

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

25 JANUARY 1995

2/4/5/9/2

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UNKNOWN: I have scheduled other meetings for the rest of the day.

MR TAFT: Just to say, I don't think that these things can be changed, because we made certain logistical and administrative arrangements. We can't just change it in this meetings.

UNKNOWN: Can somebody just tell us who the bright spark is was, who thought of 4.30 in the afternoon and why?

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UNKNOWN: It was clashing with other meetings, I think.

UNKNOWN: It must have been the ANC.

UNKNOWN: They must say permitting the weather.

UNKNOWN: Can I just say this, I have raised it at that Committee Meetings specifically and said, look it looks very stop start sort of way of doing things. Is there a limitation to the venues, because that appears to be the limitation. I was given the assurance that it is not the only limitation. We can change it.

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UNKNOWN: Chairperson, there is a good reason. The Constitutional Committee is meeting until 4 o'clock. Therefor Theme Committees can't meet till half past four.

UNKNOWN: Agreed 4.30

UNKNOWN: Right.

UNKNOWN: You must right down the right times.

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CHAIRPERSON: Ladies and Gentlemen, we move to 6.6 Technical Committees, I think you all have been appraised by the situation there. Anything you would like to raise on that? I don't think we have anything to raise on that. Fine, then we move to point 7. Mr ...(inaudible) perhaps you can give us some back-ground as to how many submissions we have received and when we will get it.

UNKNOWN: To date, Theme Committee 5 hasn't received much submissions. Most of the submissions is more of a personal and general nature.

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UNKNOWN: I can assure you that the submission from the National

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Party is not personal and I don't think the IFP one is personal.

UNKNOWN: The IFP one was in first. What has happened, is that since Wednesday we have received submissions from organizations like SANCO and also other organizations outside. So, as from next week there will be some standard issues to discuss.

CHAIRPERSON: Thank you. Has the ANC submitted their submission yet? 10

UNKNOWN: The courier has dropped it off, it is there.

UNKNOWN: I think it is late. We won't be able to accept it.

UNKNOWN: We will vote in the end.

CHAIRPERSON: Then point 8, Anything under General?

UNKNOWN: Chairman, what about the (inaudible) ... for (inaudible) ... 20
workshop (inaudible) ... I remember that I bumped my
head once. Is that going to go off from our (inaudible) ...

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CHAIRPERSON: This is something that the Core Group and the Administration have to deal with. It cannot be in doubt, this is a mixture as far as I am concerned. It is not that can possibly (inaudible) ...

UNKNOWN: I have a General, Chairperson, and it is on the venue for the workshop. We know in dismay that it is in Pretoria. We hope that it is not an indication of things to come and that is the last time they hold the workshop in Pretoria.

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UNKNOWN: Yes.

UNKNOWN: Can't we stop the first time?

CHAIRPERSON: If once Parliament moves there, we move all our venues.

MR MATTHEWS: Mr Chairman, the General and talking about fly tickets, I really think that, we as Members of the Theme Committees, are really put in a bad spot as far as that is concerned, because already for next week and the week after that, we will have to use at least four further tickets and that only applies to the members of the Theme Committees.

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Members who are involved now. Others don't have to use their tickets. Now, they can use it later on. I really think that the Constitutional Assembly as such should provide for extra tickets for those Members of the Theme Committees.

CHAIRPERSON:

Mr Taft has indicated to me now that it is catered for in the budget, so this I think should be argued with the very capable assistance of the Whips in the various parties.

MR MATTHEWS:

Yes, Mr Chairman, that certainly can be done but I think it should also come from the Theme Committee as such. I just wonder if we are all at even. Whether it goes through unanonymously from this Theme Committee

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CHAIRPERSON:

The point that Mr Matthews raises is that the Members of the Theme Committees have got the added burden of being here at least until Parliament starts and there are a number of Parliamentarians who do not have that extra burden and I believe that the Capetonians cannot have a speech on this aspect. Mr de Lange.

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MR DE LANGE:

Chairperson, I think you would be surprised to know that the Capetonians do have some sympathy with this, but I

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think what we have to do is difficult for us to make decisions here or not. One of the reasons why we have been brought here on Monday to have a Parliamentary meeting is exactly to cut down on all the S and T and so.

I think what we need to do is to ask our Core Group to meet urgently with the Executive Director through Mr Taft and who else they can do it and get this information to us urgently, even through the different parties and if it is then necessary to make representations and we feel there is a Committee to do so, let us do so. But let us just, before we take decisions, let us just get all the facts - I think the press is here and one hates to start the year off with a gravy train kind of scenario. I would suggest, please let we get the information and then let us discuss it. I don't think there is big opposition to it at all.

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MR DALLING:

I just have a question, which I am sure you can answer. Why did the Core Group decide on Pretoria? Why not in Cape Town where most of us are for this purpose?

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CHAIRPERSON:

It was felt also to limit the cost. It was felt that all the major spokes people on this kind of thing will be in the

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Transvaal and it was felt this is also an opportunity for public participation. To move around. To show our face elsewhere in the country.

I would imagine that the next workshop will be in the illustrious province of Kwa Zulu Natal. The next one could be in Bloemfontein or something. I think that is the argument behind it.

Thank you very much ladies and gentlemen, the meeting is closed. The Core Group please, remain behind.

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[END]

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H Potgieter

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EDITOR: H POTGIETER

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UNKNOWN: ... position to make the most effective inputs. I think we should send that info to all the role players.

CHAIRPERSON: What you are arguing now for is that we are more or less within a few days try and finalize a full programme?

UNKNOWN: Yes.

CHAIRPERSON: Difficulty is, I think we have made a few attempts at that and every time it is changed by the Constitutional Committee or somebody outside us.

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MR HOFMEYR: Chairperson, can I make a practical suggestion? I think there is an urgency for us to get going and I think we all feel that urgency. I would suggest that we do not have our Theme Committee meeting tomorrow but that we have it as a substantial Core Group meeting and that anybody who feels that they would like to have a say in the programme and in the specific questions to be raised under each of those items, that they come along to that meeting.

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That we actually try and sort them and finalize the matter tomorrow. I think broadly it looks like we all agree that we

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should go back to our original programme as it was and it is therefore mostly a matter of fitting it in the new time frames and blocks as suggested here and I don't think in the light of that it would be necessary for us to come back then and do another meeting here to discuss the programme further.

I think if anybody that is interested in having their say can come along to the meeting tomorrow. We should try and finalize it there and just table later. Secondly I just want to report that we have written a subsequent letter to the major role players where we have outlined the major issues that we expect to be raised in blocks 1 and 2 - to help people with their submissions. So I think we can table those issues and see if there are any other things to be added. This lastly to report, does seem to have been a major problem and that the first letter we talked about in December to advise people about our programme, and the need for submissions, seems to have reached very few people.

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I would support the suggestion that we should send out a comprehensive letter, etc. I think in regard to the programme, that is what I would like to suggest. In regard

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to the submissions, I would suggest that our secretaries, as from tomorrow morning, very early should get onto the phone and see who they can get to come and give evidence to us in the course of this week and I think perhaps that is the overriding importance and we should start our meeting a bit later on so that they can have a bit of an opportunity to phone and perhaps we should only meet at about - I think we are scheduled to meet from 9 to 1.

I would suggest that we meet by about 10.30 or 11.00 that would give them time to get at least some sense of the possibility of filling up this week and that we then meet at 11.00 and look at the programme and at their submissions. The last thing that I would like to suggest - is the question of our technical experts was finalized today. We know who they are.

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CHAIRPERSON: I am still coming to that.

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MR HOFMEYR: I will leave that one over then.

CHAIRPERSON: Mr Gibson.

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MR GIBSON:

I support what Mr Hofmeyr has proposed there, because Chairperson, I must confess to a great measure of disappointment and frustration about what is going on in this Core Group and Theme Committee and I just want it on public record that it is not the members of this Theme Committee or our own secretarial back-up who are busy creating a totally unnecessary delays and causing a great deal of additional cost to the state.

We are now 8 days into this whole accelerated period when we are supposed to be working and doing something substantive on our Theme Committee and quite candidly we have done nothing of any consequence yet. The whole of last week was taken up on meetings and deciding things which have been upset at different levels. I am not going to keep quiet about that if it stopped by the bureaucracy or the Constitutional Committee or whoever. They must just know that in due course the public is going to hold them responsible when there is delays in finalizing the report that should come from here.

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I am very eager to get on with this and I think everybody else is. That is the first thing. The second thing is, this

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committee can really only operate properly if it has submissions and views of experts and major role players and these are various categories. One of them is the submissions which are made to CODESA and to World Trade Centre.

We have heard from Mr Ebrahim that finally we have the keys for the trunk and something and very soon we will get these submissions. I hope that the Chairperson is going to be on tracks of the bureaucracy to see that we get those submissions, because there are masses of them. Chairperson, you will remember from World Trade Centre, I wasn't there all the time, I think you were - there are masses of these. There are days and days if not weeks of reading for this committee to do. The longer we delay in getting those submissions, the longer it is going to be before we can come to grips of the thing.

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The third, the next aspect of getting submissions is hearing people. That is the major role players who want to come and give an input here. We decided days ago that we wanted people. It is now being clarified that the - that whatever they call themselves, the administration, will pay -

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or the Constitutional Assembly will pay if people are coming for meetings.

