wherever there is a case before a provincial division which involves the constitutionality of an Act of Parliament, for example, there are cases where a man is charged with murder and the question arises can he be sentenced to death? Is the death sentence constitutional? There may be a case where a man is charged with dealing in cannabis. Those who are familiar with the laws dealing with cannabis know that there are very powerful presumptions in the Act, and if a man is in possession of one Mandrax tablet - that is another section of the same Act - he is presumed to be a dealer until he proves the contrary. There is a powerful argument that that presumption is contrary to the provision in section 25 of the Constitution that every accused is presumed innocent until proved guilty. So the question arises, is the presumption of "dealing" contained in the Drugs Act constitutional? So that point, which is sometimes a very important point in a drugs case has got to go to the Constitutional Court because the ordinary court is powerless to deal with it.

The accused says "I want to take the point that this presumption is unconstitutional". The provincial court cannot deal with the matter, the matter has to go to the Constitutional Court and one can give hundreds of thousands of examples of points the Constitutional Court can deal with and the provincial courts cannot. Then, when the case is being dealt with by the Constitutional Court, it may well go to the Appellate Division on the facts, because the accused says that I did not actually have this Mandrax tablet. If I did it is presumed I am a dealer, but I say I did not, the Appellate Division has the last word whether he had the Mandrax tablet, the Constitutional Court has the last word

on the question of whether he had the Mandrax tablet whether he is presumed to be a dealer. So it is duplication.

As I say, we understand why there is a duplication at the moment. We are not quarrelling with that, we understand that; there were reasons. But really, the reasons which prompted the negotiators at Kempton Park to introduced this time-consuming and expensive system should not apply by 2001. If the Judicial Services Commission does its work properly, because by then we should have a Bench which as legitimacy, we should have practitioners who have experience - and judges in fact - who have experience of Constitutional Law, and so this heavy price that we are paying at the moment - not that we are paying, the whole community is paying - should not have to be paid. And we would then be able to have a system similar not only to the United States and Canada, but nearer home, countries like Namibia and Zimbabwe and Zambia and so on. They all have a unified system, a single top court and they do not have this division which we have, for reasons which I respectfully suggest, are temporary reasons, reasons which, while they are reasons of substance at the moment, will not and should not apply in the year 2001.

That is why we say that it would, with respect, be a mistake. To perpetuate this division it would certainly put us out of line with the rest of the Commonwealth and would involve us in having a system which is essentially based on provisions of the Continent. It is a mistake sometimes to marry elements from different systems, because you get a system that does not work properly. There is a whole complicated court structure on the Continent which none of us I think knows too much about. Our system is essentially

us I think knows too much about. Our system is essentially modelled on the Commonwealth system or the American system. It is an adversarial system. And therefore I suggest there is every reason to say that our system, as far as court structure is concerned, should also be modelled on the system which has worked well in the United States for over two centuries and which, as far as we know, is working well in most countries of the Commonwealth also.

So for those reasons we suggest it will be a mistake to have a separate Constitutional Court as part of the permanent Constitution which you ladies and gentlemen will be drafting.

SELIKOWITZ J: Chairperson, members of the committee, currently, as Judge Farlam said, in each of the major centres, and to some extent linked to the former provinces, we have a Supreme Court. The court is divided into provincial divisions, but from a public perception point of view all over the country there is the Supreme Court. That is the court that is today adjudicating all sorts of matters, criminal cases, civil cases. As soon as a matter is serious, instead of going to the local magistrate's court, it goes to the Supreme Court. We, in the Supreme Court, hear everything. We hear crime, we hear insurance cases, we hear building disputes, we hear divorces, we hear income tax cases. Whatever is going has to be dealt with by the Supreme Court. Our decisions are all appealable from our court to the Appellate Division that sits in Bloemfontein.

A few years ago it was realised that the Appellate Division was being bombarded with appeals from all the Supreme Courts round the country and a system was developed

whereby appeals could either be heard by the Appellate Division in Bloemfontein or by what we call a Full Bench of the local Supreme Court. So that a decision that I make in a motor accident case, if there is an appeal it will either go to be decided by the judges of the Appeal Court in Bloemfontein or three of my colleagues will sit in judgment upon my judgment.

The determining factors as to whether it goes to Bloemfontein to the Appeal Court or stays at the Full Bench locally are very much arbitrary and flexible and are really a decision of a judge who will decide whether the matter is serious enough to warrant Bloemfontein or whether it is really a run-of-the-mill case that can satisfactorily be dealt with by three judges locally.

That system has built into it a number of invidious and impractical aspects. Firstly, it is from a public perception point of view seeing justice being done. A little invidious that if you lose your case in Cape Town three of the judges who are the colleagues, friends and who work daily with the judge who found against you are now going to decide whether he is right or he is wrong. The system works because of the integrity of the judges, but I think it is fair to say that the public perception is that if I lost before Judge Selikowitz I want another court to decide whether he was correct or incorrect. I don't want to have Judge Farlam and two of Judge Selikowitz's neighbours sitting in judgment on Judge Selikowitz.

FARLAM J: Particularly where you are going to sit on me the next time.

SELIKOWITZ J: Or where we sit together in a two-man court in some case next week. There is a problem with that.

It has problems as well, not only at the level of the perception of the Supreme Court, but in fact our Appellate Division finds itself dealing with cases that quite frankly do not warrant the attention of the Appellate Division, motor accident cases are going to the Appellate Division, matters of little substance are going there, and in fact it was mooted by the Chief Justice some years ago, if and when he comes to give evidence you might ask him about it, to try and decentralise the Appellate Division so as to speed things up, avoid a clogging of work and to really leave this highest court in the land to deal with the type of matters that it should be dealing with.

