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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

JUDICIARY AND LEGAL SYSTEMS

PUBLIC HEARING

7TH FEBRUARY 1995

PRESENTATIONS BY

JUDGE PRESIDENT FRIEDMAN &
PROF N STEYTLER

CONSTITUTIONAL ASSEMBLY

DATE: 7 FEBRUARY 1995

VENUE: ROOM M515 (MARKS BUILDING)

CHAIRPERSON: I welcome you all here today, and before I announce the Judge, may I take this opportunity to welcome three of our technical experts and I wish to welcome in particular Judge Pierre Olivier who is a very well known legal person in the country. He has served with the Commission. He is a judge of the Appellate Division at this stage. Then also Professor Paul Benjamin who is next to him, and Miss Xabashe (?), left of Paul, maybe appropriately left of him. We will talk about our technical experts when we deal with the domestic matters of the committee, but at this stage it gives me great pleasure to introduce to you the witness for this afternoon, the Judge President of the Cape Province, Judge Friedman.

Judge Friedman ladies and gentlemen started at the Bar, for those of you who are not lawyers the Bar means where the advocates practice, not the other one, he started at the Bar in 1950, he became a senior advocate in 1970, he was made a judge in 1977 and apart from, at the moment, being the Judge President of the Cape Province, he also served for a period in the Appellate Division. We are therefore very fortunate to have one of the most distinguished and most experienced judges of the South African Bench here today. Judge, please feel welcome and give us your presentation. We are waiting and this is the reason why we waited a little, because we are waiting on some more copies of your presentation which will come later.

What we normally do is we allow you about 15 or 20

minutes/...

minutes if that will meet with your convenience, and then thereafter there will be clarification and questions. Are you ready to start Judge?

JUDGE PRESIDENT FRIEDMAN: Mr Chairperson, thank you for this opportunity of addressing this committee.

The memorandum which I was a party to was drawn up by the Chief Justice, by the Judge President of Natal and the Judge President of Gauteng, or the Transvaal if it is known as such, and myself and this represented the personal views of the signatories, because there was not enough time for us to consult the entire judiciary before presenting the paper.

What I propose to do in amplification of what was said there, is to deal this afternoon if I may, with two main topics. The first is the confirmant of constitutional jurisdiction on the Appellate Division, and the second is the question of the split or single judiciary.

I shall deal firstly with the Appellate Division's role in constitutional matters. Now as you know, the interim constitution in section 98 confers certain powers on the Constitutional Court, including an enquiry into the constitutionality of an Act of Parliament, and subsection 3 of that section provides that the Constitutional Court shall have exclusive jurisdiction in the matters set out in that section save to the extent that the constitution confers powers on other courts in other sections.

The Supreme Court is granted jurisdiction in constitutional matters in terms of section 101(3) of the interim constitution, and its powers of constitutional jurisdiction are more-or-less co-extensive with those of the Constitutional Court save that it cannot without an agreement between the parties give judgment on the

constitutionality/...

constitutionality of an Act of Parliament.

However, by subsection 5 of section 101 the jurisdiction of the Appellate Division is totally excluded. The section reads:

> "The Appellate Division should have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court".

The result of these provisions is that in constitutional matters over which the provincial divisions of the Supreme Court do have jurisdiction, appeals against those judgments lie only to the Constitutional Court, and in constitutional matters over which the provincial divisions have no jurisdiction, the matters have to be referred by the provincial divisions of the Supreme Court directly to the Constitutional Court.

Now this system has many disadvantages. As far as the Constitutional Court is concerned the exclusion of the Appellate Division inevitably will increase the work load of the Constitutional Court. Depending on the extent of the work load its work load could render its work unmanageable.

Then secondly the Constitutional Court could find itself in a position of having to deal with factual issues in order to decide constitutional points, because as I shall indicate presently it is not always easy to draw a line between what is a constitutional issue and what is a question of common law.

Thirdly, the Constitutional Court does not have the advantage of an Appellate Division judgment which would inevitably refine the issues for it and could often result in a shortening of the proceedings before the Constitutional

Court.

Court.

Broadly speaking, the disadvantages as far as the Appellate Division are concerned are that it is completely sidelined in what is a fast developing field of the law.

Secondly, it must lead, the exclusion of the Appellate Division, is going to lead to a diminution in status of the highest court in the land, barring the Constitutional Court.

Thirdly, as I indicated a moment ago, it is often difficult to separate constitutional issues from common law issues. For example the clash between the right of free speech which was granted in terms of the constitution and the law of defamation which is the subject matter of the common law. One could also find clashes, for example, in the fundamental right granted under the constitution to persons, granting freedom of movement. This could be in conflict with common law rules relating to the law of trespass.

So it is difficult to delineate a case and say this is a constitutional issue, and that is a common law issue, and a constitutional issue must be decided by the Constitutional Court, and a common law issue by the Appellate Division. The exclusion of the Appellate Division will lead, because of this difficulty in delineation, to an impoverishment of the development of the common law.

Now, as I mentioned in the memorandum, the question of the role of the Appellate Division in the constitution was the subject matter of a memorandum prepared by Judge Ackermann who on 27 April 1994, a very significant date, he was at that stage a judge of the Cape Provincial Division, he is now a judge of the Constitutional Court and I have his authority to make this memorandum available to the members

of this committee. I have handed a copy to Mr Taft(?).

CHAIRPERSON: Judge, may I just say that we have a copy now and we will see that all members, in due course, as soon as possible get copies of Judge Ackerman's memorandum.

JUDGE PRESIDENT FRIEDMAN: Thank you Chairperson. I therefore will not go into this in any detail. I just want to highlight the certain points which he made.

Judge Ackerman's memorandum was aimed at an amendment to the constitution to provide for the inclusion of the Appellate Division as a court of appeal from the provincial divisions of the Supreme Court in constitutional matters, with a final appeal to the Constitutional Court, and it is that concept which I support.

He said on the first page in paragraph 2, some of the points he mentioned were, and I would just like to read them, under the present system where constitutional issues are excluded from the Appellate division, he says,

"1. It will cause an unmanageable work load for the Constitutional Court with all the attendant dangers.

2. It will seriously attenuate the work of the Appellate Division in developing the common law in relation to private, administrative and criminal law to an extent not hitherto appreciated,

3. It will deprive the country of the expertise and the experience of the Appellate Division in the development of constitutional law under the constitution.

4. It will downgrade generally the status

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and role of the Appellate Division as a legal institution".

At the end of his memorandum, he stated in paragraph 12,

> "For the aforegoing reasons it is suggested that in the interests of the administration of justice generally, but also more specifically in the interests of the Appellate Division and the Constitutional Court the constitution should, as a matter of urgency be amended to confer on the Appellate Division as a Court of Appeal, exactly the same jurisdiction in respect of constitutional matters as is being conferred by the constitution on the provincial and local divisions of the Supreme Court".

