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CONSTITUTIONAL ASSEMBLY

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THE JUDICIARY AND LEGAL SYSTEMS

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PRESENTATIONS BY
NADEL & LAWYERS FOR HUMAN RIGHTS

CONSTITUTIONAL ASSEMBLY

DATE: 8 FEBRUARY 1995

CHAIRPERSON: Half past eight and Mr Gibson is still busy on his second coffee. Mr Gibson, will you join us, please?

We have today from now until 12:30. I'm sure all of you have many other matters to attend to, so let's try to keep today's session as brief as possible, and we will start by introducing NADEL. We welcome the four members, Adv Desai - can you just indicate who you are, Mr Desai? Just put up your hand so that they see who is Mr Desai, and then Mr Vincent Saldanha, that one, and Dr Vela Sibisi, Dr Sibisi there, and Mr Brian Hurwitz.

You have 15 minutes, gentlemen, to put your case and if the one who starts first just will take one minute to tell us something about NADEL, thereafter the members will be entitled to ask you questions. Nobody is entitled to argue with you. There will be only questions of clarification so that we understand fully what your input is.

Is the other gentleman also with you? Who is he?

(?): (Indistinct.)

CHAIRPERSON: Thank you. Who's going to be first? Can I just finally say, I know you are all lawyers, in order to keep it brief, may I remind you that you're not being paid.

(?): Thank you, Mr Chairperson, and warm wishes to the panel here. On behalf of NADEL nationally we wish to thank you for the opportunity, which you afford not only to us but to the nation, to the people of South Africa, to make these submissions to you.

 Mr Chairperson, .../

Mr Chairperson, a brief background to NADEL. We are a national lawyers' organisation; we're comprised of practising attorneys, advocates, legal academic students, paralegals; we have nine branches throughout the country; we have a national executive; our head office is based in Johannesburg; our National President is Adv Selbi Barkwa(?); and our past National President was Adv Pias Langa(?), who has now gone to higher echelons.

Mr Chair, NADEL's history dates back from 1987. It is one of three what we regard as progressive lawyer organisations, together with the Black Lawyers' Association and Lawyers for Human Rights, who are our fraternal organisations who were borne out of a period of immense struggle and conflict in our society and there appeared to be a need for progressive lawyers to come together to begin to articulate the aspirations of their clients and the communities whom they served. That is the rationale for NADEL. We've existed all these years. We have extensive links with community organisations and with lawyer organisations internationally. We subscribe fully to the principles of nonracialism and democracy and acutely are sensitive to the issues of gender sensitivity. Mr Chair, that's a brief background to NADEL.

I hand over to Adv Desai, who will lead us in our submissions.

(?): (Indistinct - not speaking into microphone.)

ADV DESAI: Thank you, Mr Chair. May I just deal specifically with the issues which we'll deal with today. May I at the outset say thank you very much for giving us the opportunity to participate in your historic duty.

I will not deal with the papers before you but specific

proposals with regard to the structures contemplated and to be discussed by yourselves. Firstly, on the issue of the constitutional court, I put forward a firm view and a firm view which we hold, and that is that the constitutional court should remain a separate chamber. We make the submission simply because - and I don't think it's a subject to debate - the legal profession as presently constituted reflects its distorted task. That if the constitutional court or any other court which presently exists inevitably will reflect the unfortunate history of this country.

I know it has been argued that in the next seven years or when the present lifespan of this constitutional court expires, the South African legal situation, the face of South Africa may have changed, but that's simply put and simply stated and I doubt very much whether reality will bear that out. The legal system in this country as it is dominated and as its structures are constituted will survive for many generations to go. And I think the only appropriate thing to do is that we have a court which enjoys the maximum support of the people of this country. It has the double advantage - it does not come simply from the ranks of the established legal forum but it also comes and it's also appointed by a commission. When appointing and when selecting a constitutional committee, it's aware of the demands placed upon it by the Constitution and by the parameters within which the Judicial Services Commission is constituted. For a number of reasons it seems to be the most appropriate method of continuing having a constitutional court separate and distinct from the ordinary courts of the country.

The other point which emerges in so far as structures

are .../

are concerned, is the issue which I read about in the newspapers, the suggestion that there be three different appellate divisions in the country. Now, instinctively and on my understanding of NADEL policy, this notion would not be accepted simply because one views the country and the legal system in the country as a unified legal system. To divide the country up into separate, or three or four divisions where appellate divisions are located would result in a fragmentation of the legal system in the country. The disadvantage, obviously, to that also is the fact that this country has different structures, the economics differ from one part of the country to another, and if there are separate appellate divisions, then the law will develop separately in different parts of the country. Also it's an unrealistic proposal in the sense that it would be far too costly to set up three new structures to replace the existing Appellate Division.

In so far as structures are concerned, there's another important aspect, and that is the creation of further structures, not to duplicate but to simplify the implementation of justice in the country. The first and obvious example is serious consideration must be given to the creation, for instance, of a family court. A family court needs its own personnel to implement. We've gone some way in that regard with the setting up of family advocates and so on. Family courts, by definition, require a separate sort of structure, a separate support structure. One needs welfare officers, which we have. One needs family advocates. To house them separately and to be able to implement family justice more effectively is one of the structures that one should consider as a separate structure.

To make the law less cumbersome, the other structure is not a structure to be created but a structure to be deleted, or work of judicial structures to be excluded. There are certain offences in this country which must be decriminalised. One doesn't need to have people going for traffic offences to any court of law, or for petty crime for that matter, or very petty offences. Some of these offences could be dealt with administratively, but more than anything else, petty differences belong to a community and to be resolved within a community.

The proposal would be that in so far as these instances are dealt with, we propose that a peace officer, or whatever you call him, be appointed by the Justice Department in each little area of this country - a respective member, not necessarily a trained lawyer - and he attempts to resolve petty differences. It means there'll be less strain on the courts and with criminal and civil matters of a petty nature it could be speedily and summarily resolved.

I'm mindful of the time, so I'll go as fast as I can. In so far as the relationships between the different levels of courts are concerned, I wish to make simply two points, the first being this, that the constitutional court inevitably at the maximum would hear 40, 50 matters for the year, if that. The President of the court has remarked on occasion there will be 27 matters for the year, but at the most they hear 40, 50 matters. This Constitution permeates every aspect of our lives and I think it would be unrealistic to expect every aspect, every issue to be resolved in a constitutional court. There must be provision for constitutional matters to be raised in the other courts as well and for the other courts to dispose of constitutional

matters which can be disposed of quickly. Obviously, the ultimate arbiter of constitutional matters will have to be the constitutional court.

The other important matter, and I think the lawyers, members of the Bench who are present would appreciate, and I raise this specifically and it's the only other matter I raise under the relationship between different levels of court, and that is that as presently constituted, any person who appears in a Supreme Court, who appears in front of a single judge, does not have an unfettered right of appeal. In practice it means that a person who can get life imprisonment, appearing in front of a single judge, that judge is not disposed to grant him leave to appeal to a higher tribunal. It effectively means, unless he gets leave from the Appellate Division, that his matter has been tried and disposed of by one single judge sitting alone or sitting with assessors. It's an unfortunate sort of situation, because there are three different varying factors involved. One would depend entirely upon the personality of an individual. It's unfortunate to make justice dependent upon the personality of a schooled, trained individual, but nevertheless an individual. Secondly, it depends on the seniority of the counsel who drafts leave to appeal to get leave to appeal to the Appellate Division. If that is turned down, then your doors are closed. Ultimately it also depends on which judge of the Appellate Division reads the petition. So there are a number of variables which would serve to fetter your right to appeal, and your right to appeal in these circumstances inevitably is restricted.

There is a provision in the Constitution which talks about the right of appeal, but in drafting new structures

for the new era which we're moving in there should at the very least be the right of appeal to every individual who appears in front of a single tribunal. I'll deal no further with that aspect, although one could deal with great detail, both to the structures and the relationship.

In so far as the composition of the courts are concerned, I don't intend to repeat like a stuck record the things that are said by every progressive lawyer in this country. It's not, in fact, said by all lawyers in this country today. Whatever we do, whatever we say, the Bench remains a Bench composed, because of our history, because of our past, as it stands - not gender sensitive, not race sensitive and not class sensitive. It reflects the norms and values of a particular, a very narrow sector of society. Now, this has been the subject of debate.

There's a paper here somewhere that deals with that issue, but the point I want to make simply with regard to the composition of the Bench is that what we are talking about when we talk about restructuring the composition of the Bench is not simply changing the colour composition of the court or the gender composition of the court. There's a far greater principle involved. What we are talking about, we're talking of a transformation of the court, we are talking about putting in place a court which reflects the values and norms of a new South Africa, a new South Africa to which all of us who are signatories to this Constitution and all of us who have participated in the struggle against apartheid adhere to.

It does not mean that if one appoints two black judges in each division, that the situation is resolved. I say so and I say so without fear of contradiction, that the person

may be black but it may reflect the values and norms of a white middle class man. Similarly, a person may be a woman and have no notion of what the struggle of women is all about. So I would suggest that in dealing with the composition of the court, one bears that factor in mind, that one is talking of a transformation of the judiciary system at all levels.