I think that we need some specific action, perhaps by the two Chairpersons to assist our secretarial assistance just in contacting three or four of the really major role players To tell them precisely what representations we want and to urge them to be available as soon as possible. The reason that it is necessary, I think for the Chairpersons to get involved, is because our own people, Noël and Unice are being messed around about work programmes. Even now, the members of this committee don't know what submissions we actually want now.

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We wrote a letter just a few days ago to all these role players telling them that we want submissions on our blocks one and two and apparently now that is either going to be counted, changed or something. The moment, we have an echo here - once the Core Group is sorted out tomorrow and networked it through to who ever has to approve it, may I urge that we then make sure that the role players and the people who want to give submissions to us really do know what we want and when we want these submissions.

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Lets start making some progress Chairperson.

CHAIRPERSON: Thank you Mr Gibson. Any further inputs? Nothing. I would suggest that the suggestion by Mr Hofmeyr should be followed and that is that this matter should be referred - the matters that he raised be referred to an extended Core Group meeting. Is 10.30 acceptable?

UNKNOWN: For when?

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CHAIRPERSON: Tomorrow.

UNKNOWN: No, we sit on the Truth Commission. That is tomorrow afternoon at 3H00.

UNKNOWN: We have a Theme Committee meeting the whole morning

UNKNOWN: Does that mean I can sleep late tomorrow?

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UNKNOWN: It means with the other Chairman you will start phoning people to be here.

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CHAIRPERSON:

Is that acceptable? Fine. Then we move to point Nr 5 and I can at least record some progress. That is that we have our four technical experts -they have now been allocated for our Theme Committee - they are Prof P. Benjamin, Advocate Geramy Goldblatt, Mrs L. Ngabashe, and Judge P. Olivier.

So, those are the four experts that have been allocated to us. I would suggest that also regarding this, that perhaps we refer the matter to the Core Group to decide which issues can now be referred to them and what we want report at this stage. Is there suggestions from your side?

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Mr Hofmeyr.

MR HOFMEYR:

I was going to suggest earlier that if by the time we meet tomorrow morning at 10.30 - if our Secretaries could have contacted our experts and give us some indication about their availability at the moment. I know some of them may be involved in trials and things.

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I think certainly we would like to have substantial amount of their time this week. If that is possible.

CHAIRPERSON:

Any further matters on this? Mr de Lange.

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MR DE LANGE:

Chairperson, I would say that we shouldn't just leave it to the Core Group to decide and tell them what they must do. I think we already, as a Theme Committee has decided that we are dealing in this block one and two together with the relationship between the different court structures. The issue of a single and split traditional and the issue of structures of the courts. I would want to suggest that they should actually get on with collecting those documents that were done at the World Trade Centre.

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On those particular issues, to work through them and start drafting the different options that are proposed so that we then have a document as soon as possible that at least raises the options that were raised at the World Trade Centre. If we then here feel that we should look at some other options as well, then at least the work has gone that far and then we have done that. That will also start facilitating our discussions with people that have come and to give inputs. I don't think we should let all that go wasted at this stage. I would want to suggest very specifically then, that the Core Group actually deal with it in terms that we agreed so far should be dealt with in this period.

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Again, we think may just emphasize very clearly, that these experts are not to express preferences on one option to the other. They are just there to draft the options for us and then to put that forward for us to debate and discuss. So, that would be some guidelines I would like to put forward Chairperson, on how the Core Group should tackle the

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issue.

CHAIRPERSON: Doctor van Heerden.

DR VAN HEERDEN: Mr Chairman, they just asked a question. How is this technical or these experts, how are they going to work. How are they going to assist us? On a temporary basis or are we going to call them in when we need them here or what is the idea? Can we just get an indication please?

CHAIRPERSON: They are there basically to assist us. In formulating, in research and as Mr de Lange said, not to - they are basically to give us the information that we require and to argue the information that we require and not to put a certain point of view or for or against. They are there to assist us in our research and put in forward the process.

Ladies and Gentlemen, I think the proposal by Mr de Lange appears to be a productive one and that is that we - at the outset ask them to look at all the proposals in the CODESA files and to put that perhaps in a document. To put all the possible alternatives to us. Agreed. Thank you. Then we come to point Nr 6. I think we have dealt with that.

I don't think there is any further, I can just report to you that the ANC has, at long last, submitted their submission. I must say that the quality is such, if I were them, I would have kept it. The DP has also put in their submission. Anything further under submissions? Nothing. Then we

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come to General. Anything under General.

UNKNOWN:

Can I submit something. I submit that we now adjourn.

CHAIRPERSON:

We adjourn now, but the Core Group remains.

Thank you.

[END]

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UNKNOWN:

... 9 provinces in South Africa. I had not considered the circuit court appeal idea which the Judge of Parliament has put together, put forward before this afternoon and certainly I would like to think about it more, but in principle it appears to be a logical and attractive idea.

UNKNOWN:

The third issue, the single and the split judiciary, it would certainly make a difference to my answer and my initial submissions, where they to be horizontal immobility at each level.

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Certainly if it was possible for people to move in and out, from private practice into that career stream traditional, that would solve many of the difficulties that I might have with the closed single system.

CHAIRPERSON:

Thank you very much. Any further questions? I don't see any.

Prof Cordey, you are saying that you do not want an separation between the chambers that judges can move around. Can I just deal with structure and composition? I understand that you want the judges, the composition to be

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able to be changed, but are you rigid in term of the structure of the two chambers. That there will be a chamber that deals with Non-Constitutional issues and one that deals with Constitutional issues - that there can be an overlap or even an exchange of personnel, can I just get clarity on that Chairperson.

CHAIRPERSON:

Yes, I certainly wouldn't be rigid on that, but I think it would make certain logical sense that if a matter came to the supreme court, to the highest court, and they were clearly only issues relating to fact and Non-Constitutional law.

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That it might be more easily dispensed referring to one part of that highest body, that highest judicial structure. In the nature of things, Constitutional matters, take longer to resolve and are more highly charged. Because they have a wider impact. In the sense, my separation between the two chambers, were it to be rigid, would correspond with those circuit courts of appeal that the judges referred to earlier on.

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CHAIRPERSON:

It remains only for me to thank you again for being with us

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at very short notice for giving us the benefits of your views and also for the very stimulating way and very succinct way in which you replied to our questions. Thank you very much. Professor I have a suspicion that we may again call on you. Thank you very much. Ladies and Gentleman, may we then move to the next point and if you look at your agenda, we then come to the meeting of the Theme Committee. It is opened.

I would like to refer you to the minutes. That is the minutes of the meeting of the 30th of January - you should have it before you. It looks fine except for the Chairman's initials on page 4(1)(a), but I am sure you will correct that. Is there any other amendments that you would like to propose? Is it acceptable?

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UNKNOWN:

We have a Core Group report Chairperson, but nothing else.

CHAIRPERSON:

Well, you should have - I have the notes. It says documentation. Today's date. Yes, please there is a register to be signed, please don't leave before signing it. Where is it? It is on the way. Any amendments to be

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made. I see that clause 6.1 the wording isn't 100%. It is agreed that the CODESA submissions being put together in the form of a working document which would be available the Theme Committee to facilitate discussion on the work programme. I think it is the wording that must be changed. Pardon.

UNKNOWN: Add by whom? Is that by the Technical Committee?

CHAIRPERSON: Yes. That Technical Committee should do that. 10
Acceptable? Right. We then accept the minutes. Matters arising. I think everything will be dealt with under the Core Group report. Core Group report, you have that before you. That is the document - Core Group Report on revised work programme. The first matter that we must just deal with is the work plan and schedule of meetings. You have before you the Core Group report on revised work programme.

That more or less is the suggestion put forward by the work, 20
by the Core Group. In other words, that we deal with from Block 1 to 4 with the structure of the court system. The relationship between the different levels of courts.

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Three, the composition and appointment of a Judicial Officer. The composition of courts, I would say, and the appointment of Judicial Officers. Four, the access to the courts including late participation. Then block 5, traditional authorities and customary law, block 6, Attorneys General and other judicial appointments. Block 7 - general. Block 8 - Legal education and legal profession. Block 9 - Transitional arrangements. Discussion? Mr de Lange.

MR DE LANGE:

Chairperson, I don't have any problems with the document. I just want to record, the whole issue of continental system or the system as we have now, the split kind of traditionary will be dealt with under 2, just as long as it is understood clearly then that is fine.

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UNKNOWN:

Is that under relationship?

CHAIRPERSON:

Yes

UNKNOWN:

Chairperson, to what extent are we entitled to have a loose boundary between these four blocks, because I suspect every time we have a hearing some of the other of these four blocks will be raised with people who will come and talk to

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us, like today, for example.

CHAIRPERSON:

The Secretariat must help me, but the only reason why we are putting it in these blocks is that we, it is for the purpose of the Constitutional Committee. So that we at least give them an indication that when block 4 has to report, we will have to report on the four aspects. Under no circumstances, I think it will be sensible to restrict people to certain aspects.

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MR HOFMEYR:

I think just a clarity. The four points listed under blocks 1 to 4 are not to co-inside with blocks 1 to 4. I think it is merely to say that in block 1 to 4 we will be dealing with all four of those issues at the same time.