I agree with what he says insofar as the inclusion of the Appellate Division in constitutional jurisdiction save that I do not agree that it should be the same as the jurisdiction of the provincial divisions under the interim constitution.

My proposal is that provincial and local divisions of the Supreme Court should have the power to decide in addition to the matters conferred upon it, the jurisdiction conferred upon it by the interim constitution, it should have power to decide on the constitutionality of acts of Parliament with an automatic right of appeal to the Constitutional Court, or if necessary, this is obviously a technical matter, if necessary via the Appellate Division with leave of the Constitutional Court.

But the provision at the moment that the parties can

agree/...

agree, parties to a dispute can agree that a provincial or local division shall have jurisdiction to determine the constitutionality of an Act of Parliament is to my mind illogical and there is no reason why it should exist. If the parties can agree that a provincial division of the Supreme Court can decide on the constitutionality of an Act of Parliament, why should the court not have that power in all cases? Why should it depend on the agreement of the parties? Subject to that I agree that the jurisdiction of the Appellate Division should be the same as that of the provincial divisions.

Secondly there should be, in my view, there should be an appeal to the Appellate Division, from the provincial divisions in all constitutional matters including constitutional issues in respect of which the final word lies with the Constitutional Court.

Then finally provision I think should be made for a right of appeal from the Appellate Division to the Constitutional Court with the leave of the latter court as is the case in the United States of America, because otherwise frivolous appeals could find their way to the Constitutional Court which is not necessary and which is disadvantageous to the whole administration of justice.

Those broadly are my submissions with regard to the involvement of the Appellate Division in the constitution. I think it is important that the final constitution should make provision for a role for the Appellate Division.

I might say that this morning I received a telephone call from the president of the Constitutional Court, Mr Justice Chaskelson who has authorised me to inform this committee that he has discussed this matter with Judge

Ackerman/...

Ackerman and with Judge Mahomed, both members of the Constitutional Court, and they agree with him that the Appellate Division should be included in the process of constitutional adjudication under the final constitution. I should imagine that the president of the Constitutional Court will in due course submit his own memorandum, but this much I have been authorised on his behalf to state.

Now the second main topic that I want to touch on this afternoon is the question of a single or split judiciary. By this I understand that the question is, do we continue to have, as provided for under the interim constitution, a Magistrate's Court system and a Supreme Court system, or do we leave this system entirely and embark upon a system which one finds in continental countries where there is no differentiation between the courts in this sense that people wanting to become judges embark upon a judicial career. I understand that they go to university and do special courses after they have graduated as lawyers and they start at the bottom and they work their way up.

Now there will, under any system, whether under our system or under the continental system always be higher and lower courts, and to my mind there is no advantage to be gained in departing from the present distinction between magistrate's courts and the Supreme Court. We have, after all, the infrastructure in this country of magistrate's courts in every town and village in South Africa, and we must be talking, I do not know what the numbers are, but it is more than hundreds of magistrates, it could be thousands.

This is not to say that I agree that the present system produces the best results as far as the magistracy is concerned. On the contrary, I think that there is a lot of

room/...

room for improvement in the system, but this is not with respect, Chairperson, a matter for the constitution, it is a matter for legislation. May I be permitted just to point out some of the problems that I see in the present system and why I feel that the present structures of the Magistrate's Courts are not satisfactory.

Under the present system as you know, magistrates start as clerks in the Magistrate's Court. They then become prosecutors and then they graduate to assistant magistrate and ultimately to magistrate and finally to the position of regional magistrate, and the present qualification in section 7 of the Magistrate's Court Act, for a magistrate is a civil service lower law examination, or an examination declared to be equivalent to such an examination by the Public Service Commission. That is not a very high qualification.

Regional magistrate's qualifications are laid down by section 9(b) of the Magistrate's Court Act and a regional magistrate is required to have an LLB degree or a public service senior law examination or its equivalent. Regional courts under the present dispensation hear only criminal cases, and I might just interpose to say that as far as the regional courts are concerned, I think that it is generally accepted that they do a good job and that they are generally speaking manned by competent persons who are well acquainted with the ins and outs of criminal law. Unfortunately the same cannot be said for the civil magistrates.

Ordinary magistrates, those magistrates who are not regional magistrates and who sit in the ordinary magistrate's courts have to hear, in the course of their duties, both civil and criminal cases, and whereas they have

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had, because of their background in the prosecution field, a certain amount of experience in criminal cases, their experience in the civil law has been nil, generally speaking.

Their civil jurisdiction is admittedly limited by the provisions of the Magistrate's Court Act, but the result of all this is, that the standard of civil jurisdiction in the magistrate's courts, the ordinary magistrate's courts is generally speaking low. It is not considered to be very high in judicial circles, and I feel that reforms are definitely necessary. I do not want to take up too much time of this committee to point these out, because as I have said, I think it is not a matter for the constitution it is a matter for legislation, but I feel that it is necessary to have the full background of the court structures in this country to understand what the committee is actually going to recommend.

Now more emphasis, in my opinion, should be placed on the training of civil magistrates, and in this regard I would draw attention to the fact that in 1993, by Act 120 of 1993 the Magistrate's Court Act was substantially amended in order to provide for this very difficulty. The Act was promulgated in 1993 but it has never been brought into operation. What the reason for this is, I do not know, but that Act provided for the establishment of civil divisions of the magistrate's court which would be equivalent to regional courts. It also provided for the establishment of family divisions in the magistrate's court, and it laid down higher qualifications for persons sitting in those courts. It had to be a magistrate or an attorney or an advocate with an LLB degree or a diploma in law.

What/...

What is very important is, that the Act contained a provision, in section 9 ...(indistinct) which authorised the Minister to appoint an advocate or an attorney as a senior civil magistrate either generally or for the purposes of a specific case. The idea also was to raise the civil jurisdiction of the magistrate's courts from R20 000,00 to R200 000,00, that has also not been done.

Now if this Act were to be implemented it would, in my opinion, substantially enhance the value of the civil jurisdiction of the magistrate's courts, because the position at the moment is that you would have practitioners and experienced persons trying civil cases, and if the aim should be that people wishing to start off in the magistrate's court with the intention of one day ending up on the Supreme Court, this is the only way in which this could be achieved.

Now my suggestion is that the qualification for senior civil magistrates should be that the person must be an advocate or an attorney who has practised as such for a period of five years and can satisfy the Magistrate's Commission that he or she has had adequate exposure to civil cases during that time. Existing magistrates who wish to progress to the status of senior civil magistrates, must in my view have qualified as an advocate or an attorney and must have sat as a civil magistrate for a period of at least three years.

Just by way of interest in the history of this country there have been magistrates who have been appointed to the Supreme Court Bench, and this has happened in Natal in the early days of the century, one of the persons concerned was Mr Justice William Broom who was a grandfather of the

present/...

present Deputy Judge President of Natal whose father was also a judge in Natal. So there were three generations in Natal and the first of which was the chief magistrate of Durban at the time that he was appointed. If we are going to look further afield for appointments to the Bench, and we are going to look to the magistracy, then under the present system I am afraid that we are not going to find many candidates. That to my mind is not the primary object of the exercise. I think the primary object of the exercise should be to improve the quality of the civil jurisdiction of the magistrate's courts.