Hence, and in order to solve these problems, we have suggested, by looking around at other jurisdictions, that built into the Constitution should be a decentralisation of this, the highest court in the land which one can call the Appellate Division or the High Court or the Supreme Court, whichever you like, so that between the existing Supreme Court which is a court of first instance hearing matters for the first time, and the highest court in the land, there is a level of Appellate Court which will hear appeals. We have suggested from a practical point of view that the country be divided into three areas which, for convenience, and following the American system, we have called Appeal Circuits - there is no magic in the names at all. And for example, the three coastal divisions, that the Natal Division, the Eastern Cape Division and the Western Cape Division, we would have one single appeal court to which cases from our three divisions would go. There would be two other divisions which we describe in the memorandum and which I will not go into detail. So that in the first place

cases will not reach the highest court in the land unless they warrant the attention of that court. They will be dealt with at this level.

This will become even more important when, as a result of current trends, the law becomes more accessible and we have more people using the courts where, as a result of a human rights culture, we have more cases coming before the courts, at least in the foreseeable future. Then again we provide in our present Constitution, and one anticipates that this will desist, that one has a right of appeal. You are not obliged to accept the first judge's finding. If you want to go further you are entitled to. So that there are going to be more and more cases going on appeal.

Advantages of having this intermediate appeal court are not only that you take away this invidious situation of Full Benches, but you screen the work that is going to the highest court. Coupled with the system one would want to introduce what they have in America as the "Certiorari System"(?), where the only cases that get to the highest court in the land, are the cases which that court invites and is prepared to hear. In other words, people who are dissatisfied with the appeal judgment from the three circuits can then submit their case to the highest court in the land and the highest court in the land will decide whether there is a point at issue which justifies them hearing it. This is what happens in the United States of America very successfully.

This highest court then would have a status of being the single highest court in our land. It would decide, as Judge Farlam said, constitutional issues of importance. It would also decide the very many common law issues of

importance that come up from time to time that are fundamental. It would resolve conflicting judgments between the various divisions or the various appellate circuit courts, and it would also maintain the advisory capacity which it now has in the interim Constitution to be able to advise in advance whether proposed legislation will in fact be in line with the Constitution or will run counter to the Constitution before that legislation is adopted.

From a further practical point of view it will provide us with a system whereby judges can be brought into the system at a level of Supreme Court first instance court and where those who on merit earn it will then be promoted to the various appellate courts, the various appellate circuits, based on their experience and their performance. And, of course, one can then have a similar system up to the highest court in the land.

I am not at this stage wanting to address questions of whether that should be the only way of getting into the courts but it will provide this sort of system. We have to be realistic. We are entering into an era where we are changing our criteria for judges. As a result of that we are inevitably going to go through a period of learning. There are going to be excellent appointments and there are going to be good and adequate appointments.

There are, however, along the line, and as part of this learning system and learning curve, going to be calls for more and more appeals where people are dissatisfied with the type of justice they are getting. The system we propose means that everything that goes from the local Supreme Courts does not have to go straight to the highest court of the land and involve the judges at that level. It creates

a flexible system. It would obviously as well have practical advantages of cost and speed. Clearly, if you have a division dealing with appeals simply for, as we said, the coastal area, they will get through the work far more quickly than a court that is having to assimilate appeals from the whole of the country. I anticipate that these courts could move around, could sit in different places. That is matters of practical arrangement later. But people would get quicker justice and, of course, speedy justice is very, very important. It would also inevitably be less expensive because of that and particularly because of the delay.

It is for these reasons, not only the practical ones, but because we also feel that the highest court in the land must be maintained as a status institution, that we want to create a level of practical appellate jurisdiction between the Supreme Court as a court of first instance, and the final upper court - the top court in the land.

Thank you.

CHAIRMAN: Thank you very much. Ladies and gentlemen, any questions?

MR DALLING: Thank you, Mr Chairman. I would just like to thank the two judges for their very helpful comments and for the manner in which they have elucidated them.

I have just a few questions for Judge Farlam, if I might ask him to respond. Judge, as I see it, the constitutional sort of issues that are going to arise fall into broadly three categories. The violation of an individual's constitutional rights in one form or another, where he or she would seek redress, a declaratory order, secondly, on matters affecting whole groups of people, such as an issue like the death penalty, and lastly, the testing of legislation on constitutional issues, where legislation is passed either by Parliament or by a Provincial Parliament, which might be seen to be unconstitutional. Now that seems to be the three broad groups that I can think of. There might be others as well.

What I would like to do is, how do you - taking your concept into account - how do you track, dealing with all of these? Where would you start out in your view? And then where would it progress to and in what way? Could we start with the violation of an individual's constitutional rights? I would just like to know how would you track actions in your concept?

FARLAM J: Violation of an individual's rights would, on the assumption that they begin in the Supreme Court - we are not dealing with cases in the magistrate's court - would obviously begin in the provincial division. And they would then go, as they would do in America, to the Circuit Court of Appeal, and only if a fundamental issue arose would the

case go to the top court, and then only if the top court thought - if you remember, that is the point that Judge Selikowitz made - the top court, like the United States Supreme Court, only hears the cases which it is satisfied justify its attention. So it would go to the top court if the top court thought that it was important enough to justify that.

Obviously, if the first circuit had given a judgment one way, and the second circuit had given a judgment on the same point the other way, then I imagine there would be no difficulty. Obviously the top court will hear the case in order to resolve the dispute.

The second case, as you call it "group rights", the death penalty, I am not sure that that is really a second category. Because the point about the death penalty is, is whether the section in the Criminal Procedure Act which applies for the death penalty, is valid? So it really falls in the third category. But you could have a kind of a representative action, where a whole group were concerned to establish some right that they had, not as a group, but each member had as member of the group. That would also start in the provincial division. It has to start there because very often in a case, as Mr Dalling knows very well, there are very often disputes of fact. Now the Constitutional Court that we have at the moment has got no way of dealing with disputes of fact. It cannot. A court like that cannot get involved in the details of factual disputes, so the factual disputes have got to be decided by someone, and that will be the provincial division, and of course, on appeal once again to the Circuit Court of Appeal.