The other point in so far as the Judicial Services Commission is concerned, I know the word "pact"(?) is a popular word nowadays, but there was this pact which arose as a result of the interpretation of section 105(e) and (f) of the Constitution. That pact arose because at the time this Constitution was negotiated, and those of you who were there at the time of the negotiations will remember that the proposal was that the two advocates, the two attorneys be appointed by their respective professional bodies. It was recognised, and correctly so, that the professional bodies do not represent or are not representative of the population as a whole. Their own composition is a product of our history. The proposal then was that the two advocates and two attorneys be designated by the profession. The drafters of this section obviously duck the issue, but I think in facing this issue one must face the facts and in drafting a new constitution one must face the facts and deal with it to give dominance to the profession as costs. It remains constituted, but we give dominance to a particular sector of the society as well and one must, if necessary, amplify these sections.

The other aspect of the Judicial Services Commission - and I say so without fear of contradiction for my colleagues certainly - is that in the composition of the Judicial

Services Commission lawyers are very well represented. We have the Chief Justice; we have the President of the constitutional court; we have the Minister who is also a lawyer, I suppose; we have two advocates, two attorneys and professors of the law; and then we come with the senators and so on. Now, I don't intend to repeat how we see the professionals involved in this country, but it is to be a democratisation of the legal profession in this country and of the judicial system in this country. If we are to give effect to democracy as it is adversely understood, then the candidates or the people who constitute the commission should be largely people from the community. In other words, I'm not saying that the legal profession should not be there. Obviously the legal profession has a role; it determines competency. It can make an input as to the ability of people to sit on one or other judicial body, but over and above that the Judicial Services Commission must reflect the will of the people of this country as well, and that's best done by people like you, the elected representatives of the people of this country. Our submission is that if the Judicial Services Commission is to be weighted, it should be weighted in favour of the people, not in favour of lawyers. I say so against my cause, but it should be weighted in favour of the people of this country. As it is presently constituted, the weight may swing the other side. I'm not saying it does, but if you take the figures into account, the lawyers form a substantial majority in the ...

In so far as access to the courts is concerned - it's the final block ... Mr Chairman, if I've extended the time, will you give me a minute more? I'll just deal briefly with the question of access. We support the notion of it being

implemented particularly in the Cape Town Magistrate's Court region where there should be lay participation in all court structures as far as possible. It has, in fact, been done so and it's the progressive step in the correct direction. It has two advantages - one, it addresses the imbalances of the past, that may well be, but secondly and more importantly, it brings the courts nearer to the people. The people actually participate in factual findings and sentences. It is being done. It should be refined, it should be formulated into law.

The other negative aspect is the question of the Supreme Courts where judges choose the assessors. That's an unacceptable state of affairs, because a judge chooses - I'm not saying all or any judges do, but a system of lay participation or even if it's professional participation in the Supreme Court structures should involve certainly the persons participating should be selected on a random basis or a basis which takes away the arbitrary nature where the judge decides who sits with him. He decides his own court. That must be looked at and how community participation is incorporated in all levels of legal practice in this country.

I've raised a number of points. None of the points, I'm not suggesting in any way that we must scrap the legal system, and that means throwing the baby out with the bath water. The legal system should be adjusted within the parameters of suggest. Thank you.

CHAIRPERSON: I notice from the document which was circulated, which only arrived yesterday, and I don't think our members have had time to look at it, but you say there that the question of a single or a split judiciary you, will

comment to that later. Is somebody going to do that, because although your time is up, this is going to be part of the first blocks. Could I give you another minute or three, if you are in a position to do so, to say something about your attitude towards that?

____(?)____: Thank you, Mr Chair. In fact, by agreement with adv Desai it was agreed that I would address you on that issue, together with others. At a national conference of NADEL which was attended by a number of lawyer organisations the issue of the split judiciary arose very crisply. And what was very clear was that there were various views from the various legal organisations with regard to whether there should be a split judiciary or a bifurcated judiciary. We think that there's certainly merit in the argument for a single judiciary as in the continental systems, but we think, and we take the submission no further at this stage, this is an issue which we and NADEL would still wish to consider within our branches and at a later stage make submissions. We also think that it's an issue important enough for your technical team to begin to research stories that an informed position could be arrived at.

One of our big concerns about the bifurcated judicial system is that you have a Magistrate's Court on the one hand and you have a Supreme Court on the other. The perception by ordinary people is that there are two types of justice in the country. There's a cheap and a quick justice in the Magistrate's Court and a very expensive and inaccessible justice in the Supreme Court, and that's the situation which we think needs addressing.

Mr Chair, that's our position on that and we would like

to address you further on that at some later stage.

CHAIRPERSON: I must point out to you that a later stage mustn't be very far in the distant future, because we're now writing the constitution, we are in the process. If there were some others of you who intended to make remarks now, in view of the fact that you are overtime now, I think when the questions are now being put you can decide which member is to reply to the question and then they can make their inputs. We have Mr Danie Schutte and then Mr Douglas Gibson, and then ...

MR SCHUTTE: Thank you, Mr Chairman. I cannot but congratulate the honourable members for the very short, lucid, clear, to the point presentation here, covering a very wide range. I must compliment them on the way that they did it.

Two matters - first of all, I think that you made a very important input on the community courts for petty offences. My question is - this should be closest to the people, there's no doubt about this - in which level of Government should this be attached to? Is there not a good argument that this should possibly be a power that could be devolved to the provincial governments, or even lower? That's the one point. The other point is - and that's perhaps departing from the practical nature of your representation - your whole argument regarding the appointments of the judiciary. I think scrapped of all the niceties, it is actually an appeal for political appointments. I'd like to have your response to that. And if so, is that not in line with the Constitution, if one looks at constitutional principle 7 which says:

"The judiciary shall be appropriately qualified,

independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights."

Now, I have not heard in your representations this morning any appeal for impartiality for the upholding of the Constitution, and is that not the crux of the matter that we should have a judiciary? And I can take all the criticisms that you've got, but the point should be that we should have a judiciary that is impartial and as a result can uphold the Constitution and the law impartially. Thank you, Mr Chairman.

ADV DESAI: Thank you, Mr Schutte. In so far as the first question is concerned, I agree wholeheartedly with the suggestion. This power should, in fact, devolve to local governments, right at the lowest level. How else do you determine who are the respective communities but the communities themselves to decide who enjoys their respect and who enjoys the sufficient authority to be a peace officer in that area? It's a subject which can be debated. We initially thought that all these peace officers should, in fact, be appointed from a list to be determined by the Justice Department, but I think it makes much more sense, as you suggest, that we actually determine it at local level of Government. It's probably more democratic in that sense of the word.

In so far as your second question is concerned, I agree absolutely without any reservations that a court should be impartial, that the courts at all levels should exercise their authority impartially, but impartiality in many instances is a myth. What impartiality has there been in the past when we proclaim a judicial system which inevitably

implements justice from its own particular perspective, if we take the past into account? One is not looking at political appointments, one is not asking for the political credentials of people but one is asking for a judiciary which enjoys the greatest respect and confidence of the people, and the only way to determine that would be, as is set out in the Constitution, the parameters that have been set out in the Constitution. We set out in the papers before you the criteria that we used in selecting judges. There's been detail criteria set out, and we say very clearly what the criteria should be.

It's a very important question. May I just refer to the ... if you look at paragraph 3 of the first paper, we say that the people appointing the judges should be independent of judgment, (b) integrity, (c) experienced in the law, but we go a step further and say that he should have community awareness and be sensitive to the social problems and social values. We say further there should be commitment to uphold the law and then obviously they should have professional competence and ability to give clear and reasoned judgment. Those are the criteria we use to select the judge.

The issue remains who selects the judge. Now, we all select them from our own particular perspective. Whether you or I select the judge, we certainly would select them from different perspectives, but my argument is this, we have a democratic Parliament here. Shouldn't that democratic Parliament, as reflecting the will of the people, have a say or a greater say in determining who should be our judicial - who should be judges? I'm not saying that lawyers should be excluded. It is important to have

lawyers there, to have judges there who can deal with the questions of competence and who can deal with some of the criteria that are set out in here. But on the other hand, the community must have the deciding say, otherwise you'll go and you'll entrench the past. You must go beyond that and let a new generation decide how justice is implemented in this country. I repeat that one must absolutely guard against any political interference from the judiciary and any political attempt to appoint judicial officers politically. That we must guard against. I agree with you on that.

CHAIRPERSON: Just to put your minds at rest, it's Mr Gibson now, then Mr De Lange, then Willie, (indistinct.), Mrs Naidoo, Jana and Dr Frik van Heerden. So it's you, Dougie.

MR GIBSON: Thank you, Chairperson. Just a couple of questions. Firstly, as far as the Appellate Division is concerned and the constitutional court, it seems that what you want is to retain the new structure that we have as now. We've heard quite a bit of evidence to the effect that it's probably not as efficiently workable as we would have liked to have the constitutional court overloaded with an unbearable flood of cases and that one of the ways to assist is to look at the question of giving the AD and the Supreme Courts and others jurisdiction in constitutional matters. Would you agree that there is a looming problem with the constitutional court here and whether one should not be looking at this question of increased jurisdiction for other branches of the court? That's the first question.