These in broad outline are the two main points that I wish to make and I will be very happy to answer Chairperson any questions relating to what I have said, as well as any other matters which fall within the ambit of this committee's functions.

CHAIRPERSON: Thank you Judge. Thank you very much. I think you have made an extremely interesting input, especially the new ideas that you have brought in, and ladies and gentleman I now give you the opportunity to ask question for clarification. Please no speeches, no arguments with the Judge, just questions for clarification. Danie Schutte as usual number one.

D SCHUTTE: Judge, sadly many of us still think about the truth commission, we have had a lot of truth commission this morning, so could I summarise your representation as follows, and please correct me if I am wrong.

Firstly, that the Constitutional Court should be retained? Secondly, that the jurisdiction as far as subject matter is concerned will be the same for the Appellate Division as well as for the provincial divisions, and

thirdly/...

thirdly that the Constitutional Court will be the final instance as far as constitutional matters are concerned, and they will only entertain matters in which they give leave to appeal? Is that more-or-less a fair summary of your proposals or not?

JUDGE PRESIDENT FRIEDMAN: Yes, the answer is yes. I did not say so in so many words, but I agree that the Constitutional Court should remain in the constitution. I do not agree with the proposals made by my colleagues in this regard. I think that we have embarked upon a dispensation involving the establishment of a Constitutional Court and I don't think that this should be changed. Excuse me, the answers to questions two and three are yes in both cases.

D SCHUTTE: I assume that one of the reasons for expanding the jurisdiction of the Appeal Court and of the Supreme Court is to alleviate the burden on the Constitutional Court, but our main difficulty at this stage is the burden on the Supreme Court. If in certain cases it takes more than two years for serious criminal cases to be heard and even in other cases even longer for civil cases to be heard, then it seems to me at this stage that the problem is the burden on the Supreme Court.

JUDGE PRESIDENT FRIEDMAN: I do not agree with that. To some extent of course the object is to alleviate the burden with which the Constitutional Court would be lumbered simply because I do not think that the Constitutional Court would be capable of carrying the burden if some alleviation were not granted, but I do not agree that, first of all I do not agree that there is a two year waiting list for serious criminal cases, nor is there a two year waiting period for

criminal cases. I think that that is an exaggeration. The period is far shorter, certainly for criminal cases it is very much shorter. For civil cases it is a bit longer but it is not two years. It will, to some extent increase the burden on the Supreme Court, but as far as that is concerned there is a proposal you will see in the memorandum which was submitted under my name that the Chief Justice has proposed the establishment of Court of Criminal Appeal, I think you know the background of that, and if the Court of Criminal Appeal were to be established that would considerably alleviate the burden on the Appellate Division. One does not know what is going to happen with the death sentence cases, because that is before the Constitutional Court next week, but should there be any diminution in the operation of the death sentence in this country that too will decrease the work load of the Appellate Division.

Then that leaves the Supreme Court and quite frankly the Supreme Court has had, since the new interim constitution cam into existence, has had a number of cases to deal with constitutional issues, the only issues that it has not dealt with are issues involving the interpretation of certain sections of the Criminal Procedure Act. I do not believe, and in one or two instances with the agreement of the parties, even these have been dealt with by the Supreme Court and I do not believe that to give the Supreme Court these slight additional powers that I suggested and to bring the Appellate Division into the process is going to unduly burden either of those two divisions with too much work.

CHAIRPERSON: Mr Willy Hofmeyr.

W HOFMEYR: Judge I wanted to ask you one general question, and that is in your submission you made the

statement/...

statement that the constitution should delineate the system of administration of justice in broad terms and not seek to go into too much detail. Now you did not really expand on that in your submission to us now, but obviously if one is going to raise ideas such as a criminal court of appeal or the ideas that were presented to us by Judge Selikowitz and Judge Farlam, I think that an element of flexibility is going to be required in our judicial system in the future, and I think there are a number of people who have put forward the view that the constitution should in fact deal with less detail than it is dealing with at the moment. I would like you perhaps just to expand or to comment on that point.

I think the second point that I would like to raise is, on the issue of a split or a single judiciary I think the issue that one really needs to address is the question of whether there needs to be some ability between the magistracy and the judiciary. The view has again been put forward that with the existence of the judicial service commission and it's practice as it may involve perhaps that question has actually been resolved that there may not be any real bar now to magistrates being nominated and being appointed as judges should they be suitably qualified. So again I would like you just to respond to that question. Thank you.

JUDGE PRESIDENT FRIEDMAN: Chairperson with regard to the first question which Mr Hofmeyr raises, the question of the delineation of the system of justice in broad terms, what we have in mind is that what the constitution should provide is for in my view a Constitutional Court and a Supreme Court with the Appellate Division at the head of it, the Supreme

Court/...

Court being divided into divisions, broadly on geographic lines, and that there should be a provision for a magistracy as we have it at the moment. Those are the broad lines that I envisage.

Within those structures you can have, for example, starting with the magistrates you can have various types of magistrates, but that doesn't need to be provided for in the constitution, because that can be provided for legislatively.

Similarly as far as the Supreme Court is concerned, I envisage the continuation of specialist courts like the Income Tax Special Court, the Patents Court, the Water Court, courts of that kind which are also part of the Supreme Court which do not require constitutional provision. That broadly is what I envisage. I do not agree with, as I have said before, the delineation drawn by my colleagues Selikowitz and Farlam with one court at the end and the American system of circuits.

I might say that had this idea been put forward in the days when the interim constitution was being debated at Kempton Park there might have been a lot to be said for it, it's an interesting proposal, but I feel that once we have embarked upon a system with a Constitutional Court such as countries on the Continent and elsewhere in the world, Canada, New Zealand and the judges have been appointed and the Constitutional Court is going to exist for seven years, I don't think that we should depart from it. I think we must accept that we have embarked upon a system of constitutionalism with a Constitutional Court at the head of it. Therefore, when I talk about delineation I am talking about the system that I have just mentioned.

As far as the mobility between magistracy and the Supreme Court is concerned, Mr Hofmeyr is quite right Chairperson, the Judicial Service Commission is entitled to recommend any person who is considered fit and proper to be on the Supreme Court Bench. It is not limited in any way and there is nothing to prevent, under the present system, there is nothing to prevent a magistrate who has shown himself to be sufficiently competent to be appointed to the Supreme Court Bench, although I must say this, that under the present system, I can't see it happening too readily, but if the system is reformed along the lines that I suggested then there is, in my view, going to be room for mobility.

CHAIRPERSON: Thank you. The next is Ms Jana.

MS JANA: Thank you Mr Chairperson. Judge Friedman I have two questions for you. The first question is how do you reconcile your proposal with the issue of time and costs, bearing in mind that accessibility is a crucial problem in our society.