So, we just felt it became too difficult to try and separate them out and deal with them one after the other. As today's input show us, the learned Senator says.

CHAIRPERSON:

Any further, is that acceptable? Going, agreed? Fine.

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Next aspect is the technical assistance. Perhaps we can just leave the meetings until last. Technical assistance, I can

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report to you that the Technical assistance, our technical experts will be briefed on Monday and we have asked them to be with us on Tuesday. So, I think they should have at least a meeting of the Core Group on Tuesday. They should also be present at our meeting on Tuesday.

MR VAN DER MERWE: Mr Chairman, are you now dealing with page 2, which start with a Core Group report? A was work plan and then it goes on with schedule of meetings. What did we say about that?

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CHAIRPERSON: I have asked that we dealt with that after submissions.

MR VAN DER MERWE: Thank you. In future I will try to concentrate more.

CHAIRPERSON: Anything on technical assistance? Further?

UNKNOWN: I am completely lost. I was on the first page and my next page is schedule 4. What document is that?

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CHAIRPERSON: That is just for your own benefit. In other words, setting out the schedule for Constitutional principles of the Constitution

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UNKNOWN: So where are we then?

CHAIRPERSON: We are on the agenda. Senator Moosa.

MR MOOSA: I am sorry, while we clarify matters - can you clarify one more thing for me. What is the status of that document called first division of recommended work programme which is attached to the minutes of the last meeting?

CHAIRPERSON: I would imagine that you are referring now to the work programme, the amended work programme that is submitted to the CC. That is just for reference. That was not even adopted by the CC. 10

MR MOOSA: Yes, because there were some considerable problems with that.

CHAIRPERSON: That is actually as a result of that, that we have revised our work programme. We hope that somebody will not revise it again. Mr Mathee. 20

MR MATTHEWS: I don't know if I am the only one that is starting to find difficulty, you know, finding things in the document that are

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getting annoying, what document I have to look at any specific time. I remember at getting back to CODESA we had the same problem in the beginning there and then we devised a system where every single document that goes out gets in part of an index.

You get an index so that you know you can properly index all your papers. When somebody refers to a specific document you can refer to that index number. Really, I think, you know in two or three months from now on, if we want to refer to a specific document, it is going to be very difficult, unless it is properly indexed.

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CHAIRPERSON:

Mr Gibson on this matter?

MR GIBSON:

Chairperson, I have made a comment earlier to Mr De Ville, saying that I was experiencing difficulty with the documents and I wondered whether we shouldn't do the same annotation that you have when you go to court. That the pages are number right through out. For example, I don't know how many pages we have put before us so far, perhaps two or three hundred or what ever. If we simply follow on from there. 301 and 302 etc. Be quite simple to know in

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due course which page you are on.

CHAIRPERSON: The difficulty is that you have got documents with a very short life span, for instance the agendas and the minutes and so forth. Then you have other documents such as the representations of the judges and so forth that has a longer life span. I think one must try and make a difference between them.

MR GIBSON: Mr Chairman, can the secretariat not look at this to the view of making life easier for us? 10

CHAIRPERSON: Right. Mr de Lange.

MR DE LANGE: I want to say the same thing. That the Secretariat sit down with yourself. I think the last point made is very valid. That we keep working documents one side and come up with a system they have just implemented and if they talk to the Chairpersons, they will get a scheme.

CHAIRPERSON: Right, Chairpersons, not only me. Fine. Thank you very much. We come to workshop participation. Ladies and Gentlemen, finally we have the green light, so I would ask

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you to diarist the 27th and the 28th of this month for the workshop and public participation.

There is still some doubt as to whether, because there is now what I regard as a novel idea, that this should now be a joint workshop. There should be other Theme Committees involved in this workshop. Now how that can possibly work, I don't know.

UNKNOWN:

Who wants to do that?

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CHAIRPERSON:

That is suggested by the Community Liaison people. I think that is something that the Core Group will have to deal with, but I would like to have your views on this, if you have very strong views in this regard. Mr de Lange.

MR DE LANGE:

Chairperson, really, I know for one and I know everyone here has got a lot of work. For me to be burdened with another Theme Committee's issues, it just not make sense. So keep our Theme Committees separate. If they want to use the same telephones, that is fine, but I don't want to listen to other people's issues at this stage. Honestly we can't. We just have too much work.

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UNKNOWN: I will use the word apart instead of separate Mr Chairperson.

CHAIRPERSON: Mr van der Merwe.

MR VAN DER MERWE: I think this Theme Committee should, if we are anonymous, anonymously take that decision what Johnny has suggested and go back to the directorate and tell them, we just want a workshop for Theme Committee 5 and that is the end of it.

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UNKNOWN: I personally would like to go there and tell them what the objectives of the workshop are. So that we can underpin it with some contact. We can't just appear to be selfish and have a workshop of our own.

CHAIRPERSON: I have already stated that very strongly, because I just cannot see how you can join up a lot of other issues. Make a sensible workshop of a day and a half. I mean, we have heard only these two submissions and it has taken us the whole afternoon. Any further inputs?

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UNKNOWN: Venue?

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CHAIRPERSON: Venue, because of that, we have decided on UNISA. UNISA is also very keen to do it on the 27th and 28th, but because of this complication, it was suggested Cape Town. My own personal view is that we should be seemed to be moving around. We should also be seen to be doing something for public participation and ...

UNKNOWN: The weather is very good in Durban.

CHAIRPERSON: Let us not complicate it further, Mr Mathee. At this stage, 10
I think if at all possible, we should be seen as to be moving around and be seen to do our thing.

UNKNOWN: Mr Chairperson, I think from the ANC's side, we agreed the workshop to be in Pretoria and lets not re-open that issue. I think from our side it's ...

UNKNOWN: Does that mean we are not going to Ulundi?

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CHAIRPERSON: Thank you very much. Then we move to submissions. Shall we refer that to the Core group and also the administrative way of dealing with it. Agreed. Then we come to the last

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matter before General and that is the next meeting.

Ladies and Gentlemen, we have at this stage only one set submission that can be made to us and that is of Prof Steytler and that is on Tuesday, no Friday. Judge Friedman on Tuesday.

UNKNOWN: Prof Steytler is available on Tuesday Chairperson.

CHAIRPERSON: Is there an agreement that we take both on Tuesday.

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UNKNOWN: Yes

CHAIRPERSON: Prof Steytler and Prof Judge Friedman. From the Community Law Centre.

UNKNOWN: Mr Chairman, when is the next meeting then?

CHAIRPERSON: Well, the Core Group is going to sit this afternoon to try and get as many people as possible in next week, but I can tell you it is not that easy. I have tried personally to get the General Council of the Bar here. They have given me a date now, that is the 15th - the General Council of the Bar can

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be here on the 15th.

The Association of Law Societies has asked for an extension. They would only be able to tell us after tomorrow when they will be able to see us. We are having a battle at this stage to get people to come and talk to us.

UNKNOWN:

Mr Chairman, so in other words, if I may make then a deduction here, we expect only to have a meeting then on the 7th next week and then not any more this week.

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CHAIRPERSON:

We are going to do our best to try and fill up at least Wednesday and if possible Thursday. Mr van der Merwe.

MR VAN DER MERWE:

Mr Chairman, I think we should point out to the Theme Committee, that the Core Group has nominated some of its members who are telephoning practically on a daily basis to get witnesses. It is not a question that we are not trying to get people here.

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CHAIRPERSON:

Thank you Mr van der Merwe,
Mr Hofmeyr.

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MR HOFMEYR:

Chairperson, I just saw when I re-located some of the submissions, there is a fairly substantive submission from a UCT on this issue of Community Courts and I think with our re-work to programme we should actually ask - we should schedule that for next week if it is not going to be full otherwise.

I assume that the person said that they would be available from the 22nd of January. That they would be available at relatively short notice.

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CHAIRPERSON:

I think we have got a mandate from Theme Committee to the Core Group to try and fill at least another two days next week. Agreed. Fine. Thank you very much. Anything on General?

UNKNOWN:

Chairperson, I am just submitting a formal apology for all meetings next week. I won't be able to attend.

UNKNOWN:

Chairperson, just one other thing. In the agenda where we made a proposal that the Technical Committee must start drafting that document. Maybe on Monday someone should give them a very brief, and that is one of their tasks, so that

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they can get on with that as soon as possible, if they can get quite a distance next week into that, then at least we have that to discuss and look at it ready. So if someone could just Monday brief them on that issue.

CHAIRPERSON:

Fine. Thank you. Anything further? Then the meeting is closed. The Core Group must stay behind please.

[END]

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THE CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

1 FEBRUARY 1995

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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

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PUBLIC HEARING:

WITS UNIVERSITY - LAW DEPARTMENT

2/4/5/9/2

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CHAIRPERSON:

(inaudible) ... and you being one sector, the students, the academia, we also thought that it was necessary to visit you and to ask for your opinions on various aspects of this Constitution, but more specifically with matters related to Theme Committee 5.

There are 16 Committees in the Constituent Assembly. The first Theme Committee deals with the character of the State. The second one deals with the structure of the State. Then we have a Theme Committee that deals with the relationship between the different structures of the State.

10

We have a Theme Committee that deals with fundamental rights. More specifically the bill of rights and issues related to that. Then you have this Theme Committee that is the Judicial Theme Committee looking at the judicial system. The structures of our courts. Access to justice and matters related to that.