CHAIRPERSON: Mr Gibson, do you have more questions?

MR GIBSON: I've got more. They're not exactly on the same subject.

CHAIRPERSON: .../

CHAIRPERSON: I'm going to allow you to do that, but what worries me is a tendency that a person puts up his hand to ask a question, then he asks seven questions. Can you reply to that one then?

MR (?): A very short reply, Mr Chairman. We fully agree that certainly we need to look closely at the process of getting into the constitutional court. We anticipate that the wheels will come off. It's somewhat an unhappy situation that the constitutional court will only be able to deal with no more than about 50 cases, and one can imagine there's going to be almost hundreds of issues which will need to be adjudicated by the constitutional court. We think that closer attention needs to be paid to look at possible ways of seepage with into the other court structures.

MR GIBSON(?): Chairperson, that's exactly the opposite of the recommendation you make here. The answer you've just given isn't what you recommend. So I'm glad we've clarified that. Then also on this question of the reconstitution of the judiciary, I think I'm on the same side as NADEL on this, but I also have a concern when one reads here that the judiciary must be bold enough to uphold the principles and values of the people of South Africa, even if not provided for in the Constitution. Now, this might be entirely innocuous, but the thing that does worry me is judges are there to uphold the Constitution and to apply the law and to protect the individual. If they start interpreting what the principles and values of the people of South Africa are and this goes outside of the Constitution and outside of the law, I'd like to ask you whether you're not getting into a very dangerous area, more particularly because of the fact

that .../

that we have very sharp differences in our society, and political differences? Now, I suspect that most of the political parties in South Africa, in fact, share the same principles and values, and we do operate under a liberal democratic Constitution. We hope the new one will be there. But when you start getting further than that, do you not have the danger that somebody who's, for example, a supporter of the Democratic Party will have a view which differs from somebody who's a supporter of the PAC and he then or she then, that judge is going to start interpreting what he or she thinks are the principles and values? And when you ally that with your selection which says they've got to reflect the norms and values and you want to inject the politicians into it, are you not creating the very situation that Mr Schutte referred to, or certainly hinted at, that you're going to politicise the judiciary? I'd like to ask you whether you've considered the fact that governments can change. It's happened twice in my lifetime, it's happened once in the lifetime of most of the people sitting around here. It's happened twice in my lifetime.

(?): (Indistinct.)

MR GIBSON: Yes. But it's a possibility, and if one believes in a democracy, then you must think that governments can change and in five years' time you might well have a totally different composition all voting for different judges, and are we then not going to end up with the same situation that the new lot say the old judges are all illegitimate? I'd like you to just address those concerns.

MR (?): I think, Mr Chair, when we say that judges must uphold fundamental rights and norms and values which

even if they're not reflected in the Constitution, we believe that there should be no limit on a court to uphold fundamental universally accepted rights and values. We believe that's a cardinal point. Your constitution might not reflect, for whatever reason. You might have a change in government and you might have your constitution drastically changed. So the onus is on the judiciary to uphold those values and to uphold those rights, and it's precisely to deal with your dilemma of a change in government where your constitution is changed, and we've seen it in the past. We've had a government, we've had a constitution but the courts were not able to uphold people's fundamental and people's universal rights. That's the fine issue that we attempt to raise there. We don't think that there is a contradiction between what is enshrined in the present Constitution and what the duty of the courts are.

To deal with the issue - when you raised it and I might also just be able to slip in a further comment which we think your committee might wish to consider by way of research and by way of further argument. The present or the past judiciary was brought in to the new South Africa by way of political compromise. They were retained intact and that was a necessary political compromise and we recognised it, otherwise there would have been a serious crisis in the legal system and certainly elsewhere. We think that the new Government and this Constitutional Assembly must address the issue of the legitimacy of the Bench and whether mechanisms must be set up to legitimise the old judiciary, the old judges, and we say this without impinging on the integrity of any of the judges. We think that there has to be some legitimating process to ensure that the judges of the old

are .../

are the same way qualified to be judges as those that go to the present JSC. That's the point we're making. We'll take it no further. We think that's an issue which your committee needs to look at very closely.

MR (?): Just one final question, Chairperson.

CHAIRPERSON: Very, very final.

MR (?): Yes. Can NADEL tell this committee, because it's very important, of any basic and universal rights that they consider are not included in the current Constitution and should be written into the new constitution?

MR (?): It's not something that we're able to deal with now. If there is anything that we consider to be seriously omitted, we will certainly make those representations, but presently we're satisfied that the constitutional principles and certainly Chapter 3 sets out the most basic and fundamental of rights. There is certainly major argument with regards to socio and economic rights. We don't think this is the appropriate forum to be dealing with it, but that's where our concerns lie.

CHAIRPERSON: Mr Gibson.

MR GIBSON(?): (Indistinct.) you'd be happy.

CHAIRPERSON: Mr Gibson has had three bites at the cherry. We'll give Mr De Lange a chance to go for the cherry.

MR DE LANGE: Chairperson, I am much more disciplined than Mr Gibson. He's coming from the ANC and not the DP, and I also am only going to raise three issues and not your guideline of seven, as you've pointed out, Chairperson.

CHAIRPERSON: (Indistinct.)

MR DE LANGE: Well, that's true. Can I also share in Adv Schutte's commendation of NADEL, firstly on their

presentation and also in the amount of work that they've already done, and as they've pointed out, they are going to take up a few more issues. I think it is very useful for us to have these ideas, and I would also like to join that congratulations.

I want to touch on two issues that have already been raised by the other speakers and just to get some elucidation and clarification on that and then raise one separate one. The first one is the issue that Adv Schutte had raised about the community participation and kind of more immediately community-type issues. Now, I just want to get clarity on this, so that we don't have any doubt what you're saying. Of course, there is a difference between where the competence lies to legislate on an issue and where it should be administered, and there are different ways of achieving that. Now, as you know, at the moment justice issues are a national competence. Is there a suggestion that on certain justice issues that competence must be taken away nationally and be given at another level - that's the one part of it - or is there a suggestion that this could be done through delegation from national and that it's administered at a lower level? Just so that we have 100% clarity on what you're saying on that issue.

Secondly, I've always had great difficulties understanding this issue about a political bench. The little bit of reading I've done on constitutional courts in the rest of the world, I've always understood them to have not even a covertly political role, but a very strong overt political role. I mean, one thinks of the German courts, that's what their lawyers and their judges see their role as. If you look at the American courts, that is the most stark example

of that. Now, there is a big distinction, and I want to hear if you could respond to this, Adv Desai. There is a very distinct distinction between the party-political role for courts and the more broader political role which is one where laws that are made by a democratically elected parliament can be struck down and therefore certain valued judgments are made by judges and in that sense they play as political role as a legislature plays. They decide whether the values of the Constitution have been upheld or not, whether there's a transgression or not, in that sense they play a very strong overtly political role, and I've always understood it to be like that all over the world.

Let me give you a specific example. The Americans - and I, God forbid, do not suggest that we should go in that direction - appoint their judges either on being a democratic or a Republican. I mean, Thomas's latest appointment was just prove of that. He was overtly a Republican, he stood on a Republican ticket and that's on the basis he made it. A Republican President had appointed him. I just want to get clarity on what we're saying here. I mean, we all agree that there must be impartiality, independence, but what kind of idea do we have, is this political creature we're talking about, because it seems to me we have two different views on that and I would like to see on which side of the line NADEL falls on this, if at all, or maybe a third line.

Then, thirdly, the new issue I want to raise is the issue of the view that you've expressed in your paragraph 1, and that is the legitimacy crisis that faces the country. Now, it's not necessary going into all the details, but if you can elaborate a bit on that, because we have had

differences of opinions before this committee and the kind of constituency you represent. If you can give us your views a bit more elaborately on what you perceive to be this legitimacy crisis and this crisis of representivity. Thank you, Chairperson, those are the three issues.

MR DESAI: Mr Chairman, it will take some time to deal with each of the questions raised by Mr De Lange.

CHAIRPERSON: You said you must be in court by ten.

MR DESAI: That's the point I'm going to make, sir. I'm going to deal very briefly with the issues raised by Mr De Lange.

Firstly, on the question of the community courts, the question raised by Mr Schutte as well. Mr De Lange, I think the proposal is that why should certain petty issues be the subject of litigation in a criminal court. For instance, if somebody breaks your window, the present tendency is to report the matter to the police and he gets charged with malicious injury to property. Or if one person smacks another, it's a charge of assault. You go to the police station and it becomes a criminal charge. In some cases the senior prosecutors in their wisdom withdraw the matters, but in other cases singularly not displaying a lack of wisdom, the cases are proceeded with. But if you look at the courts - and I think Judge Olivier will agree with me and those people who have been in court for a long time - you'll see that a lot of the time is taken up with very, very petty matters, matters which could have been easily dispensed with within a community. It means, obviously, that the competency ... we're not taking away the competency of the courts to deal with the matter, but what we're trying to set up is another formula, another basis on which the matter

 could .../

could be resolved. I think that's the proposal. The proposal is setting up a structure which could deal with this matter without going to the criminal courts. Obviously, if a party insists on going to the criminal court, we have to deal with that sort of situation, but in most instances these can be and will be resolved within a community. If a person of stature intervenes to resolve the matter, in so far as the political bench is concerned, I agree with you and I agree with the distinction that you make which is a party-political role and value judgments. In fact, all judgments have been and will be value judgments in a sense and be tampered by one's particular perspective of society. It will be political judgments in that sense of the word.