My second question to you is, that in deciding between a single or split system one of the very important factors to be taken into account is how to best redress the imbalances created in our system at the moment and how to create proper representivity and I would like your comments on that. Thank you.

JUDGE PRESIDENT FRIEDMAN: May I Chairperson deal with the second question first. The redress of the imbalances is a matter which the Judicial Service Commission is going to have to tackle and is tackling already. I do not believe that under a system which is regarded as single as opposed to split, that there is going to be any hastening of the

process/...

process of redressing the present imbalances in the system. I think that the only way in which you are going to redress these imbalances is, as far as these reforms are concerned, providing a magistrate's court's structure where people who sit on those benches are going to get the necessary experience to advance to the Supreme Court. So I do not think, the fact that I advocated a split judiciary is going to retard the process of redressing the imbalances.

Then as far as representivity is concerned, that is a matter also in the hands of the Judicial Service Commission and is not going to depend upon whether we have a single or a split system in this country.

I am not, as far as the first question is concerned, I am not quite sure that I understand the import of it. Perhaps I could ask Mr Chairperson if you could, if I could just ask Miss Jana to explain a little more fully what, I do not quite understand the question of time and cost.

MRS JANA: Judge Friedman your proposal is that the AD should be given jurisdiction as a court of appeal on constitutional matters, it's a court of first instance of appeal, and the Constitutional Court will be the final court of appeal, so obviously now it means that a matter can be taken in terms of ...

JUDGE PRESIDENT FRIEDMAN: Yes I understand the point now. Of course if you go through the process of starting in the Supreme Court and then going to the Appellate Division and then ultimately to the Constitutional Court, if every case were to go that route then of course it would take time and it would cost money. But I do not envisage Chairperson, that if you introduce the Appellate Division that there is going to be a three tier system every time. Cases have a

habit/...

habit of being clarified along the line as they go along from one court up to a higher court, and there is nothing to prevent provision being made for direct access from the Supreme Court to the Constitutional Court there is provision in the present law, in certain cases, for example under the Income Tax Act, a decision of the President of the Income Court, can in terms of the Income Tax Court go directly to the Appellate Division without going through the intermediatory Supreme Court. There are lots of ways in which this can be done. Also if the Appellate Division is introduced and a matter goes on appeal from say the Supreme Court to the Appellate Division, the Constitutional Court does not have to decide the matter. There is not, I do not envisage an automatic right of appeal by any means. I think that as in the United States of America, I think the Constitutional Court should have the final say as to whether it is going to hear a matter or not, and if a matter has gone as far as the Appellate Division and the Constitutional Court has had the opportunity of reading the judgment of the Appellate Division, in many cases it will not grant leave to appeal to it. Consequently I do not believe that the introduction of the Appellate Division is generally speaking going to take up an undue amount of time or involve undue expenditure of cost.

CHAIRPERSON: Mrs Jana are you happy. The next is Mr Joe Matthews, Deputy Minister Matthews.

MR MATTHEWS: Thank you Mr Chairman. Judge, I must say as an experienced attorney I am not sure that the factor of time mentioned by Mr Schutte can be so easily disposed of, but I really don't want to go into that because that's a matter of practice and sometimes it depends on the

efficiency/...

efficiency of the attorney concerned, how fast he can get things going in both the Supreme Court and the Appellate Division. But sir you mentioned in passing other jurisdictions, you mentioned United States and you mentioned some continental countries and I was wondering if you and others in preparing these memoranda did have any kind of comparative analysis that you did of the experiences elsewhere? I have in mind for example that in Italy the Constitutional Court has a backlog of 15,000 cases right now as we speak. On the other hand if you did mention or suggest that the Constitutional Court should be replaced there would be an uproar, but it's taking years, and years and years for people to have their cases heard in the Constitutional Courts. But their prestige, on the other hand as in Germany is so high that it would be politically unacceptable to even raise the possibility, but I am just wondering whether there was any kind of sort of comparison and analysis of experience that has occurred in other countries where there is both a Supreme Court and a Constitutional Court?

JUDGE PRESIDENT FRIEDMAN: Chairperson I personally have not conducted a comparison between the position in the United States for example and Italy or elsewhere in the world. I do know Chairperson, as the Deputy Minister has pointed out, that there are in certain countries tremendous delays, India is one of the worst I think. Italy is also bad. I think that the answer lies in the way in which the Constitutional Court is going to manage its workload and its affairs, and I do not know whether you have had the opportunity of looking at the rules which have just been promulgated, but the rules of the Constitutional Court are

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in my view, drawn up in such a way that the probability of a backlog being built up to the extent mentioned is unlikely. I think that if the Constitutional Court sets out from the basis that it is going to control the number of matters that come before it, that it doesn't deal with trifling issues which should never come before it and which could be dealt with by lower courts such as the Supreme Court, its workload should be kept at a manageable level, and I believe that that is where the solution lies Chairperson.

CHAIRPERSON: Mr Minister are you happy? Thank you. The next I have on the list is last, but definitely not the least Mr Johnny de Lange. Johnny are you related to Silver de Lange, the one that they have the boeremusiek on? (Laughter).

MR J DE LANGE: No I am unfortunately from very humble beginnings I don't come from such high stock I am afraid. Chairperson and Judge Friedman, I just want to get clarity on the first issue, I think I already know the answer, but just that we have got it on record.

Advocate Schutte summarised your position, but I just want to make it clear are you also saying that all aspects of Parliamentary legislation, as in the National Parliament, not Provisional Parliament that all those matters should also be a jurisdiction of the provincial divisions, and then of course then of course if there is an appeal that would go to the AD, so that's the one point of clarity.

The second point is just that you do not have any problems with the direct access which do not exist in many jurisdictions for example the United States, so that you can get a quick flow of matters to the court. I just want to

understand/...

understand in principal, if you don't have any problem with that as well? So those are just the two clarifications.

The more detailed issue I want to deal with Judge is the issue of the split and the single judiciary. I agree with you that clearly many of the issues that are raised here are matters of detail or also matters, not necessarily that it has to be in a constitution, but I also follow your approach that I think the constitution is to contain principles and not the detail, and when you do that, to arrive at a principle you have to have a certain model in mind and you have to have certain details at least worked out, so to that extent these things are important.