We will also be looking at the question of traditional authorities in our deliberations and then we have Theme

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Committee 6 which is a wide Committee dealing with any aspects that the other Theme Committees don't deal with. They dealing with various issues such as the Gender Commission, such as more specifically tribal leaders and customary law and matters related to that.

So that is just basically how we are structured. We then, are expected to take reports and inputs from various people in society to draft up those reports and to submit without debating those reports to the Constitutional Committee where the real debates will take place.

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So what we are doing here, is that we are taking inputs from you in order to submit it into a report which report will then be given to the Constitutional Committee where the debates will take place. After the debates have taken place, drafts of the Constitution will be prepared and presented to the Constituent Assembly and at some point, hopefully by about mid next year, actually by October this year, we will have some kind of a final draft ready which we will then put out again to all of you for your further comment until the final

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Constitution is drafted.

So, today we basically wanting to hear from you. We are not going to do much talking. You are going to be doing the talking. The Constitution is about you and the Constitution is about what you would like to see in it and how you would like your freedoms dealt with in the Constitution, your rights dealt with in the Constitution and how you would like your future Government and society to be structured.

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So we are not going to be too much talking. We hope that you will be doing all the talking. We are recording the proceedings and your inputs will then be put into some kind of report in a later stage. There is a microphone that goes around - it is not for the purposes of sound, it is for the purposes of recording - so when you do speak, please mention your name and then make your input into the microphone.

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From time to time if there are matters that can be dealt

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with or that we feel we need to deal with, or questions of clarity we need to ask, members of the Committee will then raise those questions. Do we have anybody who will kick this discussion off?

IAN JACOBSBERG:

I am an attorney from Berman Hill Finderhyn & Godfrey. We have prepared a written paper - this is prepared by my colleague Robin Steyn and myself, it deals primarily with the amendment to the Magistrates Court Act in terms of which the family court was proposed in 1993. So we have a reasonably lengthy written paper - I can read it or we can simply hand it is as the panel prefers.

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CHAIRPERSON:

Well, if you could take us through it shortly without reading it, it would be fine. We'd like to know what it say there.

UNKNOWN:

OK. Basically the points we make, the amendment Magistrates Court Act which purpose the family court, didn't perhaps make as good use of the opportunities that were available to restructure family justice and to make the resolution of family disputes as accessible and as practical as

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could have been done.

The mechanism that is proposed while it does go some way to redressing some of the old injustices merit, provides an alternative mechanism to the divorce courts that existed in terms of the old legislation - is still a very bureaucratic and cumbersome type of mechanism.

It - in terms of the Commission, the (inaudible) ...

Commissions recommendations, the court consisted, the family court is to consist of that social component being the family counselling services on the other hand - a proper judicial component. But what is noticeably lacking, is the, a mechanism for private family mediation services and we are proposing that something should be done in this regard to introduce a mediation service into the family court structure which we believe will actually create an additional mechanism that would make the resolution of family disputes far more practical, far more cost effective we believe and also far more effective from the points of view of the participants, or hopefully not litigants, but litigants.

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There is the mechanism or a mechanism provided by the mediation in certain divorce matters act of 1987 which gives the family advocate powers to introduce certain or to institute mediation in the case of divorces. Once again, the problem we have with that mechanism is that it is a - it is a bureaucratic mechanism.

It doesn't actually encourage sufficient participant input or party input. What we are advocating is that there should be a structural support for advice giving mechanisms for counselling mechanisms and counselling facilities. In a non judicial extra judicial type of forum. Our proposal is, in terms of the powers given by section 103 of the existing Constitution which allows the legislature to institute, to establish courts and to prescribe their functions - the legislature should be pro-active and take a lead in establishing a mediation forum in the family law field. That is our submission.

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CHAIRPERSON:

Thank you very much. I don't know if there are any members of the panel at this stage who want to make a

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comment on the points raised. Mr Gibson.

MR GIBSON:

Just very briefly, years ago, like a 100 years ago when anybody could get articles, I was articulated to Bowman & Gilfillan. So, I am very interested in your input and certainly that the Justice Committee will consider this very carefully.

I think most of us are members on the Select Committee on Justice and this is a very interesting input. Something else that we are considering, we have had a variety of advice that we should consider a possibility of instituting a new level of court right at the community level.

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I stress, not a street court. But a court that would take the place of that. With a limited jurisdiction. With people not necessary legally qualified. Presiding. Not with legal practitioners appearing. But one of the purposes of it would be to sort out family disputes. Neighbourly disputes and so on and that might go somewhere to meeting the case you made out.

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For all the rest I am interested in it and we will certainly will take it forward and consider it.

CHAIRPERSON:

Thank you. Are there any other comments? The input that you have in writing, should be submitted to the Committee. We will obviously distribute that to the various members of the Theme Committee 5 and have that discussed at some point.

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I must just make you aware of the fact that when we are actually discussing these matters in the Theme Committee - if you have made a written input we might want you to come to Cape Town to the Theme Committee to present your arguments in more detail, but that we will do at a later stage, as and when we require that. So, put your telephone numbers down and your addresses down on the input as well.

Just before I, I try and recognize somebody else who are due to speak. Come inside. There are a number of very

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key issues that have come up in our discussions over the past two days. In our discussions over the past 2 months or so when we have started deliberations on Theme Committee 5.

Yesterday we had a workshop at UNISA with various judges of the Constitutional Court of the Supreme Court, various Magistrates, the Magistrate association, the interpreters association, the peril legal forum. The Alexandra Community Law Centre. People who are practising law inside the communities, mediation services, and so forth. Various interesting things came up. If I may just mention a few.

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We wanted to know how much detail the Constitution should carry. Should the Constitution be just a sort of document on the basic fundamental rights, the basic structures and so forth, and have the detail of those issues dealt with elsewhere or should the Constitution be a long thick document detailing absolutely everything. Or somewhere in between? It's becoming known as the

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minimalist as oppose the the maximalist position with regard to how the Constitution should be drafted.

So I would like some comments from you about that. We'd also like to know whether you think we should have a separate Constitutional Court or not. At the moment the Chief Justice and other Judges of the Appellate Division believe that we should have one court that is the Appellate Division - we should have two chambers.

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One should be a general chamber and one should be a chamber specifically to deal with Constitutional matters. The other view is that we should have two separate courts, we should continue like we are doing at the moment where we have the Constitutional Court and the Appellate Division. At some point we should have the Constitutional Court at the Apex, being the highest court and then the Appellate Division, the Supreme Court, the Magistrates Court and so forth.

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We should have some intermedia courts of appeal. Give us

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some ideas of what you think about that. We also want to know whether the other courts, such as the Supreme Courts and the Magistrates Courts should have jurisdiction to deal with Constitutional matters.

We want to know to what extent and how should we deal with a problem of access. At the moment our judiciary system has got many failures because of the old Apartheid system. Large numbers and large percentage of our people appear in court without legal representation. People find that the courts are not structured and friendly to meet out just justice.

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People are talking about involving communities and community courts in the process. How should we do this? What ideas do you have? Do you agree with these ideas? Do you disagree with these ideas? Let us have some more comment. Who is coming next? Professor Lewis.

PROF LEWIS:

Thank you. I think that people (inaudible) ... Carol Lewis from the Faculty of Law at Wits. The faculty of law will be

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making written submissions to the Theme Committee. Obviously we have views on a number of issues. In some cases of course members of the faculty being a group of diverse people will have different views and they may be individual submissions, but in the outset I think I'd like to make my personal view as to the nature of the Constitution known and not as it should be minimalist.

We have to accept that we are not going to be writing constitutions every 5 years, but what is going to be written as a document that will last for decades, possibly for centuries as the American Constitution has done. Rather than amended every time there is a new thought or a new concept or new technology, new ideas, new basis for society, economic basis for example. Rather to do that.

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We need to leave scope for the Constitution to grow. To grow with the times and that means of course that there has to be scope for interpretation. We may differ as to how it should be interpreted and I am sure you are aware of the numerous theories on interpretation. I think what is

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dreadfully important is to remember that a Constitution isn't a piece of legislation. It is not just a statute that can be amended from year to year.

It is a document that should form the social pack between citizens and a country. It is a document that should be the basis of legislation that is to follow and the number of these issues should really be dealt with in legislation which is transcend. I think something like family courts or the status of Magistrates Courts.

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Many of the issues, I have no doubt, have been raised in other Assemblies such as this and in this Assembly on matter that should be regulated by statute what we really need to do is to create a Constitution that gives the people the room to move and to grow and the change their approaches.

That doesn't mean that we musn't write it in stone, some of the basic human rights. I think we should, it doesn't mean we shouldn't constitute the basic structures of Government

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now and enshrine certain principles. But to have a lengthy Constitution that sets out dozens of little rules and exceptions and principles dealing with the minutia of legal practice or a structure of the judiciary. I think that would be counter productive. Thank you.

CHAIRPERSON:

Thank you Professor Lewis. Are there any further comments on that issue? On the issue of how much content shall the Constitution contain?

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There are views that the American Constitution can be a minimalist because they have such an old democracy. We are starting a fresh and a regular way from the past and therefore we need to have lots of detail in the Constitution. Are there any other views? I see a hand there.

UNKNOWN:

I agree with Professor Lewis that (inaudible) ...