In regard to the third type of case that is mentioned

by Mr Dalling, the testing of legislation. Of course very often the testing of legislation arises in a case, because one of the points involved is a section of an Act which someone says is applicable and someone else says if it is applicable it is unconstitutional. So it does not always arise as a separate issue. But sometimes you have a case which is a pure case just involving the validity of a particular statute. There again, there is no reason why that should not come up before the provincial division first and be argued there. And it could go next to the Circuit Court or there could be a procedure such as there is in some Constitutions. For example, in the Australian Constitution and also in England, we have it also, as Mr Dalling will know, in our Income Tax Court, we can have what is called a "leapfrogging" provision. So it is a point involving a narrow issue as to whether a particular Act is valid, or a particular section of an Act is valid - and that is the only issue in the case - then it could go on a leapfrogging basis straight to the top court if the top court was prepared to hear it. But that is the way we envisage the issues that Mr Dalling has referred to being dealt with in practice under our system.

SELIKOWITZ J: Could I just add that it is unfortunate that perhaps even with the use of the death sentence, one is inclined to think that constitutional issues sort of arise in a vacuum. Very, very often constitutional issues arise somewhere halfway down the middle of the case. And they may be just one of many, many issues. Take the example of the man who is brought before a magistrate and says "When I was arrested I was not given a proper warning or I was not properly warned of my rights". But in fact he is also

taking the point that he did not do it, and when you get later into the case, there is some other legal presumption that he does not like. The present situation is that the magistrate has to send it to the Supreme Court and the Supreme Court has to send it to the Constitutional Court on the first issue. Then it goes back presumably to decide the facts, and it is extremely unsatisfactory. So part of the theory behind a unified court is that things will be decided in full from the very first level. In other words, the first court will decide the constitutional issue and the facts, and only if it is obvious that one or other of those could be upset would it move along from a practical point of view. Most cases may not move along if the facts are overwhelmingly one way or the other.

You know, constitutional cases arise in the most amazing ways. I was reading very recently about an equality case, and that is a group of cases which I believe are going to occupy our courts for very much more than is anticipated, of a young lady of about 8 years old in Canada who began to play soccer with the boys and her parents then took the point that she ought to have separate showering and changing facilities because she could not change and shower with the boys and therefore she should have the same sort of facilities. And that landed up in the Canadian Constitutional Court. One may smile and say it is a ridiculous situation, but in fact that judgment is a judgment that decided many, many fundamental issues about equality. So one has got to be very, very careful. One of the dangers that we have is that there is a focus on constitutionality and constitutional points and Bills of Rights. We are seeing it in our cases already today. You

get a liquidation or a sequestration enquiry and the point is taken that in terms of the Insolvency Act, books were seized by the trustee. That is against the fundamental rights of the company or members of the company seizing their books. And everything is coming to a standstill because we are now being forced to refer those cases to the Constitutional Court and they are awaiting hearing, and to the best of my knowledge they are not even on the roll. So business and the sorting out of these matters is just coming to a standstill. So it is very, very seldom that constitutional points arise in a vacuum. They arise against a background of the facts, and with a single unified system the court can deal with the facts at the same time as it deals with the points.

CHAIRMAN: Would you like a follow-up?

MR DALLING: No thanks. I have a question on another issue which I would like to come back to a bit later.

QUESTION: What happened with that Canadian court case now? When do we hear the outcome of it?

SELIKOWITZ J: The Canadians in fact resolved that they have to have a period of time for the young ladies to change and another time for the young gentlemen to change. The next case is probably going to be who is going to be first?

MR GIBSON: Chairperson, firstly to Judge Selikowitz. You referred in glancing terms to the case load of the Constitutional Court and how this is slowing up the justice in the other courts. Do you have any idea of the number of cases which are being held up, for example, in the Western Cape here as a result of referrals to the Constitutional Court, and do you have any idea how long it is likely to be before those can be disposed of together with all the others

that are coming in in the meantime?

SELIKOWITZ J: Chairperson, Mr Gibson. I cannot give an exact number, but what we have done is classes of cases have been referred, and then what happens is others go on hold.

Take the simple example that Judge Farlam gave. In our law any man who is found in possession of 115 grams of more of dagga is presumed to be a dealer and unless he or she gives convincing evidence to the effect that he or she is not a dealer, the Court is bound to find that the accused is a dealer and there are minimum sentences of imprisonment which have to be imposed.

We have referred, to my knowledge, one of these cases to the Constitutional Court because there is little point in referred every single one, and once the Constitutional Court decides about the constitutionality of that section of the Drug Abuse Dependency Act, it will answer all the cases.

What the State at the moment is doing is the State in the interests of practicality seems to us to be charging without use of the presumption. But this problem is to a great extent tied to the newness of the court. It may well be that the judgment which the Constitutional Court will give in regard to, say, the dagga provision, will clearly also apply to all other averse onus which switch the duty onto the accused to give evidence. That we will have to wait and see.

But then, of course, having said that one should add that we also have a limitation provision where in individual types of cases breaches of the fundamental provisions may in the circumstances be acceptable.

Just to give you an example so that one can understand. Every one of us who owns a motor car may or may not know but

there is a presumption that says that you the owner is presumed to be driving the motor car at all times. So when your wife, child, friend parks your car at a parking meter and picks up a parking ticket the summons and documentation comes to you as the registered owner of the motor car. You are not guilty at all if you did not drive the car and did not park the car. But in order for the system to work and in order to avoid there only being a conviction if the traffic policeman saw who parked the car and then who left it there and did not fetch it, which would bring the system to a standstill, we recognise that sort of presumption which says that you are quite free to come to court and say "Magistrate, I was not driving the car, I lent it to my son or my brother" or whatever it is. But that sort of presumption is made provision for under the limitation provision in the Constitution, section 33, which says that the Court can allow exceptions to all of the rules given certain parameters. And those parameters have to be established by evidence.

It may well be that come the dagga presumption the Attorney-General is able to produce to persuade the court that it is essential for the purposes of administering a system that is trying to cut down on abuse of drugs and dealing in drugs, that there is some point at which a man is presumed to be a dealer. It may not be 115 grams, but it well be that if he has got 1 000 Mandrax tablets you can assume that he is not going to use them all himself. All these aspects of limitation become an extremely important and time-consuming aspect of constitutional litigation.