What we're trying to avoid is party-political appointments and people who are appointed merely because of their political persuasions and political colours. That is why criteria is set out ... that's why I restated earlier a criteria for the appointment of judicial officers. We are against appointing people on the basis of their political colours and persuasions, but we are not saying that because people hold political views, they should be excluded from being appointed and we do not say that judgments do not necessarily reflect their views, the political value judgments at a given moment. That issue can be dealt with at great length. On another occasion we could deal with it again.

Mr De Lange has raised the other very important question, and that's the question of the crisis of legitimacy confronting the courts. It's mentioned in our papers. I did not raise it in my input because I've said it once

before and I say it again, that that should not be the subject of debate. Nowhere in the world is there a judiciary which comes from one sector of society alone. The South African judiciary, with now more recent exceptions and the past very few exceptions, was white, male and middle class. That in itself gives rise to a suspicion of bias. It's not a suspicion that's thumb-sucked, it's a suspicion based on an observation of the factual situation. That's the one level, the composition of the Bench give rise to a view of the Bench, and I respectfully submit that all of us agree now that there is merit to that argument, because nowhere in the world do we have people appointed to the Bench simply because of the colour of their skin.

I think an undeniable feature of a past South African society was before you became a judge, before your credentials were considered, you had to be a white man. We can't deny that today. The second criteria was whether you met with the other criterias to dispense justice, but the first criteria was whether you are a white man. That gave rise to a perception of the courts. And the second and equally important factor which leads to the crisis in the judicial system is the fact that many of those who implement justice today, many of them who implemented justice in the past, in fact applied apartheid laws. Now, with all charity one could say to them the Roman Dutch maxim, ius dicere, non uis vacere(?), they didn't make the law, they implemented the law. I can accept that as an act of charity to those men who dispense justice, but from my perspective and the perspective of many South African citizens, I think it was decided repugnant, the notion that any civilised being could implement apartheid laws. It is a repugnant notion and

remains .../

remains a repugnant notion that any person who considers himself a civilised human being, who implemented laws which we inversely recognise as crimes against humanity. By the various statements in this Constitution and the epoch that we are now entering into, it is now universally recognised that those laws were unjust within the ordinary meaning of the word "unjust". It is a crisis of legitimacy based on an experience of people on the receiving end, not simply of unjust laws but unjust implementation of those laws. And if we don't begin to face those facts, we can't begin to restructure the judicial system in this country. We can only do it on the basis of appreciation of the limitations of the past and the real crisis of legitimacy that exists. Thank you.

CHAIRPERSON: Mr Wilhelmus Hofmeyr Esquire.

MR HOFMEYR: Chairperson, I wanted to ask two questions. Firstly, I think NADEL's input on the question of community participation has really focused on two issues, that of possible jury trials or lay assessors and I think the additional idea of peace officers of some kind was raised in your input before us now. We have received other submissions for us to consider or look seriously at the issue, for example, of community courts, and I believe we will be hearing some evidence on that, but I wanted to ask whether NADEL has considered that issue. I think there has been a mixed track record in South Africa on that issue, but whether you have considered the issue and what your views would be on that.

Secondly, I think you raised the issue of the fact that in certain cases there is not an unfettered right to appeal. When Prof Steytler gave evidence to us yesterday he, in

fact, argued that the present way in which the courts are structured may well be unconstitutional in the sense that it may deny people effectively the right to appeal which is provided for in the Bill of Rights. I'm not sure if you have considered or looked at that argument, but if you have, I would like to hear your views on it.

MR (?) : Thank you, Mr Chair. The issue of Mr Hofmeyr ... (intervention.)

CHAIRPERSON: (Indistinct.)

MR (?) : Address you. I address Mr Hofmeyr through you, Mr Chair, if you don't mind. The issue of community courts has always been a beleaguered(?) question in the country and we know all too well of the gruesome stories of abuse, but it has always been the principle and the principle is that communities must have mechanisms to deal with conflict within the community, speedily and in the most amicable sort of way, and that's been the position of NADEL. We've been critical of the abuses of community courts. We've always believed that there's a place for structures as community courts inasmuch as they reflect mechanisms within the community to resolve conflict and to deal with issues on a speedily manner. So, that's our position on that, but it might also dovetail with the earlier question made by Mr De Lange. The point we need to make, Mr Chair, is that we believe that the law in the country must be uniform. There must be uniformity of the law. You cannot have various regions and various local councils adopting and prescribing new and different laws.

In a short response to the question of Mr De Lange, yes, laws need to be legislated nationally. They might well be administered in various local organs, but certainly law

must .../

must uniform, it must be national. There must be no question of it being able to come to Cape Town and not be able to be prosecuted for an offence, whereas in Johannesburg or elsewhere it would be an offence.

MR DESAI: Thank you. Mr Hofmeyr raised the question of the unfettered right of appeal. I've raised it before because of my own experiences with regard to the leave to appeal situation. But look at the Constitution. Chapter 3 provides, 25(3)(h) provides that it's a right to have recourse by way of appeal review to a higher court than the court of first instance. In other words, the fundamental rights given is a complete right of appeal in each instance, but then as - thank you for Judge Olivier pointing it out to me, under section 102 subsection (11) points out that the courts can regulate how leave to appeal can be granted. Now, that's the dilemma that arises.

What is in fact happening is that the courts are in fact saying that the old situation prevails, that leave to appeal is a prerequisite to the right to appeal. It's a very unfortunate situation. I say so for the reasons I've given earlier, but ultimately whether you get leave to appeal could be dependent on factors not necessarily legal. It could depend on what the judge had for breakfast that morning or what the person you're giving your petition the next morning had for breakfast. It's as varied as that. If, for instance, you get long terms of imprisonment or severe penalties, surely you should have a right to appeal to another tribunal, an unfettered right of appeal to another tribunal. I think the anomaly, if there is an anomaly in the Constitution. I think (indistinct.) is correct, that should be rectified.

 CHAIRPERSON: .../

CHAIRPERSON: (Indistinct.) just before you go, Mr Desai has an appointment where he's getting paid. Here he doesn't get paid. Thank you very much. We enjoyed what you had to say to us. We may not necessarily agree with everything, but thank you very much for a well presented case. We also hope that you will have success now and if you want to share your fee with us for tea and cookies at some time.

MR DESAI: ... a privilege to be at this historic gathering.

MR (?): Just before I forget Desai leaves (?), I initially thought I would join in with what Adv (indistinct.) in complimenting them, but I was sort of reluctant seeing that Adv (indistinct.) agrees with him that there may be something wrong with them.

Chairperson, I've got a number of questions. The first question relates to the structures of the courts. Adv Desai, in his input, said you propose that there should be a family court established. The question that I would like to ask is, where should this court be structured, at what level should it be? Are you proposing something like the Bantu Divorce Court? That is the first thing.

Talking about the unfettered right to appeal, again it's a pity Adv Desai is not here, I don't know what the position is going to be, where you again give the right to the constitutional court to decide which case it will entertain. If you're saying that you don't want the constitutional court to be inundated with lots of work, that it must have the discretion and it must choose which cases it's going to have, how do you reconcile that with the unfettered right to appeal? This is just on the structures.

Then on the JSC - I'm worried, it's a pity again Adv Desai is not here, but maybe the honourable guys can take up

 the .../

the matter - he made a statement that the membership of the JSC, its composition should be weighted in favour of the people. Who are the people? Who are these people that you're talking about and how do you determine who ought to sit in there? Of course, presently it is true that the JSC is weighted in favour of the lawyers. Out of the 17 members who are there, 15 of them are lawyers. Now, how do you remedy that? The President is given the power to appoint people to serve in there. Of the four people that he appoints, three are lawyers. The Senate is given power to appoint people to serve on the JSC. Of the four the Senate appoints, three are lawyers. Now, if you say the President represents the people, is there elected by the people, he himself then appoints the lawyers. The Senate is the body that is there to represent the people, elected by the people, accountable to the people. They themselves elect the lawyers. How do you deal with this question? Do you have any views on the matter?

The question of assessors is a problem. I agree that the judge cannot appoint his own assessors. How then do you appoint the assessors? Who appoints? Is it the attorney-general? Do you do the screening, like they do in the United States when they screen the jury? How do you deal with that question? These are issues that we have to answer when we talk about lay participation. Don't think it is good enough to say the judge mustn't appoint. Who must do the appointment?

CHAIRPERSON: They were many questions, but good ones.

MR (?): Thank you, Mr Chair. We think that the family courts must certainly not be courts racially based, like the old Bantu Commissioners Courts. They must be

courts .../

courts which are nonracial in character and sufficiently competent to deal with all family disputes, that would deal with issues of children and possibly an arm of that court which will deal properly with issues of maintenance and most importantly family disputes and divorces.