Now on the single and split judiciary I understand your point of view that you have put and have said that there is no reason to depart from it. The only problem I have, and again I don't have any problems with the problems you have raised that have to be fixed up in the magistrate's courts, I think we all agree with that, the problem I have is that you haven't given any reasons why we shouldn't depart from it other than it's a tried and tested kind of structure we have etc, etc. Now we have had many other tried and tested structures in this country that developed during the apartheid years and it's in my view, no necessarily the best and not necessarily structures we should hold to. Now there are two areas that I think when we talk about a split and a single judiciary that need to be addressed, the one is this, and I think you have touched on it already and the little bit of comparative reading I have done that seems to happen in all countries where there is a split judiciary, is that in real terms and in perceived terms people see the system as having A justice and B justice. The magistrates in the

lower courts have lower qualifications, they only have to pass State exams etc, etc, you don't expect the kind of professionalism and expertise for them to become magistrates and so on. So that seems to happen in many of the systems, not just in our country, not just under the apartheid kind of structure we have had. That is the one issue we need to deal with, the split and single judiciary is this perception, also the reality that we have an A and a B system of justice. Now how does one deal with that, when whatever you are saying here is 100% correct, but the problem is that we keep all the artificial divisions, and I want to emphasise the word "artificial divisions" because the divisions between a magistracy and a judiciary, they are created by us, they are in our minds, we say that they are only allowed to deal with certain matters, you are only allowed to become a magistrate through a certain way, a judge in a certain way, why retain those divisions if they are artificial as I say and do not really contribute anything real particularly in terms of what people have said here. Anyone can become a judge for example, now. The way the law stands now, the Magistrate's Commission can appoint attorneys and advocates to become magistrates. So I want to know then, what are the reasons to retain those as then in this creation of an A and B justice?

But then the second issue that we need to grapple with in a single and split judiciary, there are two issues, the one of representivity and legitimacy. Now some people may say that the legitimacy issue is a perceived one, and others of us would say that it's a reality in this country. Now the point is, whether it's perceived or a reality it exists, it's there. Now how does one deal with this kind of problem

of legitimacy and representation when one looks at the proposal you have put forward Judge, and I am not saying you have done it for these reasons? But the effect of what you have put forward is that everything is going to remain exactly the way it is, therefore the courts remain white, male dominated. There is a trickle of black lawyers and woman lawyers coming through the Judicial Service Commission for real and other reasons, and therefore the process of legitimising and making the system more representative, is going to take absolutely an enormous period of time. Whereas if one looks at making it one system of a judiciary, and you allow young black lawyers, young women lawyers, young progressive lawyers that have been excluded from the process to actually become part of a judiciary and not a B system of justice. You are actually giving legitimacy to the system where it counts a lot and that is right at the bottom where most people experience justice.

So these are some of the problems. I can go into much more detail but the Chairperson, I know I have already stretched his patience to the limit, but those are some of the issues that need to be grappled with and maybe some of it is detail, maybe most of it doesn't have to go into the constitution, but those are the things we need to look at in this system and I wonder if you could possibly comment on some of those things, because those are the real things that we need to deal with in terms of these restructuring.

JUDGE PRESIDENT FRIEDMAN: Dis nou met a mondvol. Chairperson I have written down as best I could the questions that Mr De Lange has raised, I will attempt to answer them. If I haven't got them down properly then

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perhaps Mr De Lange will help me.

The first question you asked me was, do I agree that all aspects of Parliamentary legislation should become part of the jurisdiction of the provincial divisions of the Supreme Court, the answer to that question is yes, for the reasons which I have given.

Secondly, do I agree with the provision of direct access to the Constitutional Court, the answer to that is yes. I think that it's provided for in the rules of the Constitutional Court and I have no reason to feel that it should be departed from.

Now with regard to the single or the split judiciary, the first question you asked me was, why should we not depart from the split system which you referred to it a few times as part of the apartheid system, I don't agree with you that it is anything really to do with the apartheid system, not the structures. It may be that it was perceived as such because of the way it functioned, but the question of a split judiciary is not something which was established as part of the apartheid system. It is something which exists in many countries, it exists in England, it exists even on the Continent, in Belgium they have a split judiciary. It is not a, in Australia, New Zealand, in many of the Commonwealth countries, I would say in most of the Commonwealth countries you do find this. It seems to me that the gravamen of Mr De Lange's question really comes down to the question of representivity and legitimacy. Now I think that if Mr De Lange could be satisfied that the question of representivity and legitimacy could be met under a split system then he would not have any objection to it. That is as I read it.

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You raised the question as to whether a person, a young progressive lawyer, wishing to become part of the judiciary shouldn't be caste in the mould of a B type judge or magistrate as opposed to an A type. Now, as I said right at the beginning of my representations this afternoon, there will in any system have to be a layer of courts. There is no such thing as saying that you have got a case now you can go to any court you like. Depending on the nature of the case, the amount involved, if it is a criminal case the nature of the crime that has been committed, that determines under any system of jurisdiction and jurisprudence, that determines what court you are going to go to.

Now that means that if there is a case involving a trifling amount of money, or if it is a case involving a petty criminal offence, like a petty theft for example, that kind of case is going to go to the lower court. It does not matter whether you have a split judiciary or you have a single judiciary, it is going to go to the lower court in the hierarchy. You have got to have a hierarchy of courts because otherwise where are you going to go with the most important cases. You are not going to start at the bottom with the most important case, you have got to take it to a court which the powers that be regard as competent to deal with that case. I mean take for example, let me give you an example of, you know perfectly well because you have practised in the Supreme Court, there are many cases in the Supreme Court which in the lower courts the persons presiding, whether they be magistrates or whoever they may be, they would not be competent to deal with, because they have not had sufficient experience. Now that is the position under any system.

I do not believe that a young progressive lawyer who decides that he or she wishes to become part of the judiciary is going to be cast in a lower mould because there is a split system. If you get the magistracy right and you introduce reforms along the lines that I have suggested, and I am by no means saying that these are the only ways in which the magistrate's courts can be improved, there is no reason why a young progressive lawyer should not become a magistrate. If that person progresses sufficiently to satisfy the requirements of a Supreme Court judge there is no reason why that person can't be promoted. The Judicial Service Committee is in no way limited in its recommendations that it makes to the President for appointments to the Bench.

The question of representivity is also one of once you get the magistracy, the system acceptably adjusted there is no reason why anybody shouldn't want to become a magistrate, and once you get persons of, not white males, you get black people or women joining the judiciary, there is no reason why they cannot advance to the top. Once it is accepted that the magistracy is a perfectly legitimate organisation and part of the judicial structure, there is no reason why people shouldn't decide to become magistrates, black people, women, anybody who has been disadvantaged. To my mind it does not depend on whether the system is split or whether it is single.

The question of legitimacy, I do not like this word legitimacy because I feel that I have been on the Bench for some time and I think that I do a legitimate job there as do most of my colleagues, but I know what you mean when you talk about legitimacy. I think that the whole question is,

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it is not one of legitimacy, it is a question of representivity. I think that if there were to be more persons of colour on the Bench, if it were not a white male dominated Bench, then the whole question of legitimacy would fall away, would be accepted. That is something which is already taking place Mr Chairperson. The Judicial Service Commission, as you know, has departed from the practice as far as the Cape Provincial Division is concerned, at its very last appointment it made, it did not appoint a white male, and there have been appointments in Natal.