CHAIRPERSON:

If you may just mention your name before you talk.

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MS MADONSELA:

My name is Trudie Madonsela from the Centre for Applied

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Legal Studies. I said that I agree entirely with Prof Carol Lewis that we should try as much as possible to, only include the critical issues in the Constitution. We cannot afford detail.

My concern with that is that its not just the fact that we are going to end up with a bulky Constitution - that people are too intimidated to read. It is also the whole question of change. I mean, if you are not able to change, it has got to be difficult to change the Constitution. If you have details, for example, if you decide specifically whether you are going to have Magistrate Courts or for argument sake, laid courts in the rural areas, etc.

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If you include that in the Constitution, if it doesn't work in a years time it may be difficult to change it. My suggestion (inaudible) ...

CHAIRPERSON:

Should we include lay courts in the Constitution?

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MS MADONSELA:

In the Constitution. My suggestion is that you don't

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necessarily have to do that. I think the Constitution should capture broad principle issues like for example, my suggestion would be that the justice system should be accessible, affordable, expedient, equitable, impartial, representative and co-hearent.

Then maybe then you can say, legislation shall be past to make this possible.

CHAIRPERSON: Thank you very much. Are there any other comments? 10
Comments from the panel? Mr Gibson.

MR GIBSON: I am most interested to hear these two views with which I respectfully disagree. I could speak for quite a while about it. I won't. I simply say, the best example of a minimalist Constitution is that of the United States of America. The home of the free and the land of the brave.

It took them 200 years for people to get their ordinary civil rights. If that Constitution have spelt out that everybody 20
has entitled to vote, then you wouldn't have had in my, long

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after I have left University, in my political life time, people in the United States of America, having to demonstrate and eventually overcoming. There is one example.

The other example also from the United States is the fact that the States ended up having this ghastly civil war where tens of thousands of people were killed. That was on the rights of States and it also dealt with the slavery question. So, that is an example of where it certainly didn't work.

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I want to point out that South Africa is now a Constitutional state. The Constitution is Supreme and its above Parliament. If that is so, then surely it should spell out in sufficient detail what it is actually protecting. Because it is there to protect the individual ordinary citizen in South Africa. I don't say that it has to go into every detail. But the classical minimalist position - I don't think is appropriate in this country.

Just two other reasons I want to give. I am going to be very short. One of the reasons which is advanced against spelling

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it out, is that, because this is a Constitution, you don't want to amend it every 5 minutes. Of course, you don't want to and the fact is, there is a tension between - and there should be tension between all the elements of society. Between Parliament and the courts. Between the Executive and the Legislature and so on.

If Parliament can simply encroach without being properly checked by a Constitution, then you can't say you have a Constitutional state. The final thing, if an amendment of a Constitution becomes necessary it requires more thought, more consideration and more justification, increased majorities and so on. The final thought is that we are not an adhered democracy yet with the checks and balances that operates in those material democracies.

10

We already have a governing party which has 63% of the votes in South Africa. We don't, they are not checked by a proper multi party system. I think those are some convincing reasons why one should get a little away from the minimalist position, not necessary to the maximalist but

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somewhere in between.

CHAIRPERSON: Thank you Mr Gibson. I see Ms Madonsela has her hand up. Before she comes in, is there any other people who want to comment on this? Alright, I am going to give you only half a minute.

MS MADONSELA: I have to clarify my position. I think we have to distinguish between principles and institutions. When I was referring to what gets into the Constitution, within regards to institutions, you need a bit of research to decide what institutions you want. 10

But when you were criticizing the American minimalist approach, you are dealing with principles and I agree with you that is why I was trying to outline some principle that could guide us. I wasn't saying you should leave it open. Thank you.

CHAIRPERSON: Thank you. Are there any other comments? This is only one issue. We have got hundreds of issues. Come to the 20

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Podium.

UNKNOWN:

The function of our Committees is to get as much information as possible. I don't think members of our Committee here, should get into the debate of particular party politics of that. I think we should keep it at that level.

CHAIRPERSON:

Thank you Doctor. Are there any other hands? There are thousands of issues. I recognize you. Please mention your name before you talk.

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MR RAMSAMMY:

Chairpersons, My name is Tiny Ramsammy and I represent ...

CHAIRPERSON:

I do'nt now if people at the back can hear you. So if you want to stand up and be louder. Thanks.

MR RAMSAMMY:

My name is Tiny Ramsammy, and I represent myself in this particular regard. The thing I would like to chat about, maybe it is reserved for the Theme Committee 6 but I just upon it for the purposes of this particular Theme Committee if I may. I am concerned with the scope and the

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principles of the Constitution. I wouldn't touch on any particular issue.

Now, just to start off this particular discussion, I would like to read a preamble that I wrote to a (inaudible) ... what really (inaudible) ... in this regard. (inaudible) ... understand that a Constitution should stand as a legal document. At the same time it should (inaudible) ... (mike off)

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I would like to discuss a few salient features of a Constitution and where I find disagreement with. These are basically in random order as I haven't really written them down. I managed to struck a few notes this morning. Our Constitution seems to miss interpret something.

I might draw another scenario. (inaudible) ... what goes up, must come down. That is a truth in science. I beg to differ on that particular truth, it is only true as far as the influence of the gravid forces of the planet, beyond the gravitational forces it is no more true. Now, what we are doing in our

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Constitution at the moment - we are (inaudible) ... (mike off)

As a consequence of the Apartheid system. That is the bed rock, within which this particular monarchy group and yet, we are going to exchange that. Yet, all over the world there is movement away from it. I have a problem with this scenario.

What I am trying to say here is - truths half truths. If you look at, lets look at another topic - discrimination, sex, race and religion - what about non religion (inaudible) ... (mike off)

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(inaudible) ... mechanism of the way (inaudible) ... concepts, our images in society, (inaudible) ... (mike off) (inaudible) ... what (inaudible) ... towards the people (inaudible) ... we should try and say (inaudible) ... it is the images that I am truly concerned with.

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What images that people grow up with. Purely because of

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these (inaudible) ... (mike off) (inaudible) ... the society.
(inaudible) ... (mike off) (inaudible) ... Look at the death
penalty - the last one sir.

The death penalty, the last point Sir. Now when you talk to
somebody in a vacuum situation, which doesn't affect them.
My daughter hasn't been raped and my mother didn't hit my
father or what have you, in a vacuum situation you talk to
me about the death penalty I would tell you - death penalty
should be taboo. It should be a no-no in my society. But
when I am affected by - in other words, when my wife is
raped or my daughter is raped, then I will stand up and
shout the death penalty must be.

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You see, I am very concerned with that kind of behaviour.
In other words, we are fire fighters. We are not actually
going to the truth. This particular Constitution like a Castle
Lager advert, must stand the test of time. Thank you sir.

CHAIRPERSON:

Just mention your name.

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EBRAHIM:

Ebrahim (inaudible) ... Wits SRC, coming from a perspective that is not legal, I perhaps fail to understand the arguments both for the minimalist and the maximalist positions and my perception is that what the Committees need to be focused on - there is a form of Constitution where the person in the rural area will be able to understand their rights.

Whether there is minimalist or maximalist, I don't think it has any bearing on the actual work of the Constitution. I raise this for a specific concern. That the Constitution, and I think this process here, and I welcome it, at least come down to the people and people need to understand that process.

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My concern, simply and it isn't a bias against lawyers, but I think that the student movement learnt a hard lesson during the transitional arrangement. What should happen, is that, number one - the Constitution should firstly be devoid to as large extent as possible of legal terminology.

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That common man like myself can understand. Secondly, that in terms of (inaudible) ... the right to education. It needs to be completely spelled out in the Constitution whether that includes tertiary education, funding, etc. What I say simply is that the Committee should not be detracted by legal arguments. It shall understand its fundamental approach and that is to deliver to the people of South Africa. A Constitution that they simply can understand. Thank you.

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CHAIRPERSON:

Thank you for that valuable input. I see a hand here.

MR KRIEL:

My name is Ross Kriel, I am a law student at the Wits faculty of law. I like to change gear and mention a concern I have with the length of the term of office of the Constitutional Court Judges. At the standard section 99 subsection 1, judges of the Constitutional Court are appointed for a non-renewable period of 7 years.

I'd like to raise at the outset two practical issues which for me are of course a concern. The first issue is this, do we in

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South Africa have sufficient depth of talent to turn our Constitutional Court over every 7 years.

Are we going to be able to find 4 Ather Chaskalson in the next 30 or 40 years? Another practical concern that I have is that as it stands, the court would be completely turned over - in other words, short of early resignations, all of the judges would change every 7 years. What that means, is that every 7 years we are going to be faced with an entirely new and inexperienced Constitutional Court.

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Getting beyond the practical issues, if I can call them that, I am concerned that our court is turning itself over every 7 years - we may lack the stability and consistency which we need in interpretation of Constitutional issues in order for the Constitution to act as a useful medium for conflict in our country - and a further point I am making, the last one.

If our court is turned over every 7 years, it makes it that much more vulnerable to the Parliament or a President who is in a position to have control over appointments. If for

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example, the Constitutional Court is making announcements that our unpopular, for example, if our Constitutional Court decides that the death penalty is not Constitutional, and it is already being mentioned earlier that in fact, it indicates that a majority of South Africans are in favour of the death penalty.