Where the court is to be situated on the rung we think is more a matter of detail, but it is certainly not a court to be relegated to a commissioners court's building. We believe that family courts are an extremely important structure, an area which has been neglected, unfortunately, by our courts, and that's our position on that.

With regards to the question of the unfettered right of appeal, we would certainly concede that there would be many cases which would go to the constitutional court and everybody would expect the right to heard by the constitutional court. Limitation is that you have a single-panel constitutional court. Like all courts, it can do so much and no more, and that's a real tension. The extent to which one can begin to marry the expectation of a right of appeal to the constitutional court and the feasibility of a constitutional court being able to deal with those matters is something which we believe needs to be looked at much more closely. It's a difficult tension. We certainly don't have a ready-made or an easy answer to it.

The JSC to be weighted in favour of the people, yes, certainly the anomalous situation is where the President and certainly the Senate were given the prerogative to make appointments, they certainly appoint lawyers. We think it's unfortunate. It's unfortunate because it once again allows a dominance by the legal profession to choose and to select who should go onto the Bench. It has always been NADEL's

position .../

position that lawyers have a self-interest. It's anomalous and unfortunate that so many lawyers have been appointed by that mechanism.

Who are the people? We think that is the prerogative of Parliament, because Parliament expresses the will of the people. But we also think that there might be other creative ways of drawing other people into that selection process, and there might be room to look at the role of civil society and of NGOs, the extent to which they could be part of that selection process. We put it up for consideration.

Who should appoint assessors? It's unfortunate that Adv Desai is not here. Last night we had a lengthy debate as to who should be appointing assessors. One view was that there should merely just be a roster. The unfortunate thing is that you'd come to court and it would merely just be pot luck. That's a somewhat unacceptable position, your assessors to be drawn by sheer rosters and by sheer chance. We think there might well be merit in a process where the defence and the State in criminal matters could confer and possibly agree on the assessors and that mechanisms could be built in where they're not able to agree how it is resolved, but it certainly can't be left to chance of a roster system. There should be a measure of consultation between the parties, and as much as the defence would represent the interests of their clients, that they should have a say in who the assessors are. Most importantly, the assessors must come from the communities and the peers of the persons who are to be tried.

CHAIRPERSON: Mrs Gandhi, you're next. Is your question still unanswered? Please go ahead.

MRS GANDHI: .../

MRS GANDHI: Thank you. I was just wondering whether you had changed my name earlier, but anyway. I know they have plenty of Naidoos in this country like plenty of Van der Merwes, but I'm glad you realised who I was.

I've got four questions, Mr Chairman, firstly about the family court. I know that in some countries they have the so-called peacemaker courts, and I'm just wondering whether you thought of an extension to the family courts where other matters, where mediation can take place, rather than having a constant adversarial sort of system, whether we could have so-called peacemaker courts or a mediation court, and I'd like to just know what you think about that.

The second question was about - you've suggested in your presentation that there should be in-service training for officials of the Magistrate's Court. I think that's a very good idea for that to happen in the interim, because you're not going to be able to completely change those structures, but I also would like to know who would you think should take the responsibility for that in-service training or re-education of the people there.

And then, thirdly, I wanted to know about - in your submission you've talked about the legal aid boards and access to justice. Now, I know from experience as a lay person, not a lawyer myself, that people have had very many difficulties just simply because they don't have legal representation, particularly in the lower courts. They have found it very difficult to get, you know, access to the legal aid boards because of the procedures involved, and I was just wondering whether a system whereby certain lawyers or, you know, lawyers can choose to either go into Civil Service or to practise in private service so that lawyers

can .../

can then provide that kind of service to the community. Wouldn't that be an easier system whereby people can get really access to legal services?

And, fourthly, I wanted to ask the question about the selection process. You spoke about the JSC, the selection group - ja, Judicial Services Commission - and yesterday there was, I think it was Prof Steytler who spoke about criteria. Wouldn't it be, in your opinion, a more useful method whereby you have very carefully selected criteria so that whoever is in that board or in that commission would have these criteria and would be able to justify why they chose the particular person so that it's not arbitrary? It doesn't matter who is there, but they will have to stick by those criteria. So wouldn't you say that that is more important than the selection? I'm not saying that we shouldn't place importance on the selection of the people, but it's just that. Thank you.

MR (?): Thank you, Ma'am. Mr Chair, certainly it's of great concern to us that family matters lead to so much conflict and, in fact, they break down the family unit more than, in fact, attempting to solve the problems. The unfortunate victims of family disputes are the children and certainly we would welcome any mechanism and any move to begin to address that situation. Certainly, if other mechanisms of mediation, of resolving family disputes in a far less adversarial, in a far less legalistic way can be adopted, we would certainly welcome that and we would certainly encourage that. We think there's much to be said for alternative methods of resolving family disputes than merely by court injunction. So we would certainly support that and we would certainly encourage that there be

mediation in family matters more particularly.

The issue of the Magistrate's Court - and we'd be failing in our duty here if we did not raise our very serious concerns about Magistrate's Courts, about the levels of qualification, more so because it's the point of first entry of thousands of people into the justice system everyday, and that's the court which is the cutting edge, the coal-face of justice. And that's why special attention needs to be given to the Magistrate's Courts. Special attention needs to be given to the training and retraining of existing magistrates, very important, and we think that more particularly at that level of court there needs to be a greater infusion with the norms and the values which are expressed in the Constitution.

Who does the training? We don't think it's merely the responsibility of the Department of Justice. We think that there are other role-players within the legal profession who can contribute to the training and retraining of magistrates and judges. As we have already seen, there are such processes taking place with judges of the Supreme Court here in Cape Town. We think organisations like NADEL, Lawyers for Human Rights, the Black Lawyers' Association, (indistinct.) and university structures who have access to expertise, access to foreign expertise, to bring them in and so as to begin to retrain judicial officers, magistrates and judges - a very important issue, we think. We'd also like this committee to give serious and close consideration to the Magistrate's Courts.

The issue of the Legal Aid Board, and that, as you see in our paper, we raise several concerns of it and certainly there are serious limitations on the judicare(?) system.

The Budget proscribes the State being able to provide a lawyer for every single person who passes through the courts, and that's why we would encourage institutions in which young practising lawyers could serve a period of community service or other NGO structures, like legal resource centres which assist communities and people free of charge. Most importantly is your public defender system and the extension of that to the various university law clinics. The Legal Aid Board system presently is under much debate and under much scrutiny. There's a huge crisis at the moment with regard to the issue as to whether accused persons, ordinary people have the right to choose their lawyers. If you wanted a lawyer today and if you were charged in court, you would go off to the Legal Aid Board and they would appoint an attorney to you on a roster system. That's a somewhat unhappy situation, because you're denied your right to choose your own legal representative. We believe that that issue must be addressed. We also understand that the Legal Aid Board has presently adopted that mechanism to deal with the present state of abuse by many attorneys, but we think that there should be other mechanisms to deal with abuse, rather than throw away a fundamental right to choose a legal counsel of your choice.

The selection criteria for the Judicial Service Commission, certainly, we believe it must be clear, it must be public knowledge what the selection criteria is. One of our concerns about the way judges are presently being appointed by the JSC is that we don't know what criteria was used. It's unfortunate and I think the criteria needs to be spelt out very clear, but also coupled to that is the openness and the transparency of those proceedings. It's

unfortunate .../

unfortunate that judges of the superior courts are selected behind closed doors. We believe that that process should be opened. Thank you, Mr Chair. I'm told it's now open, and we certainly welcome that.

CHAIRPERSON: We have two questions left, and the tea has arrived. I think the tea can wait a little. We still have Priscilla and Dr Frik van Heerden.

MS JANA: Thank you. Mr Saldanha, in your written submission you said that a single judiciary is more suited to our country's needs. I would like you to expand briefly on this preference and I would also like you to relate this preference in redressing the imbalances of the past on representivity and sensitivity to values and customs as Adv Desai had proposed.

MR SALDANHA: As previously stated, Mr Chair, our view is that there should be a single judiciary in the country. To us it's somewhat anomalous and it's almost a fiction to have a magistry and superior courts. Why should you have magistrates and why should you have judges? Should you not have one single type of judicial officer? We think that would allow for greater credibility by ordinary people in the judicial system. We also think that it would allow for greater access by people to the judicial process and that it also allow and facilitate the manner in which people can be appointed. You can have people enter the judicial service and its lower ranks and be able to appoint it right up to the superior courts. We think it's somewhat untenable that regional court magistrates, who sit for many years as magistrates and who have acquired a tremendous amount of expertise, could and should not be appointed to the superior courts. And we believe that this false distinction between

a Magistrate's Court and your Supreme Courts should be looked at, should be researched, so that we can begin to either do away with it or refine it so as to remove this unnecessary anomaly.

CHAIRPERSON: The last question, Dr Van Heerden.

DR VAN HEERDEN: Thank you, Mr Chairman. Two of my questions have been covered by Mr De Lange and Mr Gibson, so you are lucky, I've just got one question, and this is the question of legitimacy. Don't you think that could be addressed by a jury system in the interim period? Just your remarks on this, thank you.