I think that you know obviously one does not want to wait for generations to get the system right, but do think that steps have been taken in the right direction and I am quite confident that if we leave the Judicial Service Commission in place as the structure that is going to make appointments to the Bench, this question of legitimacy and representivity is going to be met.

I hope that I have dealt with all the questions, if I have not Chairperson, please give Mr De Lange an opportunity of asking further questions.

CHAIRPERSON: We have to adjourn for an extremely important matter, in about five minutes we are going to have tea. But in the five minutes that we have there are still two questions and with my colleagues permission I will close the names now, it is Judge Olivier and thereafter Mr Willie Hofmeyr, you have got five minutes for the questions and the answers, and if there are any other colleagues who would like to take some matters up with the Judge, there is also the opportunity while we have tea.

JUDGE OLIVIER: As a technical advisor merely I think I must give precedence to a member of the Committee, to Mr

Hofmeyr.

CHAIRPERSON: I think as a member of the Appellate Division I will easily give you preference over anyone here.

...(indistinct) .....

CHAIRPERSON: I think many of your colleagues will agree with you.

JUDGE OLIVIER: Mr Chairman I think that we as technical advisors will have to help and lead the discussions at the end of this theme committee, and therefore it is very important that we get the basis correct. I was very interested to hear what Judge Friedman said about the benefit of a higher court having heard, read the record of a lower court which heard the evidence made factual decisions, credibility, whatsoever and also discussed the legal points, it clarifies the matter, it crystallises it out. Now if we accept that, that even that should be the position in constitutional matters as well, and if we accept that there should be an appeal in constitutional matters, then also from the provincial level to a higher level, isn't there another possibility to the one that was mooted by him, I would like his comment on that, and that is to integrate the Constitutional Court into the Appellate Court but as a separate chamber, the Appellate Division having then a chamber for civil and criminal work and a chamber for constitutional work, why have two tiers, vertical tiers of appeal?

JUDGE PRESIDENT FRIEDMAN: Chairperson this is a matter which I understand, formed the subject of much debate when the interim constitution was formulated. The suggestion at that time of a separate chamber of the Appellate Division was mooted and it was not acceptable politically. I have no

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objection in principle to it, but I think that we have got to be realistic and we have got to be pragmatic. We have in this country now a Constitutional Court which we have set up. We are providing and have provided the infrastructure for such a court, it is going to sit for the first time next Wednesday. The judges have been appointed for seven years. I think it is fait accompli at this stage, I don't think that we should go back on it. That is my approach, not that I have any objection in principle to the proposal of a separate chamber, but I don't think that from a practical point of view that we can go back on what we have done. I firmly believe that the interim constitution is a good one and we should stick to it as far as possible.

CHAIRPERSON: Professor Benjamin.

PROFESSOR BENJAMIN: Judge, a number of the members of the Committee raised the problems of time and cost and how any restructuring would contribute adversely to that. It seems to me that as our constitutional law develops over the next few years a large number of the cases will be criminal law cases and this has been shown in the law reports already, you mentioned the new structure that has come into being of the criminal appeal court, can you just clarify what would be the route to the Constitutional Court in criminal matters and do you see that having any adverse or advantageous effect on issues of time and delay, of cost and delay?

JUDGE PRESIDENT FRIEDMAN: The present route of a criminal matter is, if it is raised, if a constitutional issue is raised in the magistrate's court the magistrates do not have the right to decide the constitutional issue, they have to refer it to the Supreme Court. Once the Supreme Court has decided the matter it goes back to the magistrate's court,

but, if there is a constitutional issue raised and it's to go the full length of going through the various courts then it would have to go from the Supreme Court because the Supreme Court would have been the court to give them the constitutional decision, it would go the Appellate Division and if the Constitutional Court gives leave it would then go to the Constitutional Court. I believe that this would not happen save in exceptional cases. It would happen for example, where the death sentence is at issue, and in matters of tremendous constitutional importance a criminal case would go from the Supreme Court to the Appellate Division, from the Appellate Division to the Constitutional Court. Very often the Appellate Division could be bypassed, or if it went to the Appellate Division, the Constitutional Court can say it's not going to take the matter any further, it is satisfied with the judgment of the Appellate Division. I mean after all, you know the Appellate Division is the highest court in the country as far as all matters other than constitutional matters are concerned, and one knows that the judges that sit on the Appeal Court are the best qualified judges in the country, and if they have given a judgment the Constitutional Court will not necessarily say that it wants to hear the matter. I mean if you take the American system, the American Supreme Court does not hear all matters. You petition the American Supreme Court from the Federal Court and they will decide if it is sufficiently important for them to determine it. So I do not believe that timewise there is going to be any undue delay, nor is there going to be cost-wise any undue increase for these reasons.

CHAIRPERSON: Colleagues we have come to the end of this

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section. We are going to enjoy tea now, but I first see Mr Douglas Gibson now.

MR GIBSON: Chairperson you invited me to speak on behalf of all of the members of the Committee in thanking the Judge for taking the trouble to come and address us today. It's probably a measure of the respect and regard which we all have for him as one of the country's most eminent lawyers that this group of politicians and some of us lawyers acted totally contra naturam today. We all behaved ourselves, nobody heckled you and we all deferred to each other. That's the sort of effect which the Bench has on some of the politicians who are around. The fact that you got such a good hearing and really didn't get a hard time does probably indicate to you that your views are taken very seriously and will be very weighty in the deliberations of this committee. Thank you for coming.

CHAIRPERSON: The Committee is adjourned for tea for 15 minutes.

CHAIRPERSON: Welcome to the second session this afternoon and I am going to introduce to you Professor N Steytler who has various claims to fame. His first claim to fame is that he is director of the Community Law Centre at the University of the Western Cape, but that's nothing in comparison with the second one, namely that he is also a senior lecturer there, but that is nothing compared to the last call to fame and this is that yesterday his wife gave birth to their first born son. (Cheering..) With that Professor you have the floor for about 15 to 20 minutes. You saw how the Judge did it. It is your opportunity to try and improve on it.

PROF STEYTLER: Thank you Mr Chairman and with that excuse that I will use unfortunately I do not have written documents for you, in due course I have to provide them. Just a few comments that may sound trite, but on the general principles pertaining to the drafting of the constitution pertaining to the structure of the judiciary, and then the implications that it may have on the practice of the courts.

Firstly, hopefully the constitution will be an idealistic document, and I just want to refer you to a quotation by Judge Mahomed, in a decision in the Namibian Supreme Court which he said:

> "The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It's a mirror reflecting the national soul, the identification of the ideals and aspirations of the nation, the articulation are the values bonding its people and disciplining its government".

Now obviously an idealistic approach would conflict often with current political demands to solve everyday political problems. So whilst one would acknowledge that the constitution is in fact a political document, one should hopefully not lose sight of its idealistic goals.

Secondly, because it is an aspirational document the constitution should have a different character than other types of legislation. It should be written in broad language setting out basic principles. I think a number of people have already mentioned that, I think Judge Friedman as well, so that one does not clutter the document with provisions which can be dealt with elsewhere. An example, if you look at your own present constitution, the powers of the Constitutional Court very detailed references including that it may make regulations, now clearly that shouldn't be in a constitution.