Even today the current interim Constitution provides that although we cannot decide constitutional issues in the

Supreme Court we are supposed to take this evidence, and then send this evidence along to the Constitutional Court together with the rest of the papers. I did not actually come along to get terribly involved in the existing system which has defects, but in answer to the question Mr Gibson it is as long as a piece of string and much depends upon what is going to happen.

And of course, insofar as one is now drawing a Constitution for five years' time as it were, perhaps longer for the Constitutional Court, it is difficult to predict. I would predict that we are going to move through phases. I think we are going to have a phase at the beginning of cases dealing basically with the sort of fundamental rights. Can the police break into my house at midnight and search? Death sentence perhaps, abortion issues, warnings, this sort of thing, a fair trial issue. And then we are going to solve those because those are quite easily solved. You will have a set of rules that apply and that's it. Later we will move into the more sophisticated areas. The sort of economic rights areas, environmental areas perhaps. As I was saying earlier the gender and the discrimination issues, in the workplace and out of the workplace, which are going to be far more challenging and far more interesting.

UNIDENTIFIED SPEAKER: Chairperson, a question then to Judge Farlam, if I may. The model which you proposed, you might or might not be surprised to hear comes very close to the Democratic Party position.

CHAIRMAN: Don't politicise the matter.....

UNIDENTIFIED SPEAKER: We are talking about positions. We are not talking about politics at all Chairperson.

CHAIRMAN: There is no question about that.

UNIDENTIFIED SPEAKER: There is also another model. In addition to the existing model and the one you are proposing, there is also another model, and perhaps you would care just to comment about that perhaps, obviously off the cuff. There is a suggestion that all of our courts, right up to the Appeal Court, should be able to have jurisdiction on constitutional matters. But that in addition to that the Constitutional Court should exist as the final Court of Appeal on constitutional matters plus the Constitutional Appeal Court as it were could also be seized of matters it wanted to hear. How would that grab you as an alternative model?

FARLAM J: Is it suggested then that we have the existing structure with the Appellate Division at the top - near the top - and that above the Appellate Division we have the Constitutional Court only for constitutional matters? That is the current system in a sense except that we are moving the Constitutional Court sideways and upways as it were. But you are adding to it that the Appellate Division will have jurisdiction to deal with constitutional cases.

Our point is that the existing Appellate Division will in fact be overloaded, particularly as we are going to have presumably separate provincial divisions for each province. And as Judge Selikowitz says, as we have a rights culture we are going to have more and more cases coming up. You know there is provision for compulsory legal aid in certain circumstances and so on. There are going to be more and more cases, and the appeal structure we believe is going to become overloaded. So that is why we say there should be as it were three Circuit Courts of Appeal.

Then above that it is suggested that there be a top

court which will deal only with constitutional matters. We say that is wrong, because ideally one should have a top court which deals not only with constitutional matters but with other important common law points. In other words, why would you have a situation where a most important point of non-Constitutional Law arises, a very difficult point but a very important point affecting the lives of thousands of people all over the country, possibly millions of people all over the country, that point can only go to the Appellate Division, it can go no further. And the Appellate Division on the present structure, we suggest, would be overloaded in any event, would have difficulty in coping with its case load. Whereas, on top of that, there is a top court which is designed for heavyweight cases of fundamental importance. We would suggest that an important case, even of a non-constitutional nature, if the point is important enough, should both go to the top court.

And there is another reason why we would say that should be so. You know Maitland, the great English legal historian, said once that the law is a seamless web. You cannot cut the law up into separate compartments because there is always one part that impinges upon another. And there is, I believe, a great danger in having a top court which only deals with constitutional matters because constitutional matters impinge on all sorts of other aspects of the law as well. And it is far better that the court which has jurisdiction to give the final say on what the law really is, should not only be confined to constitutional matters but to all the other aspects of the law which impinge on Constitutional Law and which, in turn, are impinged on by Constitutional Law. So it is far better to

have a top court which has responsibility and oversight over the whole of the law and not just one part of the law.

CHAIRMAN: I see Mr Hofmeyr and then Ms Jana and then Senator Moosa, and then I see Senator Nkuka and then Mr De Lange. Is it perhaps not a good idea to put all your questions together?

MR HOFMEYR: I think it may get a bit too much. I do not have a very long question, in any event Chairperson, I want to thank the judges for coming along as well. I think that it has been a very useful contribution on their part. I want to ask what are the mechanisms, and especially continental models, that have separate Constitutional Courts, what are the mechanisms there to deal with the problems that you have raised and specifically the problems around time delays and the expense? Because I presume people have had to find ways of addressing those issues. And particularly, as far as I understand, you are not really suggesting that the changes that you are proposing should be made in the short-term, that we probably will be saddled with some of these problems for the next seven years, I think it would be useful to know if there are ways of improving the system, even if it is in interim period.

MR DE LANGE: Chairperson, before the Judge answers. I think your suggestion was actually quite a good one, to take three or four questions at a time....

CHAIRMAN: Ms Jana please.

MS JANA: Judge Selikowitz, my first point of clarity. Are you saying that there will be an automatic right of appeal from the Supreme Court in the provincial division to the Appellate Division, but the right of appeal to the high court will depend on leave to appeal from the high court? In

other words, in most cases the Appellate Division would be the court of final instance, and in exceptional cases matters will go to the high court? And the second is a question, what would be the criteria for granting leave to the high court?

SENATOR MOOSA: Judge Farlam, at some point you mentioned the sideways and working up principle. That reminds me of a debate that is going to take place in another Theme Committee, not here, the debate on the vertical or horizontal application of the Bill of Rights, and what the effect would be of vertical application of the Bill of the Rights.