MR SALDANHA: We've certainly given hard and long thought to the issue of the jury system. I don't think that the legal community has seriously debated and gone through the arguments of a jury system, but our gut reaction to it has been that with a society as polarised as ours, with a society that has come through a history of differences and of discrimination, it would be hard pressed to find a jury. It would an attorney or and advocate's nightmare in attempting to select a jury, so certainly during this period in which there's so much polarisation we don't think that a jury system would be appropriate. We don't rule it out completely. We think it's an issue which we would have to visit ever so often and until our society has become much more netted and our society is more homogeneous than what it is. It's an issue which we think requires further consideration and debate, but in the immediate future we'd certainly have the view that it might not be appropriate, and that's why we would opt for the process of using assessors, rather than a jury system.

CHAIRPERSON: Thank you. Colleagues, we've come to the end

of this session. After tea now, for which we will break, we will listen to the Lawyers for Human Rights, but I'll just give Dr Van Heerden an opportunity now.

DR VAN HEERDEN: Thank you, Mr Chairman. You know, my first encounter with NADEL wasn't a very pleasant one in December recently, December last year. I attended a conference on the, I was invited to put the views of the National Party on democracy and human rights, and the meeting was scheduled for half past nine and it started only at twelve o'clock. This is a great improvement, Mr Chairman, and I must say that I have to change my opinion concerning NADEL, particularly the fact that they appeared on the time scheduled, in the first place, and then in the second very important place, gender sensitive, sir, and then, finally, for a very valuable (indistinct.) and we will consider that in the theme committee. Thank you very much for your time and the trouble you took to submit this in writing as well. Thank you.

MEETING ADJOURNS FOR TEA - ON RESUMPTION

CHAIRPERSON: We now have the Lawyers for Human Rights, and I wish to welcome you here on behalf of Theme Committee 5. Thank you very much for being here today. You have ... yes, I was just going to say something about that. They have decided not to use the submission that they have here, they want to give us one later. They will explain that themselves. Thank you very much for coming, Mr Riaz Saloojee and Mr Wesley Pretorius. You have about 10, 15 minutes to put your case, thereafter members will ask you questions. They won't fight with you, they won't argue with you, they will only ask you questions to clarify matters and so forth.

Mr Schutte is the one who's just taken his seat. He is

 the .../

the one who has delayed us, so don't hold me responsible for Mr Schutte's problems. We've had lots of problems with the National Party; it still continues.

Okay, Lawyers for Human Rights, go.

MR SALOOJEE: Briefly for people who do not know much about Lawyers for Human Rights, we are a national organisation. We have about 14 offices spread nation-wide. Our focus is a little different from NADEL in that we essentially don't represent the interests of attorneys and lawyers in the established professions. We are project orientated, we have several legal clinics across the country and we engage human right issues. A prime focus of ours is the promotion and defence of human rights.

I want to apologise for not having a written document to circulate at this point in time. We have a document that we will conduct our presentation from. We need to refine it and we will in due course submit a fuller and more comprehensive document.

Our submissions at this point in time deal with the more principled issues and we are not, we didn't concentrate on the detail. As a human rights organisation, our submissions to you are principally motivated by the following considerations: the need to establish a culture of constitutionalism in the sense that all organs of Government are subject to the Constitution as the supreme law of the land; secondly, the need for a credible, independent judiciary; thirdly, the need for the effective establishment of a human rights culture; fourthly, the need for an accessible and affordable system of justice; and, fifthly, the need for the Constitution, and in particular the Bill of Rights, to play a vibrant, integral and relevant

role in the lives of all South Africans.

With regards to the structure of the courts, we are in broad agreement with the current structure of the courts as contained in Chapter 7 of the Interim Constitution. The concept of "'n regstaat" is a fundamental departure from the past. It seeks to establish and promote human rights on a scale unprecedented in our history. If this is to be done, effectively it calls for special measures and new legal visionaries with fresh and bold approaches. Within this context, an independent specialist tribunal is an indispensable requirement. Such a court staffed by experts, held in high public esteem and who have the credibility, legitimacy and sensitivity to decide important constitutional and human rights issue authoritatively would in all probability ensure that we move rapidly to a new human rights culture. This is in line with the international trend of having specialist tribunals to adjudicate on issues requiring special expertise and sensitivity, but more importantly, none of the ordinary courts have the legitimacy to successfully supervise our transition to constitutionalism. Our argument is strongly for the retention of the constitutional court. The constitutional court is, therefore, rightly entrusted with the historic task of being the final arbiter of constitutional and fundamental rights issues and the development of a body of constitutional jurisprudence.

With regard to the exclusive jurisdiction of the constitutional court, it is our view that the constitutional court should retain exclusive jurisdiction in the areas currently provided for in section 98 of the Interim Constitution. It is critical for an emerging democracy to have an arbiter on matters of national importance that is

 clearly .../

clearly also the most representative judicial structure in the land.

With regard to the Supreme Court, it must be pointed out that the Supreme Court as currently constituted is in need for redress, if it is to be representative and serve the interests of the "regstaat". Notwithstanding its current judicial make-up, we would submit that the Supreme Court be retained in terms of its structure and jurisdiction, as envisaged in section 101 of the Interim Constitution. It is important if the constitutional court is to be effective, that it should not be unduly burdened by an excessive work-load.

Further, and in line with our principle of making the constitution a living document, it is crucial that constitutional issues be deliberated at all levels of the judiciary in a cost-effective and expeditious manner. Hopefully, at a later stage we will endeavour to provide a more detailed explanation of how we achieve these ends.

With regard to the lower courts - and this is where we have a primary concern - the lower courts are the other courts for us, are the court structures that are immediately accessible to most of the people. It is our view that limited constitutional jurisdiction should be conferred on these tribunals. Jurisdiction here should ensure that the lower courts, particularly the Magistrate's Court, interpret, protect and enforce the Constitution. The role envisaged here is simply for the so-called other courts as referred to in section 103 to interpret constitutional issues or disputes in favour of the fundamental rights as enshrined in Chapter 3 and that the blanket policy of referral simply to higher courts be avoided.

We would argue further that Magistrate's Courts should have jurisdiction to determine disputes relating to alleged or threatened violations of fundamental human rights and disputes, relating to the constitutionality of administrative, executive or legislative acts of local authorities. These courts are at the coal-face of the administration of justice and it would, in our view, be short-sighted to exclude them from the development of a human rights culture.

With regard to the establishment of special courts, as a matter of principle, the new constitution should make provision for the establishment of special courts, either on an ad hoc or permanent basis to deal with particular human rights violations where these are widespread or occur in significant proportions, for example, juvenile courts; maintenance courts; domestic violence courts; sexual offences, particularly in the Western Cape; courts dealing exclusively with gangsterism. We submit that these courts should be open also to lay participation since they deal with issues of great social importance.

In so far as access to justice again is concerned, we are concerned that inadequate provision is made for direct access to the constitutional court. We feel that greater latitude for access to the constitutional court by individuals should be permitted, not only as a quick remedy to obtain a determination on important constitutional and human rights issues, but also to ensure the continued credibility and ownership of the constitutional court by the people. We submit that in this context specific provision should be made for judicial activism where there is manifest injustice and to enable the court to mero motu inquire into urgent and serious cases of human rights violations. The court should

further .../

further be empowered to issue appropriate recommendatory and (indistinct.) clarity orders. This would address the crisis of accessibility and affordability in the real and significant way.

With regard to mechanisms for appointment, we are in agreement with the current mechanisms with regard to appointment of judges to both the constitutional and Supreme Courts. We are also satisfied with the composition of the Judicial Services Commission.

With regards to magistrates, the magistrates commissions should have an element of legitimate community representation in its composition. Appointment of magistrates must be effected with due regard to representivity, culture, language, training and experience, expertise in particular fields of relevance, transparency in the selection process.

That essentially is our representation for this morning. These remarks are very preliminary and, as I said, we will submit something in greater detail for you at a later stage. Thank you.

CHAIRPERSON: Thank you, Mr Saloojee, that was what we say, "short and sweet". In regard to your last observation that it is preliminary, you must remember that we are now in the process of constitution making and that if you still want to make further inputs, now is the time to do it, so don't delay that.

Can I see hands? We have Ms Jana. Who else on that side? Willie. What a surprise, Willie wants to put a question. Anybody there, this way? Okay, Mr Singh, Mr Douglas Schutte and Van Heerden. That should take us to two o'clock. Priscilla, it's you.

 MS JANA: .../

MS JANA: Thank you, Mr Chairperson. Mr Saloojee, as you represent an organisation of human rights in this country and also in your own experience, long experience in human rights issues, my first question to you is, do you agree that the rights enshrined in our Constitution will be rendered meaningless if there is no right of accessibility? And I would like you to address us on that particularly.

My second question to you is that we had a submission earlier on from NADEL that a single system of judiciary is more suitable to the needs of our country, and I'd like you to comment on that.

And also the third issue I'd like you to comment on is on representivity and the perception of legitimacy in our communities. Thank you.

MR SALOOJEE: I'm happy that what, or a lot of what we are saying here has been said before. Hopefully that would lend support to our contentions.