Is it possible that a new Parliament and a new President could put into the Constitutional Court - at the end of a 7 year period an entirely new row of judges that might take a more conservative position in this issue.

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In other words, my concern is that the term of office is not long enough to insulate the Constitutional Courts sufficiently from the ups and downs of the political process. I don't know what I can suggest as an alternative. I guess there are two possibilities. One very simply - just a longer term of office.

The other possibility is - some kind of retirement age. I am not sure this is the position in the USA but I would imagine

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that is another alternative.

CHAIRPERSON:

Thank you very much. I may suggest that just yesterday Arthur Chaskalson expressed some views on exactly the same matter. I am going to ask Willie Hofmeyr, if he wants to in two minutes, just try and attempt some kind of a broader perspective of these things.

MR HOFMEYR:

I think it is an issue of concern and it was raised at the work shop that we had yesterday and I think Judge Chaskalson indicated that they are also concerned about these issues. I think at the moment the 7 years is in the interim Constitution because those doing the interim Constitution did not want to tie the hands of the elected Constitutional Assembly too much.

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I think certainly, many of us believe that either the judges should be able to renew their term if they so choose rather than let the Government choose or that one should have a longer term possibly with retirement ages.

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Beyond that, we will also need a mechanism to stagger the appointment of the Constitutional Court judges - so whatever the term is, that everybody does not leave at the same time and one has some stability and continuity.

CHAIRPERSON:

Thank you Mr Hofmeyr. We have lots of other very important issues that people can talk about, so I am going to cut people down. I want to call on people to give us comment about the legitimacy about the present Court structures.

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What are we to do about the fact that our courts are not regarded as the courts that represent the judicial needs of the majority of our people. Say if we can have some formulations on that. I see a hand here.

MS STEYN:

My name is Robin Steyn, I am practising at a firm Bowman Gilfillen Hayman & Godfrey here in Johannesburg. I just like to address the access to justice point if I can very briefly and I will start up by saying that my approach is a systems approach. It is born out by practical experience in the field.

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Our interim Constitution guarantees access to court as a fundamental right. In the chapter of Human Rights then goes on to discuss the judiciary. I would hope that those drafting our new Constitution, when considering the establishment of our judiciary or judicial structures, in general (mike off) (inaudible) ... that right is not to be debated in the courts only.

That right must be guaranteed as a practical necessity. An access to justice remains a fundamental problem to our legal system. The lack of legal representation, criminal matters does not lend legitimacy to our legal system. The time it takes and the cost involved in having civil disputes involved in our courts does not lend credibility to the system either. The side bar and bar divide is another factor to be taken into account.

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I think all those practical implications, day to day practice in guaranteeing people a real and fundamental right to address the courts and to have access to the courts should be taken into account and it is my hope and my wish that

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the practical issues are addressed.

Whether it is the minimalist or maximalist Constitution. The practical consideration and the way of remedy - the crisis that does exist in our system should be addressed.

CHAIRPERSON: Thank you. I see a hand here. Let me take you first and then I will take you.

UNKNOWN: My name is (inaudible)... I'm not a learned collage, I am 10
just a citizen. I pay taxes came to South Africa 28 years
ago. I became to become a South African with (inaudible)
... together.

CHAIRPERSON: Could you speak louder?

UNKNOWN: I don't think I can, I am a small fellow. My problem is a
very practical one. It is regarding landlord and tenant. We
have got a serious problem in South Africa. 20

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Squatting, building being ravished, destroyed people get throughen into the (inaudible) ... 15 years in a tuc shop centre in the North, I invested 1.6 million to build a place where Mr Thabo Mbeki came for dinner, Mr Sisulu and others. I decided to have a fight with the landlord because he was going against the Government Gazette.

Now we know that if you reasoning something and it is being (inaudible) ... 800 square metres or 2000 something else, that the Gazette can not be changed. Is that correct? 10
The Constitution provide that whatever the Gazetted is Constitutional and can not be touched. I hope this is going to happen in the future. The corrupt Municipality Sandton, let another 7 outlets of the same, exactly the same type - allowed to be built on the same premises. Where 800 square metres of restaurant were allowed...

CHAIRPERSON:

I must ask you to cut short there. We are not dealing with Constitutional matters.

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UNKNOWN:

What I mean is, this is not something from learned

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colleagues it is from a citizen who has to pay out of his pocket to keep fighting and fighting while they use public money - all of us. Stop this change to fight me postpone and postpone till I haven't got any more money.

CHAIRPERSON:

So you feel that the present structure and procedure in the courts is not conducive for justice. Thank you. We have heard that from many people. We certainly going to try and give that some attention in the Constitution. You have raised a very important point. We just didn't want to know about square meter of the building.

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It is a very important point. Thank you for that input. I saw a hand there.

MR MOODY:

My name is Pravesh Moody, I am an LLB student here.

CHAIRPERSON:

You will have to speak up, the panel can't hear you. That is not for sound, it is for recording.

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MR MOODY:

Okay, I would like to make a proposal in regard with legal

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representation. What I have seen in Washington as of Washington DC. All private firms in fact it is being legislated that all private firms will do a certain number of hours with regard to pro bono work would we have something like that here in this country?

I am working on a research project with regard to this and we may need incentives like (inaudible) ... something (inaudible) ... to do (inaudible) ... world and such that the (inaudible) ... can use their resources in the rural areas. I think this is a serious matter and should be considered.

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CHAIRPERSON:

Thank you very much. Are there any other hands? Do I see more hands? Do we want comment at this stage from members of the panel with the regards to the last few inputs?

Are there any more hands? Any more issues that we wish to raise? We have got the very serious responsibility of structuring the courts so that they work. This is serious.

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We have to write up a Constitution that is going to be acceptable to all of you. And if you don't tell us what is going to be acceptable to you, we can't possibly assume that. So, we would really like all views - no matter what they are, to be presented to us - do I have any more hands? Willie.

MR HOFMEYR:

Maybe just to respond to Robin Steyn's point. I think that it is very important for us in the Constitution to put in some imperatives for the Government in the sense to be forced to make the justice system more accessible.

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I would have a slight worry if we say in the Constitution that the Government must institute the system of family courts or community courts or if one gets too much down into the detail of what the Government must do. I think what we should try and do is to find a formulation, that in a sense does compel the Government to do something in practice, because I agree with you that that is a critical point.

Without sort of tying one self down to too much detail, that may have to be changed every year as we try different

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things. Maybe I should just say one other positive thing that was emerging at our seminar yesterday. I think that is that the legal aid budget for next year - is being tripled. Which is one good thing at least and they are considering things like assisting advice offices in rural areas, but really to expand legal and peril legal existence fairly significantly next year.

CHAIRPERSON:

A possibly related point would be to look at and possibly to think about to what extent inside communities - we can have mediation services - revolving around some kind of a community court from the Priests. From other prominent people in the community. I saw a hand there. Robin are you still on this point?

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MS STEYN:

(inaudible)... We use the family court as an example of a creative way in terms of which the Government could use section 103 of the Constitution to enhance access to justice. Our submission really describes what one can produce after researching the current status quo, the various commissions of enquiry, which have been led by Government.

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For the purposes, again, a practical outcome. I would hope to know, if it was to be considered that you would look upon it as a case study. Without addressing the minimalist and the maximalist. I do agree that the bottom line of insuring that access to justice in a workable call should be at the very least provided for.

CHAIRPERSON:

Thank you. At this stage I want to hand over the Chairperson ship to Douglas Gibson, who will take you for the rest of the day. I may leave early. I must just say - it was a pleasure talking to you and chairing this session. I come from this University. I have memories about this venue.

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During the good old BSS days and the crowds were bigger. I just hope that we do fill up these venues in future, because these are the important topical issues of the day. In those days it was struggle and resistance. In these days it is about building and about reconstructing. I am just hoping that the interest here today is an indication of the interest of the university. I am now going to hand over to Douglas Gibson.

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Thank you.

CHAIR HANDED FROM SENATOR MOOSA TO MR GIBSON

CHAIRPERSON:

Thank you Senator Moosa. I think he has to catch an aeroplane at some stage. We have developing this quite nicely. There are a number of other issues that we are interested in - we might seem to be just touching on them here and there. But within the time span that we have got we would like to hear views on, just for example, the composition of the courts and appointment of judicial offices.

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How should judges be appointed? How should Magistrates be appointed? Should the judicial service commission and the Magistrates commission be retained? If the judicial services commission is retained, should its composition be altered. Should there be different methods of appointment for different categories of judicial offices. Like for example the Constitutional Court people - should one deal with those judges in a different way - to the judges serving

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in the ordinary supreme court? I could go on on a number of these issues.

I think you have the idea of what we are interested in hearing from you. It is particularly your views that count. Is there somebody that has got a view. The gentleman there.

UNKNOWN:

My name is (inaudible)... I am also a final LLB student at this University. I was not here when the session started. So I don't know if the issue of language tackled. In fact, my concern is the issue of language requirement. For the purposes of admissions and (inaudible) ... I strongly feel that the clause in the present Interim Constitution, that there should be no diminution of language rights. Especially the existing language rights.

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Actually, it goes against the spirit of the present - the issue of reconciliation. Because I don't see how you can guarantee equality of all languages. On the other hand saying, other languages in respect should not be diminished.