I imagine that with verticality in the Bill of Rights we are going to have much more litigation of a constitutional nature and therefore I understand the motivation for having your Supreme Courts carrying some kind of jurisdiction of constitutional matters. But I am just wondering if what you said earlier related to the point that some others have made that the Constitutional Court should deal with horizontal matters and that the Supreme Court and the Appellate Division at the apex of your model should deal with vertical matters. Is that what you are in fact saying? Or are you saying that only selected types of cases,not necessarily linked to the verticality or horizontality will move across to....

CHAIRMAN: Last question, Senator Nkuka.

SENATOR NKUKA: Chairperson, it is good to see judges without their robes for a change. Judge Farlam, there are two things that I would like to raise. The first one is that of accessability. In countries such as Germany ordinary citizens can take cases directly, without any

formalities to the Constitutional Court. Of course, the judges there, they decide whether in fact the complaint does merit being dealt with by the court itself. What is your view on that issue?

Secondly, your argument for phasing out of the Constitutional Court is based on the fact that at the present moment the Constitution says the judges of the Constitutional Court are appointed for a period of seven years. So in other words whatever merit may have been there in establishing a separate Constitutional Court, those reasons may have fallen away by year 2001.

The Constitution enjoins us to come up with a new Constitution within two years, so it could well be that by May next year we will have another Constitution. How then in that instance shall we deal with this question? How do you deal with this problem? Problems that you have referred to?

SELIKOWITZ J: As far as Ms Jana's question is concerned - I am sorry, it was first Mr Hofmeyr's question on the German system. I am not by any means an expert on the German system. In fact Senator Nkuka said exactly what I understand the position to be and that is that from an accessability point of view anybody can take their case themselves by letter or otherwise to the Constitutional Court in Germany.

I attended a conference in the Transvaal in July at which there was a German Constitutional Judge present, and in explaining how the system worked he said that they have something like 5 to 6 000 applications a year, and they accept under 500. So in fact the accessability is there, but very few, less than 10% of the cases actually get past the initial scrutiny and are considered by one of - they

have two chambers who sit separately in their court.

The other mechanism the German courts use, although I think follows from what we have said is, that the court decides all the issues right at the beginning, so that by the time the matter is decided the court hearing the case has decided who is telling the truth and who is not telling the truth, whether the man did have the dagga or did not have the dagga, and that in a way weeds out many of the constitutional issues. Because where the man is found not guilty on the facts that is the end of it. Or where the facts are so overwhelming that even if the presumption or the point did not apply he would nonetheless be guilty, that puts an end to it. That is a very practical way of dealing with it. And there seems to be, following on the point Judge Farlam made, some sort of reluctance to entrust the courts with full jurisdiction which we are going to have to live through and get over with.

As far as Ms Jana's question is concerned about automatic appeal and leave to appeal, yes, there is already a provision in the Bill of Rights for an automatic appeal. The debate is whether it can subject to certain rules and leave, but be that as it may, certainly I would say that there ought to be an automatic appeal to the intermediate appeal, and as far as the top court is concerned, as they do in America, that court by its own criteria decides which cases come up to it. I am not sure of all the criteria, but in America, for example, one of the criteria is that they will not reconsider a matter that they have considered recently. You cannot bring abortion and row and wade there every year because if they have looked at it one year they may not want to look at it again for a number of years.

So that there are practical ramifications as well. But these are things that have to be worked out. I certainly do not know the answer to what the rules should be, but I am certainly in favour of that court with its overview of priorities being able to say this is an important case, but we do not have time for it this year, we will put it on the backburner because there is a more pressing issue dealing with perhaps a limitation issue on this aspect for this year and that way doing it.

As far as Mr Moosa's question is concerned, about a distinction between horizontal and vertical. I think it is a very dangerous distinction when you talk about rights before the courts. We are already experiencing the situation that in practice, if you have a contract between private individual A and private individual B, the current Bill of Rights may well not apply or the current constitutional rights may not apply to it because it is horizontal between two citizens, whereas if you have exactly the same contract with a State institution it is going to apply. And we are already running into quite interesting situations with quasi State. The sort of group of public institution places, the Broadcasting Corporation, is that a private institution or is that a public institution? But it does not really matter because the right is the same. Your right in the end of the day, if it is protected horizontally is exactly the same right as the one protected vertically. It may well be that nobody horizontal is going to do some of the things the State may do. But your boss may well send somebody to your house to search for some documents which he believes you have stolen. So that the kinds of issues that arise once you've got horizontality and verticality cannot

cannot be a criterion to determine jurisdiction of courts, because the same points are going to arise in a mixed form on the two of them.

I think Senator Nkuka, I do not know if I have dealt with what you raised. I did not hear a question so much as a comment. Oh sorry, you raised the seven year question. The seven year question is really quite fundamental. Get rid of the Constitutional Court in two years' time if you want to. If the new Constitution comes out and it has got to take effect, it has got to take effect, and what's in the interim Constitution has to fall by the way. I have always wondered why, if you have a five year timetable you had a seven year life for the Constitutional Court. It seemed to me to be somewhat of an anomaly to appoint people under an interim Constitution for seven years when you intend to have a final court after five years. But you know those numbers can be changed.

SENATOR NKUKA: Chairperson, can I just explain what my question was. The issue I was raising is the question of perception of legitimacy. How do you deal with that question next year? That is the issue that I am raising?

FARLAM J: That is why I thought there was merit perhaps in retaining the division between Constitutional Court and non-Constitutional Court for a period like seven years. I suggested and my whole argument was, that the legitimacy problem should be over in seven years' time, and I reminded the committee that you are drafting a Constitution where one hopes for centuries. So one must not have something introduced in the Constitution which is going to be there for centuries which is really designed to deal with a problem that we are going to have for the next five or six

or seven years. There are various ways of doing it. One way would be to say that the Chapter of the new Constitution which deals with the judicial structure, will only come into operation in the year 2001. That is one way of dealing with it, if you consider that. I would imagine, if I may say so, this is not really a lawyer talking but just what I hope is common sense, I would have thought that the - you know, lawyers try to have common sense, but over and above common sense they have other insights as well, at least I'd like to think that they think that - may I say this, to be serious. Is the answer not simply, it is a value judgment which the Constituent Assembly has got to make as to how long it will take to overcome what is perceived to be a problem in respect of the legitimacy of the Bench? That is a value judgment that the Constituent Assembly has got to make. Judge Selikowitz seems it can be done in two years, he may be right. Other people may say seven. All I was saying to you is I would be very surprised if there is still a legitimacy problem in seven years' time. Whether there is still a legitimacy problem in two years' time or three years' time is something I am not prepared to make a prediction on. The one thing I am clear on, we should not have a legitimacy problem in seven years' time if the Judicial Service Commission does its job properly. That I think, with respect, is the answer.