The third principle is that there should be internal consistency between each chapter of the constitution and there will be an interplay between the various chapters in the constitution and in particular between the chapter on the fundamental rights and the other sections and in particular then the section on the judiciary, because there often may be a conflict, one would seek harmony.

Two particular rights that come to mind in this regard is first the right to an independent and impartial court, and secondly the right to an appeal from the court of first instance. Both these rights have implications for how the judiciary should be structured.

Firstly then the right to an independent court. This can be done obviously by putting in broad terms that there should be a judicial service commission, that the commission

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should be composed in a particular manner, that it would appoint judges. You may have a further provision as you have at the moment that there shall be a magisterial commission to appoint magistrates. The only question really is, to what amount of detail should one go in defining the appointment of the Judicial Service Commission, the composition, the numbers etc. Again one should try to avoid not to go too detailed because the constitution would in any case say that the court should be independent. So if you ordinary legislation spelling out what does it mean in terms of pension, in terms of salary, that legislation would be measured against the standard of what is required to be independent. So there is always the safeguard that if you have ordinary legislation it would be tested against the chapter on fundamental rights.

The second right of great importance here is the right to appeal. Now section 25(3)(h) of the present constitution provides that

> "Every accused shall have a right to appeal to a higher court than the court of first instance".

Now this right has implication for how the court should be structured, and the present dispensation of appeal and review procedures where the trial court is a division of the Supreme Court is probably unconstitutional. Let me try to explain.

The right to appeal entails the following. Firstly there should be a hearing on matters of fact and law. It should be by a higher court than the court of first instance and that court should be impartial. At present these requirements are not met by our law.

First, in capital cases before the Supreme Court the law now requires that leave to appeal should be sought from the trial judge. If leave of appeal is not given then the Chief Justice may be petitioned. Now without reviewing the record the Chief Justice may refuse leave too appeal. Now it's submitted that this procedure does not comply with the constitutional requirements of the right to appeal.

The following reasons I would advance. Firstly, requesting leave to appeal from the trial court cannot be regarded as an appeal. It is not to a higher court, it's the same person, the same judge simply deciding whether there is a likelihood of success.

Secondly then, is the petitioning to the Chief Justice in itself an exercise of the right of appeal. I would submit not, because it is not a full appeal, it's not a hearing, there is no review of the record, and often the State doesn't even reply. So this procedure in terms of capital cases, you know capital cases one would add now with the amendments in 1991 where there is this now mandatory right of appeal that that would comply with the requirement of at least appeal to a higher court.

In non-capital cases the accused may appeal to a three judge bench of the Supreme Court. If the appeal is unsuccessful leave to appeal must be obtained from that court and failing that to petition the Chief Justice. Now again I would argue that this system would not be constitutional.

The first question is, is the appeal to a three judge bench, is that an appeal to a higher court? It's arguably that it's not, it's simply a larger court. Secondly, is it an impartial court? I would submit not. We heard, I think

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when was it, Judge Selikowitz explaining to us that even he would regard that the perception of such an appeal to a three judge bench would not be impartial.

Impartiality, the concept of impartiality has two components. The first one is a subjective component which means was the judge impartial in this particular case. The objective component of impartiality requires that it must appear that the Court was in fact impartial and appear to the broader public. As Judge Selikowitz said, in the eyes of the public an appeal may not be regarded, or the three judge bench may not appear to be impartial if those judges simply reviewed a decision of a brother or sister judge.

Now the problem then is, what to do with this right to appeal. If the death penalty is held to be unconstitutional then the avenue then would be simply appeal from a trial judge of the Supreme Court to a three judge bench.

Now how can one proceed? Do we scrap the right of appeal or do we retain the right of appeal and then have to adapt the rules of court to ensure that the rules are in fact in conformity to the Bill of Rights. Can it be done within the present system. It can be done but obviously with great cost. If the right of appeal is recognised to the Appellate Division it would mean that every accused person in the Supreme Court would have a right to a hearing before the AD and that clearly would overburden the Appellate Division.

The other solution would be is to change the court structure and there is thus strong constitutional arguments to create an intermediate court of appeal along the lines suggested by Judge Selikowitz. Another solution may be the creation of the separate criminal division of the appellate

division, but again one would ask if every accused has got a right to an appeal whether the Appellate Division even would, a separate division within the Appellate Division would be able to cope with it.

So I think there is a good argument to be made out for such circuit courts of appeal which would then comply with the constitutional requirement of a right to appeal.

Now what will be the step further from such an intermediate court of appeal, how does one get to the top court? Because the right of appeal is limited to one appeal there is no right to appeal to the Supreme Court or the highest court, and such a court then would be able to control its own work by deciding which cases it should hear. It would become then, the final arbiter of the law and also of which cases should be heard before it.

The question is then what becomes of the Appellate Division and the Constitutional Court? The question should be answered to my mind with reference to the constitutional jurisdiction of these courts. In the final constitution should the present position be maintained of allowing only the Constitutional Court of having the power to review legislation. I think it's not a defensible position. Already you have heard two criticisms levelled against the almost exclusive jurisdiction which the Constitutional Court has over reviewing legislation. It is expensive, it's time consuming.

I would like to add a third reason, that is by giving the Constitutional Court exclusive jurisdiction one deprives that court of the benefit of reviewing the judicial arguments of the lower courts. In Canada for example, their Supreme Court has on numerous occasions declined to decide

a constitutional matter because it said that it did not have the benefit of seeing how a lower court decided the matter. So the Constitutional Court would derive great benefit from well argued judgments of the other lower courts.

Thus constitutional jurisdiction should be given to the Supreme Court at the expiry of the seven year period of the Constitutional Court. Now this would also accord with constitutional principle number seven which talk about the judiciary which shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights. Clearly the term judiciary must be understood as broader than one court, the Constitutional Court. So I would suggest as a minimum that the Supreme Court should have the constitutional jurisdiction to review legislation, both national and provincial.

The question then remains, what should be the relationship between the Appellate Division and the Constitutional Court? Shouldn't there be a uniform court at the apex? Two broad options exist. The one is that Judge Friedman said, a separate Constitutional Court continues and a litigant may get to the Constitutional Court perhaps via the other lower courts, or there could be direct ways of approaching the Constitutional Court. Such a route would imply that there will be a separate court of final instance for all non-constitutional issues. One then gets a split court at the top.

The other route would be a single court at the apex hearing both constitutional and non-constitutional issues.

Now a unified court overseeing the whole of the development of South African law is a very attractive one. One should remember that the division between constitutional

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matters on the one hand and non-constitutional matters on the other hand is going to be blurred. Already in applying the common law and other legislation, the courts, the ordinary courts must in terms of section 35(3) have due regard to the spirit and objectives of the Bill of Rights. The aim of that section was to infuse our common law with the principles, the fundamental principles of our Bill of Rights.