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On the issue, if I give an example on the whole and you want to fit in all the animals that was not there.

There is no way in which you can accommodate all this enemies, in fact diminishing the the status of the other languages that is not there. I feel that the closing the interim Constitution is actually redundant and should be scrapped and also the requirements of languages should also be scrapped on that basis.

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Because I don't see how the issue of all 11 official languages can all be accommodated to fit - scrapping the requirement itself. It is just a given, everybody will be free to express himself, in the language of his own choice. I don't see how the current status of English and Afrikaans should remain in the Constitution. Especially for the purpose for requirements of admission as an attorney.

CHAIRPERSON:

In fact, saying there should be no language requirements for additions as an attorney or an advocate.

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UNKNOWN: Yes, I think we should call it an example in the United States. That is there no requirement for language. It was given that everybody expresses himself in the language that he or she is comfortable with.

CHAIRPERSON: Thank you. That is an interesting view. Is there anybody who would like to comment on that? Doctor.

UNKNOWN: It has been suggested in some quarters to remove the language clause from the legislation itself and allow the institutions that will give the courses to determine the curriculum, to determine what the requirements are.

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Give it at that and that can be negotiated between the students, parties, the university or any other form of negotiated matters. Would that be an acceptable form?

CHAIRPERSON: Would you like to respond?

UNKNOWN: The requirement for admission as an attorney at the present moment it is being Government by the Law Association of

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South Africa. I mean, it is best for example, you can graduate from your LLB in fact in your first languages. It not a requirement for the peoples of a LLB degree. My concern was just for the purpose of admission as an attorney or advocates. I feel that it should be scrapped. That department should be scrapped.

CHAIRPERSON: Thank you very much. Willie.

MR HOFMEYR: Maybe, I should just add. The issue was discussed at a legal forum that the Minister of Justice held last year in the context of scrapping the Latin requirements. Now I think in principle, most of the people there felt that we should not in legislation have language requirements for admission of attorneys or advocates and I think in principle that has been decided. 10

It was felt that we needed to spend a bit of time, just consulting with people and making sure that we get the views of everybody on the issue, but it is a matter that the department of Justice is dealing with and I think it would be 20

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good if you could write in. If you have views on the matter and make sure that your voice is heard on that.

I am pretty sure that we will have legislation in the next few months to scrap those legal requirements.

CHAIRPERSON:

More hands? I see a hand. Mr Kriel, is it?

MR KRIEL:

Ross Kriel a LLB student at Wits. I would like perhaps, I am not sure if it should be in the Constitution or not, but it is very important to me that hearings by the judicial services, commission or whatever body is substituted of hearings concerning nominations for the Supreme Court and the Constitutional Court be held in open in the public.

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I understand the Judicial Services Commission is now committed itself to hearing Supreme Court nominations in public, but I think that perhaps the procedure should be laid out more formally. Being a minimalist I am not sure if it should be in the Constitution or not. It should be laid out somewhere.

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The other issues I think, at the moment, at least as regard some of the judges, the President makes decisions after consultation with the Cabinet - I guess that is premised on a Multi Party Cabinet which I hope he won't have in a final Constitution and on the assumption that we don't have one, I think Members of Parliament and particularly members of opposition parties in Parliament should have a chance to question judges about their position on issues, decisions they have made in the past on matters of controversy that Members of the Public might have an interest in. ...

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CHAIRPERSON:

(inaudible) ... a long interview with an aspirant judge, is sufficient. We had a view expressed at our legal forum that people who dealt with that aspirant during his career and advocate or attorney or whatever, should also be called upon to make submissions and I suppose converted it more into United States type of system.

MR KRIEL:

It seems to me the system in the USA is not quite as friendly as that. That's why I have mentioned it and I think members of opposition parties in Parliament rather than

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colleagues and academics solely, should be in a position to question judges about their position and issues and decisions they made in the past.

We can't kid ourselves here. The Constitutional Court is a body with a great deal of political power and I think that it is important that representatives of political parties have an opportunity to air in public issues which they think are controversial and issues which they feel might be sufficiently important to undermine one of the Presidents nominations.

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As regards, the possibility of one hour at session, it seems to me a bit short. Even so, I think it should be possible as in a case of Clarendon Thomas for information comes to light that maybe significant and if the information is important enough to possibly undermine the nomination, sufficient time should be given to the process for that information to be properly digested.

CHAIRPERSON:

Are there other hands? Are there other views? I see a hand there.

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MR SKOSANA:

Robbert Skosana here, a student here at Wits Law School. I just want to say that the interim Constitution is not explicit on the competency of Magistrates or Constitutional matters. My feeling is that Magistrates Courts in the area where the majority of the people come face to face with the judicial system. With the result I should feel that the magistrates should be able to adjudicate over Constitutional issues but there is a big proviso in my opinion.

That is the bring into operation the statute custom of 1993 where you would have Senior Magistrates. Because we need people who are trained like legally to judicate over matters of the Constitution. Secondly, the provinces of this country, I feel that we need provincial divisions in each of the provinces. Not only the existing four. The third one is the Appellate Division, should also be brought into judicate over Constitutional matters. Constitutional Courts should finally decide on these.

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CHAIRPERSON:

Interesting views Mr Skosana. I saw a hand over there and then over there. We will get to you. I thought it was this

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gentleman here. Did you not put your hand up? No? It is Mr Ramsammy, is it not?

MR RAMSAMMY:

Chairperson if you look at the recent OJ Simpson trial, the very important concept has arisen there. That is concerning the rule of evidence - if you look at what the plaintiffs are saying, is that OJ Simpson's prior act of sexual abuse and assault - is that relevant to this particular issue?

Now, I think that has to be taken into consideration. Is a person's, prior behaviour, is that influencing his particular action now? In other words, if you stole 20 times before, now that you get caught, do they act on this particular issue.

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Are you therefore found guilty, simply because of your prior history? I think the rules and evidence has to be looked at in that regard. Thank you.

UNKNOWN:

Thank you Chairperson. I would like to address my comment to criteria and the process of appointing judges.

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Again just in line with the idea of just broad principles. A problem that I observed with the criteria that we have right now, is that it perpetuates the consequences of past discrimination.

It has provisions, for example, the judges should have 10 years experience or something - similar to that. That is an arbitrary provision. It is assuming to be a good judge. You necessary need 10 years and obviously it is implying that if you don't have 10 years, you can't be a good judge. Where as you can have 30 years and still be a bad judge.

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So I say basically, my response would be that we need criteria, that has relevance to the performance of their task and their task would be to deliver justice. I think that would help us again when we are dealing with Magistrates. At the present moment, people who are not competent to deal with customary law, who don't know one rule of customary law, deliberate on those cases and the effect is a miscarriage of justice.

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I would go to whole issues around for for example - interpretation in court or translation. That is again - leads to miscarriage of justice. As far as criteria is concerned, I would say it should be relevant to the performance of their task and an attempt should be made to create a representative judiciary in terms of race and gender etcetera.

How should this be done? The present process gives lawyers too much say in how judges should be appointed.

I would like to see a situation where this broader participation, by civil society - at the moment it is mainly lawyers and a few politicians and I don't have a particular suggestion but in attempt maybe to allow representatives of civil society to reduce their representation of lawyers in the Juditional Service Commission or in the Constitution that is going to perform the same task. Thank you.

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CHAIRPERSON:

Mr Jacobsberg behind you, first and then the gentleman in blue.

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MS FATIMA:

My name is Fatima (inaudible)... I am of Wits Law school.

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My main concern is the problem of the horizontal application of the Bill of Rights. The old and just system and the present democratic system which has been established. Within that context, two considerations need to be considered. The first of which is the prevention of the development of tyrannical state system. The second is to allow for individuals to have recourse to the legal system in situations of individual discrimination.

Now, if one considers this current vertical application, it caters for the first of those concerns only and not for the second. The proposed Civil Rights Act for instance, I would submit - it is possible that it would not cover all possible areas of individual discrimination. I do think that the possibility of a horizontal application of the Bill of Rights needs to be reconsidered.

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CHAIRPERSON:

That is an interesting view. There was a gentleman there, he had his hand up for ages. Then there is the man in the red shirt and then the blue.

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MR MASELUKA: My name is Mike Maseluka, I am a former student of the University of the North.

CHAIRPERSON: Can you talk up. That is not the mike, that only records.

MR MASELUKA: My name is Mike Maseluka, I am a former student of the University of the North. My question is based on law students. When they finish their education, they find out it is very difficult for them to find articles.

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Is there any possibility where they can find articles - articles are being served while you are at school. Because most of the law firms, when you go to law firms, they ask you - where are you coming from? If you are raising Turfloop they don't accept you. They say you are coming from a bush University. To avoid such practices, is there any possibility that articles can be served while we are at school, as part of the curriculum.

CHAIRPERSON: Sorry, do you mean at law school or do you mean at high school?

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MR MASELUKA: At the university, yes.

CHAIRPERSON: Do you think that one should have the opportunity of doing that?

MR MASELUKA: Yes, I believe that if - to do B.Proc, is a 4 year degree - if they can add one or 2 years for articles. That can be better.

CHAIRPERSON: Would you get sufficient experience do you think?

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MR MASELUKA: People can do community project whereby they can even help the disadvantaged people.