SELIKOWITZ J: Might I just say, one talks about a legitimacy problem. I think one must hasten to add that this is a perceived legitimacy problem. I, for one, do not recognise for one moment that there is a real legitimacy problem. I do recognise that there is a perceived legitimacy problem, and I believe that in fact one has got

to take a balanced approach.

One of the problems that seems to crop up and perhaps one is digressing a little bit, but it is relevant to this committee's future deliberations, is this perception of accountability of the Bench. It is an extremely interesting and misconceived concept. Accountability of the Bench is in fact something very contrary to concepts of democracy, and the idea that the Bench will be legitimate when judges do what the people want seems to me to be a misconception.

Judges are by definition anti-democratic. Judges have a duty to protect individuals against the majority. It is the task of judges to look around as to what the majority want and then to act accordingly. It is the purpose and duty of judges to uphold the basic fundamental rights of the individual against the desire of the majority to impinge upon those individual rights. Judges will never be popular, judges will never be accountable in the sense that they answer to the majority for their actions. Judges answer to the Constitution and to the law which is made by somebody other than the judges.

MR DE LANGE: Thank you Chairperson. And may I also thank the judges for kicking off this debate of ours on structures and so on in the new Constitution.

I have got three areas I want to cover. The first one is easy. I assume within the structure that has been put out in the document that although you talk of provincial courts and so on, that there is an assumption in your proposal that justice still remains a national competence or do you deviate from that? That is the first area.

Secondly is the point that Judge Selikowitz touched on to some extent, and that is that within a proposal like this

which he has characterised as having many similarities with the US system, that seems to have that indeed, and that it works well, and I imagine it does, but equally there are many complaints that one does get from the American system, that it is very rigid, that cases take an enormous amount of time, sometimes up to seven years to get to their top court with all the cost implications and the kind of uncertainty it brings. Judge Selikowitz did mention one mechanism to deal with that and that is a leapfrogging mechanism which would clearly deal with some of the problems. I was just interested to know if you are aware of any other mechanisms that one could look at other than that to deal with this particular problem, if one were to deal with a kind of structure like this?

Then the third area is the one that Judge Selikowitz has just touched on now which I think needs to be looked at a bit more, and that is the issue of legitimacy and representivity of the Bench. I think there are many of us that fully agree that there are individual judges in this country, even in the apartheid days, that clearly do not have to hang their head in shame, that they did what was expected from judges, but equally there is more than a perception I would say Judge Selikowitz amongst many of us and many of our people that there is a legitimacy crisis and definitely a very serious lack of representivity on the Bench. Even a seven year period does not easily change that lack of representivity. The legitimacy issue may of course start shifting, as the whole system becomes more legitimated, then of course the legitimacy grows, but that does not necessarily mean that the representivity problem has gone away with. And I would agree broadly with what

Judge Selikowitz is saying. When one is talking about representivity you are not talking about people that report back to a constituency. That is not what is mean by representivity. It is trying to bring all the world experiences of all the people in our country onto the Bench so that that is the kind of richness that we bring into the law.

I do not say that to actually just tackle Judge Selikowitz, but I think in all fairness that our brief to you has been very narrow and that is to look at structures and not to composition. But it seems to me that it is very difficult to look at a structure without looking at composition. You cannot just put a structure there. I mean the first thing that struck me about this structure is that it very much takes what we have now and just re-arrange it to some extent, maybe more efficiently and much more workable and even maybe cheaper, but very much as far as the composition is concerned it remains the same. Because part of your looking at it is keeping the whole split, for example, between the lower courts and the superior courts. That your entry into the lower courts will still be as a civil servant and you cannot progress any further than that, you do not get onto the Bench at any stage, there is no way that that is a career path for you to become a judge and vice versa, once you are a judge you will get there in different ways than it used to be in the past, just through the Bar, you will get there through the Judicial Service Commission, but clearly you are going to need very many years of experience to do so.

There is a whole crop of young black and women lawyers that are coming onto the market. And if one says to them

well, look we want you to become judges, then they have to make one or two choices within your scheme that you have chosen. The one is I become a magistrate, because then I am being a judicial officer, but it means I can never go higher than whatever the highest magistrate is, which is a regional magistrate. The other one is I become a lawyer, either in a firm of attorneys or an advocate practice for many,many years and then I become a judge. I raise these problems because these are the real problems we are going to have to face. There is definitely the representivity and legitimacy issue we have to deal with. Secondly, we have to find ways within the structure we create to open up space to make sure the representivity issue is dealt with quickly and efficiently without undermining the kind of efficiency that you've mentioned. I would like to know whether in this third question whether that is the assumption that underlies it that those two judiciaries will remain split, which is opposite to the continental system where you have one judiciary. Secondly, to what extent you have taken into consideration these factors of representivity and legitimacy, whether they are perceived or not, into the equation of your structure you have proposed.

And then lastly to say, we have obviously not given you that mandate, but obviously if that is not so, then clearly I would personally ask that at a later stage that that is brought into the equation to see if there is anything that that would change in what you have said as far as the structure is concerned.

CHAIRMAN: Could I just before you reply throw in two things as well. If there are any further questions, I think we can add another question, and then have a final session.