With regard to the rights of accessibility, this is very crucial for us, it is very important for us, it is true and certainly it is necessary for any human rights as enshrined in Chapter 3 to be translated at grassroots level. The problems we have had in our country with regard to accessibility - just to draw in the other aspect of the question in respect of representivity - is that we've had law in the country, but the perception was always that the law was for one group and the order was for the other group. That situation cannot prevail. Affordability has been a significant problem, because we had all sorts of cost factors that had been prohibited in the past, allowing people to have access to the courts.

A single system of judiciary is crucial for the country

in the sense that what we will have here is potential for the development of a body of jurisprudence in a very uniform manner and also so that we can have certainty on a national basis. Thank you.

MR HOFMEYR: I would like just to raise the points you made about particularly the jurisdiction of the Supreme Court around certain constitutional matters. Now, I think at one point you said that the exclusive jurisdiction that the constitutional court has at the moment in terms of section 78 should be preserved, but I think later on in your input you also said that it is important for all levels of courts to be dealing with constitutional issues and for those issues to permeate the courts at all levels. It seems to me that there is a slight contradiction between those two ideals or viewpoints in a sense. I think one of the suggestions that have been put to us, or two suggestions, I think the one suggestion has been that the Appellate Division should be given jurisdiction over constitutional matters with those matters then still being subject to an appeal to the constitutional court, and I think we would like to hear your views on that.

I think the second question has been the fact that the Supreme Courts are not able to deal with national legislation at the moment. Now, that is obviously a thorny issue, but I think again a view has been put forward that ... [END OF TAPE 2.] ... subject to an appeal or a right of automatic appeal so that in effect your Supreme Court would not be able to declare laws invalid until that had been confirmed by the constitutional court. I would like you just to comment on those two issues in light of your remarks at the beginning.

MR PRETORIUS: .../

MR PRETORIUS: If I may be permitted to respond to Mr Hofmeyr's questions, Mr Chairman. The question of the jurisdiction of the Supreme Court and as opposed to the exclusive jurisdiction of the constitutional court and whether that is a constradiction, it is not in our view. What we see is a sort of inverted pyramid where, although all courts deal with constitutional issues, at every level there is greater jurisdiction than at the lower level so that all courts can discuss and debate these issues and not a single court quite far removed, admittedly, from the people reserves that jurisdiction. So we don't see any contradiction in that.

The suggestion that the AD's jurisdiction should be extended to constitutional issues, we have difficulty with that, Mr Chairperson. We feel that the Appellate Division as an institution has not done this country proud. It doesn't have a proud record of protecting and enforcing human rights and in our view that militates against the suggestion that they should have constitutional jurisdiction. One would also find that by extending, as it were, the right of appeal to an even further level, you would probably be delaying justice in the end.

With regards to the question of a Supreme Court being able to deal with national legislation, we have a difficulty with that as well in that what you would probably find in the end is a fair amount of forum shopping going around. We also do not believe that the Supreme Court has the necessary legitimacy to deal with issues of national importance, and probably what will arise in relation to national legislation is a fair amount of interstatal issues which would also militate against the Supreme Court based in a particular

province dealing with such issues.

CHAIRPERSON: Mr Singh? You can now sing, Mr Singh.

MR SINGH: Thank you, Mr Chairman. I'd like to address my question to Mr Saloojee there, please.

Mr Saloojee, you know, until now we've had a whole lot of discussion and controversy about a split judiciary and a - what do you call it? - a unified judiciary and that kind of thing, but it was very refreshing to find that the Lawyers for Human Rights, it would appear, advocate the split judiciary as it exist up to now. In other words, what I'm talking about is a separate Magistrate's Court as against the Supreme Court.

Now, just before I get your answer to this question, to my mind, Mr Saloojee, I think that, you know, we should retain these courts as they are. Admittedly, there is the need for some kind of improvement and modification as far as probably designations are concerned, because basically we all know that the legal maxim of said, uis dicere set non dare(?), exists. Now, the arbitrator, the presiding officer in the court is not entitled to make his own laws. Now, perhaps what we need to do is to inform the general public about this. I think the real problem has been created in so far as description of the lower court is concerned. There is a tendency, it would appear, for many people to refer to the Magistrate's Court is an inferior court as opposed to a lower court. Now, inferior, admittedly, carries a whole lot of negative connotations. Now, just because of this perception that has been created, which is really not appropriate, I do not think that it would be a wise exercise to change the two systems into one complete thing.

Also, you know, we find that these courts have

different jurisdictions, and they have been working very well for many, many years. To my mind it would be, well, unwise, you know, to get a court to try a person for a parking fine, for example, a parking offence, as well as, let's say, murder. For obvious logistical and practical reasons, I think we need to specialise, but I would strongly urge that, you know, this perception be removed, that the Magistrate's Court is an inferior court.

The other reason why I think we should retain the Magistrate's Court, you know, as against the Supreme Court is because over the years, because of their specialised jurisdiction, it has been found that these legal personnel develop knowledge and expertise which is exclusive to their particular area of jurisdiction. Now, all this will be lost if you take a magistrate from a lower court and suddenly appoint him as a judge of a Supreme Court.

CHAIRPERSON: (Indistinct.), Mr Singh.

MR SINGH: Now, my question - sorry, sorry. My question, Mr Saloojee, is I'd like you to confirm, do you really advocate that, you know, we should retain these courts as they are, as is my own what you call opinion, or have I understood you wrongly?

CHAIRPERSON: (Indistinct.)

MR SALOOJEE: We agree with you that the structure as it stands is appropriate. We've had difficulty with perceptions, we've had difficulty with credibility, we've had difficulty with inspiring confidence at grassroots level in the court and, of course, the reason for that is obvious. It's our legacy that we come from. Even at Magistrate's Court level, magistrates were more political people in most instances, as was outlined earlier by NADEL people. And

it's no secret that there was a certain kind of justice for white people and a certain kind of justice for black people. There's a certain kind of sensitivity for white people and a certain kind of insensitivity to black people. These are the problems. That is why Magistrate's Courts have become unapproachable, but as a structure, as it stands, as a mechanism to provide access to justice it is an important mechanism, it is a valuable mechanism and one that I think we can utilise very fruitfully.

You are right when you say that in so far as - there might be a need for training. Of course, there might be a need for training. One of the difficulties with a Magistrate's Court is that they've been doing a lot of everything. The problem of Magistrate's Courts is also that we are very clogged at that level, and that is one of our arguments for having specialised courts, where we can have ... We as an organisation haven't really canvassed the issue of separate community courts, but the idea seems to sound. The idea seems to have merit in the sense that it unclogs the courts. It gives the courts ability to administer more qualitative kind of justice. So we would agree with you that there's a definite need for training. We would agree with you that the composition of the courts needs to be reassessed. We will also agree with you that the whole ethos behind the courts, and particularly in criminal matters where the whole adversarial kind of ethic that prevails where you have the prosecution out to obtain convictions and you have the defence out to establish innocence, we feel that should be retained. We should have a more truth-seeking kind of establishment at that level. Thank you.

CHAIRPERSON: .../

CHAIRPERSON: Thank you, Mr Saloojee. The next is Sir Douglas.

MR GIBSON: Thank you, sir. Chairperson, two of the questions I wanted to ask have already been asked and answered, so I'd like to focus on the question of lay participation. We have had a very interesting submission from NADEL and we've heard from other people as well to the effect that we simply have to have a much more inclusive, a much more pervasive system of assessors. NADEL goes so far as to suggest that in every court, criminal and civil, in every trial there should be assessors. I'd like to know what your views are about that.

And then, secondly, assuming for the moment that one goes along with the idea, what are the practicalities in terms of providing the numbers of assessors and ... yes, the practicalities of providing them, because there are thousands of trials, presumably, that go on every day. And then, thirdly, how would the assessors be given to the court? I mean, there's an opinion that judges, and presumably magistrates, shouldn't simply be able to choose the assessors they want. The suggestion is that the State and the defence negotiate on the assessors.

CHAIRPERSON: Go for it.

MR SALOOJEE: Thank you. Ja, in so far as every trial requiring an assessor is concerned, and in terms of practicality, I'm not so sure and I don't want to vent myself on that aspect as yet.

Assessors are important in the sense if they are going to assist in this truth-gathering exercise and if they can play a meaningful role, then they should play a meaningful role. For that reason assessors are important. In terms of

selecting assessors, I see no difficulty in us capitalising and utilising community structures that exist. Virtually every community, every black community, has what we call civic organisations, have advice officers, and people in communities know who their representatives are. People in communities know who, and there are personalities in communities where people have confidence in and people will accept the decision-making and the judgments of those people. So in terms of ... I think there are those resources, there are those restructures that can be tapped to provide assessors. Thank you.

Just one more point. You mentioned the fact of the State. The important thing to mention about the State is that the State seemingly is representative of the people. That is why we should try and give meaning to that, that when an offence, if we talk in terms of criminal terms is committed, it is committed not only against the individual, but against the State. The reason is bring in our communities. Let's give meaning to the State being represenative of the community. Thanks.

CHAIRPERSON: Adv Danie Schutte.