CHAIRPERSON: Thank you. The gentleman in the red shirt here. While we are waiting for the microphone. Let Willie respond to this about the articles.

MR HOFMEYR: I think it is a big problem and certainly one - I don't think one that we can deal with in the Constitution. But in the justice standing Committee, we looked at a number of ways of tackling that problem.

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On the one hand we have many people in this country who are not represented in court and on the other hand we have many people with legal qualifications who are not able to be used to represent them. I think two of the things that we are looking at is the one is to have a called a ladder system of legal qualifications. So that people can go and do a diploma of law or a B. Proc even, and then go and practice, that they will have certain appearance rights in smaller matters perhaps and so on.

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They can come back, finish their LLB later on. That you have greater mobility between the profession and your studies. That you don't have to finish your full LLB before anybody is going to look at you. I think the other areas where we are looking at the short term of utilizing people, would be in things like the public defenders system.

With the increased allocation for legal aid, for example. I think the legal services will be expanded significantly. I think the proposal that you made is a new one - that I have not heard before. I think certainly it is one that one also

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can look at. I think you will again then have the problem of the Universities having to find somebody to take you for articles and you may have the same problem again. I think what we really should look at is a number of different ways in which we can tackle this problem.

The other thing that has been developed is the law schools, now run by the association of Law Society and others where you can do practical training and write your admission exams with very little work in the profession itself. I think we are going to have to find a number of different ways to tackle the problem. I think that is a useful suggestion, but it will have to be one of many.

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CHAIRPERSON: Finally thanks.

UNKNOWN: Unfortunately I have arrived late, so please stop me if this matter is being raised. My concern relates to the 10 year of the Constitutional Court judges and particularly the provision which states that they serve for a period of 7 years.

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CHAIRPERSON: We did have the matter raised by Ross Kriel. Do you have a view?

UNKNOWN: Then I am covered. Just that I think that the term is both arbitrary and is too rigid, because the results in the entire bench. Almost be exchanged at once. It lacks continuity.

CHAIRPERSON: Ross made that point. We said that Judge Chaskalson yesterday expressed the same view. So, you are in very distinguished company.

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UNKNOWN: I am glad to hear that.

CHAIRPERSON: There was a gentleman here in a blue shirt. Then Mr Jacobsberg please.

UNKNOWN: I am from the Community Dispute Resolution Trust. I am very concerned about the legal aid system in South Africa. I heard over there, Johnny de Lange talking about the tripling of the budget of the legal aid fund. But the problem is not with the budget. We might have so millions which is

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set aside for people to be represented freely.

For those who can't afford lawyers. But the problem is with those people who are dispensing or administering that particular fund. Especially the Magistrates Courts. Those people I think still need some education - how to treat the community. Especially black people. When ever they go there and apply for legal aid, they are being asked so many questions which are sometimes irrelevant - which will even lead for that person not to get that particular legal aid.

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If you can educate our court personnel especially those whites who are still holding those grudges against black people. I think the legal aid fund, no matter how much it is, it won't just become effective. That is my great concern.

CHAIRPERSON:

The gentleman here is Johnny de Lange. Johnny de Lange he is the good looking one who is not here. Mr Willie Hofmeyer is the one with the brains who is here. Sorry I think Mr Ebrahim would like to respond.

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MR EBRAHIM:

I think the issue that you are raising here is with the regard

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to the administration of the legal aid board and other institutions that are supposed to assist, but there is also the other issue of the question of the community courts - I think this is something that has to be also looked at, at the grass root.

Where you find that people have got together and have established dispute resolution Committees - as to how we should bring that in - should we leave it to civics bodies to administer that. Should we give it some sort of legal status. Inside issues that have come up. How do you bring them in? How do you appoint the people who are suppose to administer justice even at that level.

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Should it be popularly elected - should we have one person popularly elected, another person brought from the judicial fraternity to put together - these are some of the views we would like to have in addition to what you are saying here with regard to - I understand there is the question of the administration. The legal aid has had quite a lot of problems in that regard.

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CHAIRPERSON:

Just on the question of the civil service, you know, there are a lot of people in the civil services who forgotten how to be civil and the fact that they are there to serve the people. The people must remind them every now and then about it. The people's representatives must do the same. Mr Jacobsberg.

MR JACOBSBERG:

Thank you Mr Chairman. I just like to add my voice - I want to state my name again. It is Ian Jacobsberg. I just like to add my voice of support to the opinions that have been expressed that a separate Constitutional Court is not appropriate.

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I realize that in our interim faze there are problems of the legitimacy of the existing court structure and that the Constitutional Court may be an inappropriate interim measure, that one would hope that in a fully democratic society the court structure is going to be - the entire court structure is going to be the way in which the people will in force their rights.

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There are going to be a growing number of cases coming to court with a Constitutional overturn or a Constitutional aspect. The procedure that the Constitution, the Interim Constitution lays down, is only going to create further bottle necks, as it is, litigation is an extremely lengthy and costly process.

This process that we have at present where the Appellate Division cannot deal with a Constitutional issue, where the Supreme Court has the authority to decide not to deal with the Constitutional issue and kick the matter for touch to the Constitutional Court. That will inevitably - immediately duplicate litigation, create another procedure extensively lengthen the process by at least months if not years. Duplicate the costs and as I say, just to sum up, the court structure, coming from the Magistrates Court upwards through the Supreme Court, to the Appellate Division, should be the structure through which the people in force their rights and therefore is no reason why the Appellate division should not have the jurisdiction to decide on the Constitutional issues and to decide on infringements of

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rights.

MR HOFMEYR:

Maybe it is said that it is an issue that we are debating vigorously at the moment. I think that there is a strong argument that all the courts must have as much Constitutional jurisdiction as possible. That they all need to be guided and fused by our bill of rights and the Constitutional Approach.

I think the arguments in favour of the Constitutional Court has not only been that the present judiciary and in the foreseeable future, that the judiciary and the field court are going to be pale and male. Therefore lack a certain representativeness of society. Which is very important in a situation where your highest court is going to be given immense powers to tell Parliament that you can't pass a law like that for instance.

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So, it is important that your highest court - in some sense the people must have a confidence in that. Whatever the views may be about the legitimacy or otherwise of the

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present court. I think if you look at Europe and a number of those states like Spain and Portugal and Germany - where people have come from very repressive societies into a Constitutional state, they have felt the need to set up a Constitutional Court that is separate from the existing judiciary which often had the same problems that in a sense we have had here.

I think that one can probably achieve the same - I think you can distinguish the need to have a Constitutional Court from the question of whether other courts should have Constitutional jurisdiction. I think there is certainly a strong argument that all the courts should have Constitutional jurisdiction. But in some ways, you will still need a Constitutional Court that will have the final say.

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Some of the courts take the decisions that lack, human rights perspective or what ever, that the Constitutional Court will be able to turn that around. I think that is a vigorous debate at the moment and if people have formulated views, we would really welcome them in writing

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or otherwise on that issue.

It is not an easy or simple question. I think also we are obviously, we must not look too much into the problems that we have right now. I mean, we are writing a Constitution. Hopefully for the next 200 or 300 years. So, one also does need to look forward. There are many countries in Europe where there is a separate Constitutional Court that deals finally with matters of Constitutional importance.

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CHAIRPERSON: Thank you Willie. Now the gentleman in front here.

MR GREGORICH: My name is Johannes Gregorich. I am an Austrian lawyer just visiting your country.

CHAIRPERSON: Welcome.

MR GREGORICH: Thank you. Excuse my poor English. I think the main point is come from the gentleman, I forgot your name - I am sorry. You must ask then what has the Constitutional

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Court to repair in fact. Has it to repair an individual case - that it hasn't built adequately with the human rights of this individual person or has it to repair a single law for example, that in fact, discriminates a person, for example.

When you look at the - as you mentioned, the European systems, I think practice European Commission of Human Right with a excellent catalogue of the European Commission of Human Rights, good catalogue of Human Rights. If you look in fact at the results of the cases, far most of the cases are dealing with this article 6 of this convention. That means vehemence of procedure in the different countries.

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Lengths of procedure and so on. I think you have to look, what in fact has a Constitutional Court to repair for the individual case.

CHAIRPERSON:

Thank you. That is interesting. You don't have to apologize for your English, it is much better than our German. Are there more hands? It was Mr Skosana.

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MR SKOSANA: I am just curious to know from Mr Hofmeyr as to how the issue of privilege was dealt with in Somerset. In that law forum. You will agree with me that privilege are fairly reasoned phenomena. What I am worried about are the by - exams.

MR HOFMEYR: I can't remember that it was actually dealt with there. I think the main point that was discussed was attorneys right to appear in the Supreme Court, which I think in principle has been accepted and legislation has been prepared on that.

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I mean, in some ways that does get around the question of privilege.

CHAIRPERSON: I sense that people are getting agitated about getting back to lectures or to the swimming pool or whatever students do in the afternoon. I see no other hands.

May I then on behalf of all of us thank Dean Lewis for arranging today's opportunity - for the members of our

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CONSTITUTIONAL ASSEMBLY

PUBLIC HEARING:

THEME COMMITTEE 5

28 FEBRUARY 1995

Theme Committee to have some public participation with students.

[END]

CONSTITUTIONAL ASSEMBLY

PUBLIC HEARING:

WITS LAW DEPARTMENT


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THE CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

28 FEBRUARY 1995

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