Two points. The one is, I think your representations is on the assumption that you will only have one class of judge. In other words, you will have a sort of professional judge. That judge will then also be in the Supreme Court and also more or less deal with constitutional issues. My question is, don't we really have a different kind of animal? The Constitution issues, especially those with regard to the validity of Bills, definitely have a high political content. Do we want to have the risk of drawing in high political content matters at "provincial Supreme Court level"? Is that not going to have a negative aspect?

Then the other aspect is your structure of the courts will mean, if my interpretation is correct, that every provincial division will be able to decide on the validity of the national Bills, parliamentary bills....(intervention).

FARLAM J: Not Bills, Acts.

CHAIRMAN: Well, even when they are in their Bill form, they may be - Parliament may decide to approach the Supreme Court. So that is another aspect that you will perhaps have to deal with as to where Parliament - which court Parliament approaches. But is that not going to affect the (indistinct)? In other words, you may have the possibility of two courts with different decisions. Dr Van Heerden, the last one.

DR VAN HEERDEN: Chairperson, thank you very much. To any one of the two judges. We do not know what the new Constitution is going to be, but under the present Constitution I think, and I would like to have your comments in this regard, that the role of the courts are much bigger now than had been before the new Constitution. In other

words since we are embarking on a system of a constitutional state, the role to be played by the courts are bigger than it was before. Would you in other words expect more or less the same approach in the new Constitution, namely a constitutional state?

FARLAM J: Chairperson, if I can start in endeavouring to answer questions. I am sure Judge Selikowitz has got comments to make as well. If I take the questions in the reverse order in which they were put to us. Dr Van Heerden's question, do I agree that the role of the courts will be bigger than before, the answer to that is yes. That is because we have adopted as part of the interim Constitution, and in fact it is part of the constitutional principles, so it has got to be in the - we have adopted it as part of the interim Constitution - but it has got to be part of the new Constitution because it is in the constitutional principles, the idea of a rights culture. And that necessarily involves the courts, because if there is an argument about whether a right has been infringed, the only body to decide it can in the nature of things be a court. So the answer to the question is yes, it is bigger than before.

Will there be the same approach in the new Constitution? The answer to that is clearly there must be because that I think flows quite clearly from certain of the constitutional principles to which the new Constitution will have to give effect, in particular from Principle 7 that I referred to earlier -

> "The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the

constitutional or fundamental rights".

So the answer to that must be yes.

That answer brings me to your question or comment really Chairperson, and that was with regard to a high political content. I think that we must be very careful about this. And I think we can also learn to some extent from countries like the United States which have a long tradition of constitutional government. One of the great achievements of Chief Justice Marshall, who was perhaps I suppose unquestionably the greatest Chief Justice in the history of the United States, was he was able to ensure that the constitutional judgments he gave - though they were controversial at times - were not party political. He made it his business to ensure that insofar as he decided a constitutional point he decided it as much as he could on constitutional grounds and grounds of law rather than pure politics. And other judges, if one thinks for example of someone like Justice Oliver Winkle-Holmes, were very strong on that, that the courts must refrain from being involved in political issues unless the political issue itself involves a constitutional point and the Court must be very careful to confine itself as much as it can to the constitutional point only. Obviously there are political issues. Take for example like the death penalty. The death penalty is going to be heard by the Constitutional Court on the 15th and 16th of this month, the constitutionality of the death penalty. That is a very controversial question. I believe that the National Party has indicated that it is in favour of it, and I think the ANC has indicated it is against the death penalty, so it is a political issue. But the Constitutional Court, and under our system, the unified

top court, when it decides the question, would not decide the question on political grounds. It would decide the question on legal grounds as set out the Constitution, whether it involves an infringement of the right to life. Whether, if it does, it can be justifiable in a democratic society, whether it is reasonable and necessary? In deciding whether it is justifiable in a democratic society fundamental principles of equality and liberty and so on have to be looked at. Whether it negates the essential content of a right? Those are to some extent factual questions. They involve value judgments, but they are not judgments in the party political sense that would have to be made, and indeed it would be a great mistake for the Constitutional Court or for the top court in our system to give judgments which are manifestly party political judgments. I do not think the top court will do that. I am sure that the top court under our system would not do that either. But it is a self-denying ordinance, if I may put it that way, that constitutional judges have to lay upon themselves all the time. So that I think is the answer to the first question that you asked Chairperson.

In regard to the question of the provincial divisions, particularly in regard to (indistinct) you wanted to know about, you wanted to know about advisory opinions. Now let me deal with those in reverse order. As far as advisory opinions are concerned, it is obviously a detail which has to be determined, I do not think it is a matter of principle. I would have thought that the appropriate approach would be if we want to have an advisory opinion jurisdiction in respect of the constitutionality of legislation, the way to do it is probably the way which the

interim Constitution envisages, and that is as far as provincial legislation is concerned that would be the appropriate court to be approached for an advisory opinion would in the first instance be the relevant provincial division, which is probably another reason why you should have a separate provincial division for each province, because it would be the court designed for that.

As far as national legislation is concerned there might well be a basis for saying that inasmuch as it is only an advisory opinion, the advisory opinion would be sought from the top court. I think I am correct in saying that that is the procedure in Canada. There is provision I believe, or there certainly was, for advisory opinions and they were given by the top court. So I suggest that is the answer to that.

The next question is (indistinct)? Now it is true that our system involves decisions by the various provincial divisions on, inter alia, the constitutionality of national legislation. That, of course, is the case in the United States as well. The way it works of course is if all three under our system - I think there are nine circuit courts of appeal in the United States - if all nine were to give the same decision on the constitutionality of a statute, that will probably be the end of the matter and the Supreme Court would not take the case and be prepared to hear it. If one circuit court of appeal said a particular provision in the Dagga Act is invalid, and another court said it was valid, then obviously the top court would give leave for that matter to be heard. And if it was a matter in respect of which judgment was needed quite soon, I have no doubt the court would clear its rolls to hear the matter as a matter

of urgency.