MR SCHUTTE: Mr Chairman, thank you. A number of issues. First of all, you said that the Supreme Court should not be unduly burdened by constitutional issues. Have you given thought to possibly the establishment of provincial constitutional courts as in Germany? Secondly, you've referred to local courts, if I've heard you correctly. Could you perhaps just expand on your suggestions in this regard? Thirdly, you referred to special courts, but then you even went so far as to refer to special courts for gangs, for instance. You're certainly not suggesting that

there should be constitutional provision specifically for the gangs in the Cape, so I don't exactly know what you mean by special courts. All right, one can say that there should be courts, or the courts should specialise in certain things, but surely there shouldn't be constitutional provision made for that. The next one, small claims court. Nobody has expressed itself on the small claims court yet. What is your views on that? And then procedures. Are you in favour of a more inquisitorial system, like the continental system? What is your views on this?

MR PRETORIUS: If you will allow us to address this jointly, Mr Chairperson.

CHAIRPERSON: (Indistinct.) for that.

MR PRETORIUS: Some of the questions arise from what my colleague said here. With regard to the issue of specialist courts, we are no way suggesting that some of these detail ought to be incorporated in the Constitution. It's certainly not the purpose of the Constitution to have that amount of detail in it, but we feel that there should be provision for specialist courts in the Constitution as a particular structure. How these are to be, what kind of flesh are to be given to this, that is probably a matter for legislation later on. And, yes, we would suggest that there should be special courts to deal with such very socially disruptive conduct as gangsterism, but only in legislation subordinate to the constitutional courts.

With regard to the provincial constitutional courts, I must be honest and say that we haven't given that aspect sufficient thought. Our view as it stands in the submissions is that we would prefer that the Supreme Court as it stands has concurrent jurisdiction to deal with

certain constitutional issues.

MR SALOOJEE: Ja. I just want to add that a part of the dissemination of justice is that justice be disseminated expeditiously. Clogging any court, the constitutional court, is going to be problematic. We're starting from a clean slate, zero. We're endeavouring to infuse our total society with new values, with new democratic values. There's a lot of work to be done. We can't see that that entire task should be the task of an eleven-person court solely. That is one of the reasons we're saying that let's give some of that capacity to Supreme Courts. Of course, the nitty-gritty of what we give to the Supreme, that has to be decided, that has to be debated. Testing of the validity of legislation, that we say leave exclusively to the constitutional court, because that is a national issue.

What we would also like to see is that the Constitution be deliberated at these other levels. Special courts for gangsterism, no, we're not being ludicrous about it. We are saying that we have a problem. In the Western Cape we have a major problem; there's gansterism. It is a problem that arises from our past, it is a problem that has social economic roots, it is a problem that is tearing communities apart, that is disseminating communities. It is a very real problem, and we are saying in principal, put it in the Constitution, that should we need a court to come in and address it exclusively, then let us have the possibility for it.

The issue of gangsterism - may I just address it a little further - is that it has certain peculiarities of its own. It requires certain sensitivities of its own and that it requires certain witness protection programmes of its

own, .../

own, and that is why we're arguing, let's have a specialist court giving special procedures to deal with the special problem, even if it is on an ad hoc basis. Let the idea be there that we can establish ad hoc kind of courts that deal with real social problems. Thank you.

CHAIRPERSON: You are very convincing, Mr Saloojee. You want to follow up?

MR SCHUTTE(?): Mr Chairman, just the small claims court and the local courts were not dealt with, if I could ...

MR PRETORIUS: If I might say, the small claims court, yes, we need small claims courts. It is very important, small claims courts. The inequity of income, also the economic (indistinct.) for roots people (?) experience, the percentage of people who suffer certain hardships as a result of this income make it necessary for the courts to be distinguished in terms of jurisdiction. A small claims court ties in clearly and appositely with my earlier proposal that there be specialist courts, because within the jurisdiction that you currently have for the small claims courts, a lot of people have difficulties in securing their rights but don't have the necessary funding to get the kind of justice that they require or get the kind of assistance from the State that they should be entitled to, and the small claims courts provide that service. It's a very necessary service, and although we might have difficulties with the jurisdiction, those are details that we can address at a later stage, those are details that we can address in consultation and with further debate.

CHAIRPERSON: Dr Frik van Heerden.

DR VAN HEERDEN: Mr Chairman, just the same question that I put to NADEL, namely your views. Have you considered the

jury .../

jury system to meet the approach to get lay participation, and if so, what are your views on this?

MR (?): Mr Chairperson, we have considered the jury system and although we believe there to be great merit in the system from the point of view that you would be encouraging public participation in the judicial system, we would agree with the point expressed by NADEL that it seems to us at this stage of our development there is simply too much polarisation to utilise that system effectively and productively.

MR PRETORIUS: Can I just add on the question of the jury system? I just want to go a little beyond the polarisation aspect. I think it's important for any democracy that you have an enlightened majority and it is also important that when we talk about jury system, when we talk about lay participation in courts, that we take these issues to the communities and you who are the communities have to say it is not sufficient for our purposes to take systems from abroad and try impose them or introduce in a country. I think the jury system in principal is found we need to refine it, we need to adapt it to our situation and we need to see whether it, in fact, is suitable.

CHAIRPERSON: The last question is by Mrs Gandhi, and I suggest you do it in such a manner not as to totally awake Senator Bulalani(?) next to you.

MRS GANDHI: Thanks, Mr Chairman. I just have one question, and that is in your submission you haven't referred to the position of the circuit courts, you know, its composition, its use and its purpose in the future. I'm posing this question particularly because we know that most human rights organisations as well as NGOs have severely criticised some

of the work that circuit courts have been doing and the kind of judgments that have been passed by these circuit courts. Could you please comment on that? Thank you.

MR SALOOJEE: Thank you, Mr Chairperson. We don't believe that it's as much a matter that should enter into the debate around constitution-making, but in so far as it does present certain problems, there's a bit of a dilemma in that circuit courts, especially in vast regions, they tend to improve accessibility to the court. But certainly the kind of justice that has been dispensed in some of these circuit courts is not beyond reproach. It's probably a matter once again that has to go to training and improving the whole sort of ethos of the court and what the judges are there for. Those are matters of attitude in policy and they are changes that will come despite any legislation on the matter.

CHAIRPERSON: We have a final, final question by Mr Hofmeyr.

MR HOFMEYR: Two questions actually, if you'll indulge. I think the one is just a general question which you have alluded to, but if you could expand on it - your view of what should be in the Constitution, how much detail. Should we have as much detail as we have at the moment in the Constitution, or should the Constitution be a much shorter statement of general principles and structures and that the detail be left more to legislation?

The second issue that I was not very clear about in your representations was the question of the constitutional jurisdiction that you proposed for Magistrate's Courts. I think you mentioned the acts of local authorities essentially, but if somebody is alleging a violation of a human right or a contravention of the Bill of Rights, or

whatever, would Magistrate's Courts be able to hear those cases and decide whether a right has been violated or not, for instance?

MR PRETORIUS: If I may take the second question and my colleague will address the first one. With regard to the jurisdiction of Magistrate's Courts, yes, it is our contention that they should be able to address allegations of violations of constitutional rights or threatened violations in the sense that we would hope that there would be a separate sort of system that would develop around remedies for breaches of constitutional rights. And in the same way that one would get interdicts against threatened violations of your delictual rights in a Magistrate's Court you could get interdicts and other remedies - damages, if you want, compensation - if that is the way that the constitutional court sees the remedying of a breach of a constitutional right should proceed, but there is certainly, the present, the current jurisdiction of the Magistrate's Court allows for that type of intervention in any event. It is just a matter of adding the limited constitutional jurisdiction to that.

The question of local authorities and the legislative and administrative acts of local authorities, that jurisdiction is also already there in a sense in that they can test the validity of these acts, this type of subordinate legislation. So it's nothing new, it's just adding the constitutional dynamic to that.

MR SALOOJEE: Ja, just briefly in response to the first question. I think what needs to be said in the Constitution has to be said in the Constitution. If we can say it more economically, then so be it. Thank you.

CHAIRPERSON: .../

CHAIRPERSON: Colleagues, we've come to the end of this session, and I call on our colleague, Mr Singh, to sing a few words of praise.

MR SINGH: Thank you, Mr Chairman. Mr Chairman, on behalf of Theme Committee 5 and all my colleagues present here this afternoon, this morning at least, I would like to extend our very special thanks to our friends from the Lawyers for Human Rights for a very informative and a very succinct presentation here this afternoon. In particular, we are appreciative of the fact that you've responded to our invitation here at very short notice. We are aware that you have very busy schedules, and for having accommodated us we are very grateful.

Gentlemen, you will appreciate that as the appointed representatives of the people we have been entrusted with the very, very important task of drawing up this new constitution which will be the supreme law of the land. And we would like to ensure as far as possible that we leave no stone unturned in order that we present a document that is comprehensive and as free from defect and omissions as possible. Therefore, we are very grateful to you for your contribution. Thank you very much.

CHAIRPERSON: That was well sung, Mr Singh. Thank you very much. The meeting is adjourned. The core group to remain behind, please.

MEETING ADJOURNED

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