As far as (indistinct) is concerned, obviously all courts in a particular circuit would be bound by judgments of that circuit court of appeal. Judgments in other circuit courts of appeal would be persuasive, which is the practice we have at the moment with other provincial divisions, clearly judgments of the top court is binding on everybody. So I hope that answers the question the Chairperson asked.

We were asked a question about legitimacy, and this is something I know Judge Selikowitz would want to deal with as well. We were asked about the continental system and the questions of legitimacy and so on being taken into account. And we were also asked about practitioners. It was suggested that there were a number of young practitioners who are entering the market as it was said who would like to know what they can do to have a judicial career. And a number of questions were asked about that, how we can open up the court structures to people from different sectors of the community, and I think the thrust of the question was, to people, particularly people from previously disadvantaged communities.

I want to make a very strong plea to this committee at this stage in this regard. A Constitution I would respectfully suggest is not the document in which you decide how the court is to be manned, how you decide questions of composition. That is a matter for the Judicial Service Commission. The Judicial Service Commission has responsibility for making appointments, the Judicial Service Commission I am quite sure will have regard to the sort of questions that Mr De Lange mentioned to see to it that the Bench is staffed by people who are able to bring this sort

of collective wisdom and experience of all the sections of the community. but you cannot put that in a Constitution. And ti is a very dangerous thing to put in a Constitution because you cannot change a Constitution very easily. This is a Constitution that we hope is going to be around for two centuries. But you do not have to put it in the Constitution. If you have a proper Judicial Service Commission functioning it should be able to deal with that sort of thing quite easily.

The next question was, what about the civil service? What about a young person who is entering the profession who - he or she - want to become a magistrate, does that mean he or she can only become a regional magistrate and can't go further? That is a question that we have not addressed yet. We did not feel called upon to address it.

I do not understand that it is necessarily follows that if you accept an appointment as a magistrate that you necessarily cannot be a Supreme Court judge. Let me explain why I say that. Firstly, as you will know, it is a controversial question as to whether magistrates should be civil servants anyway, and there is legislation, I am not sure if it has been properly implemented yet, inherited from the old regime, which sets up a Magistrate's Commission, and the Hoexter Commission you remember long ago proposed that the magistrates should be taken out of the civil service and should be put in an independent category. And that is something clearly that will have to be looked at by the National Assembly and the Senate.

But it is not a given under our system, certainly under our proposed system, that the magistracy will always be staffed by civil servants. Ideally, the magistracy will

not be. And there are various ways of looking at the magistracy that are not relevant now. There is the English system of part-time justices. There is provision for practitioners sitting on a part-time basis as they do in Small Claim Courts to help to do the work of the magistrate's court. But you know, even in England, it can happen that a practitioner who is appointed to the county court can, after being appointed a county court judge can, in exceptional cases, if he or she shows the aptitude, can be promoted to the Supreme Court, and there have been such cases. Justice Elizabeth Lane was, as far as I remember, a county court judge before she was appointed to the high court. So there is no reason why a magistrate, who shows the aptitude for judicial work, could not be appointed to the Supreme Court. That is a matter for the Judicial Service Commission.

I would caution against it generally because magistrates, from the nature of things, do limited work. Vast areas of jurisdiction which the Supreme Court handles do not come before the magistrate's court. So it is unlikely that the ordinary magistrate will have experience to deal with the sort of problems that a judge has to deal with, but there is no reason why in a suitable case it should not be done. And as I said, it has certainly been done in England. So it is not a be all and end all at all.

Again the question of young people coming onto the market, they want to be judges. Now I would caution young people expecting to be appointed tomorrow. I do not know that it is a good idea to appoint - as general rule - young, inexperienced practitioners to the Supreme Court bench on a wholesale basis. But there are exceptions.

Sir John Kotze, who was one of the greatest judges in our history, was appointed a judge when he was 28 and he retired when he was 77, when he was the oldest judge in the British Commonwealth. So there can be exceptions. But generally speaking, experience shows it is a mistake for a practitioner to go on the Bench too early. It is better to wait a little bit, get more experience in court craft and experience of people and litigation and so on, before going on the Bench. But I understand that circumstances alter cases and there may well be exceptions which justify a different approach.

We were asked to suggest ways to open up the structures. Again I say, by all means do that, but do not do it in the Constitution. That is a matter for the Judicial Services Commission.

We were asked our views as to the split between the magistrates and the judiciary. As I have said, that is not really as we see it, relevant to what we came to say, but I have I think en passant expressed views in that regard.

The one point that Mr De Lange also made in regard to legitimacy in representivity was this. He said there is a legitimacy crisis. He said seven years is not enough. The representivity problem will still be there. I want to make one thing clear. Who is appointed to our top court is not a matter in respect of which we make suggestions. We are suggesting as new top court. The members of that new top court will be appointed by the Judicial Service Commission I take it, if that is accepted by the Constitutional Assembly, and I am sure that in making appointments to the top court those responsible for the appointments will be very conscious of the need to ensure that the people who

are appointed are perceived to have legitimacy and insofar as representivity is an issue, without introducing quotas or anything of that kind which might be dangerous, but insofar as representivity is considered to be desirable, I am sure they will have regard to that as well.

I do not know whether I have answered all Mr De Lange's questions, but I have tried.

CHAIRMAN: Judge Selikowitz, a last word from you.

SELIKOWITZ J: No, just to say that I endorse what Judge Farlam says. Questions of representivity are questions of manning the courts - and/or women....(intervention).

CHAIRMAN: Personing the courts.

SELIKOWITZ J: Personing the courts and staffing the courts. Frankly, it does not fall within the compass of the structures of the courts, but I agree with Judge Farlam there is absolutely no question of the judges for these courts coming from any specific direction or area. And fit and proper people have to man the courts and staff the courts. Questions of representivity or where they come from is a separate issue completely.

CHAIRMAN: Ladies and Gentlemen, I am afraid I have got to call an end to this. I thank you on behalf of us all for the very interesting and excellent way in which you have put your case. I would like to suggest that you have kicked off our activities at a very high level. Thank you very much and please join us for tea.

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