So it is not going to be such a neat split as people would suggest, and if there is a split court both courts giving interpretations of the Bill of Rights one may have conflicting views. Of course one may say that the Constitutional Court should be above the Appellate Division and that one should then get a third tier of appeal.

Now the arguments for the creation of the present separate Constitutional Court I think were valid, they were compelling. The question is whether those arguments will continue to be valid in the years to come. I am not so optimistic that all the reasons that made a separate Constitutional Court valid will disappear within seven years, but the constitution's life should be longer than that. It may well be that there could be ordinary legislation which would create a constitutional division of the top court, whatever we may call this court, but that need not be included or worked out in the constitution. Also in this area one should keep in mind the two guidelines that I suggested earlier on, the constitution should not be cluttered. One need not deal with the detail of a division of the Appellate Division being a Constitutional Court. We don't have to deal with that in the constitution and secondly that the constitution should not lost its

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idealistic quality. One should try to formulate and devise a court which in the long run will serve the best interest of South Africa. Thank you Mr Chairman.

CHAIRPERSON: Thank you very much. Questions Mr Schutte? No questions this time, is that in respect to the new born son? Question Minister Joe Matthews?

MR J MATTHEWS: Thank you Mr Chairman. I was wondering whether there was a kind of confusion in what you are saying between substantive law and adjactive(?) law, in other words a right, and then the procedures which are set up to enforce that right. Now you are almost suggesting that certain procedures extinguished a right. It's a very subtle situation and it to my mind of course we would be guided by a precedent before one could conclude that by merely reading the relevant statutes and the constitution you could arrive at the conclusion that the procedures laid down today have the effect of extinguishing a substantive right. Of course that always depends on the record, on what happened. If a ...(indistinct) pleaded guilty in the lower court he had already admitted his guilt and all the other evidence and so on recorded there, the fact that he subsequently wishes to appeal may not be regarded by a Chief Justice sitting in the Appellate Division as reasonable, and I don't think it could then be said that in those circumstances a rejection of his request for an appeal is extinguishing his right. So it just seems to me that once or twice I wasn't quite sure whether you hadn't gone too far in suggesting that procedures of various kinds had the effect of extinguishing somebody's right.

CHAIRPERSON: Professor?

PROF STEYTLER: The question is if we recognise a right of

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appeal then clearly there's consequences flowing from that and from my reading of comparative law the definition of right of appeal is a higher court, is a proper reveal of the record and of a hearing sometimes not an oral hearing, but at least written submissions. Now with that definition of a right of appeal your court structure that you want to devise must be able to meet that substantive right and the problem that I had is how are we going to meet that substantive right with the present system by having a limited right of appeal to the Appellate Division and how would it look in the future where your trial court is the Supreme Court and there it seems that it's advisable to build in an intermediate court which would be able to give effect to this right of appeal as of right, as opposed to an Appellate Division which will control its own cases, control the number of cases coming before it. Because these intermediate courts will have no control over the cases coming before it.

CHAIRPERSON: Thank you. The next is Mr J De Lange.

MR DE LANGE: Professor Steytler we have listened to various options as far as structures are concerned and in my mind at least four have been mentioned and I want to put a fifth one to you to hear your view and then generally to hear which of those five options you think would fit in all the kind of criteria you have set out. The first one is the present system. The second one is what I call the Friedman option which is the present system which then also gives further jurisdiction to the Supreme Courts and then in particular also gives the Appellate Division the right to hear certain constitutional matters. Then there is the Farlam/Selikowitz option which you have explained with the three circuit

courts and then the highest court that hears both constitutional matters and non-constitutional matters as the highest court in the land. Then there would what I call the Corder option that was Professor Corder the other day who said to us that there is another option, that is to have the top court in the land to exist of a two chamber court. The one to hear constitutional matters. The one to hear non-constitutional matters. In other words you put the AD and the Constitutional Court at the top together. Obviously the president of the Constitutional Court oversees all the matters and you can even shift the judges between the two courts, although the jurisdiction of the two courts remains separate.

Then there is a fifth option from one's reading and that is the German one where to expedite matters and to make constitutional matters flow quicker, they have two chambers at the top of the system of their Constitutional Court. Those chambers obviously can do twice the amount of work that is done otherwise, particularly if you can comment on that option, the German one, in the context of our country where we are starting with a rights based culture. With a constitutional state for the first time now and in particular looking at our past and the kind of things that have happened in the past. So if you could comment on that option. Then to give me also an overall view of the five options, which one would you favour to fit into the kind of court structure that you think there should be in this country.

PROF STEYTLER: If we can just go through the five that you listed. The first, the present system, I think it is obvious that a few people want to see it continuing in the way that

it is now, at least the extension of constitutional jurisdiction to the Supreme Court and questionable how far to the magistrate's court at the lower levels. The Friedman option, the Corder option, German option will sometimes become fairly close in its it's a matter of degree, because in the end what one will be looking at is what should your top court apex look like and the criteria should be is the harmony of law, both constitutional law and non-constitutional law in which I tried to argue, is not going to be so separable. So the difficulty of trying to have a very neat vision in law, which the constitution tries to minimise by giving the courts their instructions to interpret the common law, the non-constitutional law in the light of the constitution is going to make that division much more difficult.

So within a unified court structure where you can have Appellate Division which hears constitutional matters, and then over above that, a final Constitutional Court, which only hears then very, fewer cases of constitutional doctrine, may have abstract review of legislation, may have even review of bill before Parliament, perhaps that is an option. It may just be that it creates yet a further level of a court of appeal.

The Corder option is probably closer to the German one where you have a unified court but with chambers within that court, one for constitutional, the other for non-constitutional and this is how I see the German court working.

Now the details of whether one should write it into the constitution that there should be divisions because, in time to come, it may well be that most lawyers are very au fait

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with constitutional matters, this need to separation in terms of in terms of personnel, in terms of issues may disappear and that one may want to deal with that in terms of ordinary legislation how the appellate or the apex court would divise its cases or divise its roles, divise it's ...(indistinct).

Just to give you a broad answer in terms of what I would prefer is clearly the unification of the law, and the whole of the South African law within a right space culture with influence and penetrated by the values that underlie the constitution. I think to achieve that there should be the greatest amount of integration of the courts so that all courts are obliged to look seriously at the constitution, at the bill of rights. How it should work in detail one can argue about, whether it should best be a further higher court like the final Constitutional Court, or simply a division or a chamber. I have no firm views on that but at least there should be an integrated apex court.

CHAIRPERSON: Thank you. I have the name of Mr Ngcuka.

MR B NGCUKA: Okay, Thank you Chairperson. Professor, I have not yet heard the motivation why you would want to grant the provincial division with regard to pronounce upon the validity of the Acts of Parliament. There were good reasons last year why that power was not granted and those reasons, as far as I am concerned, they still exist and are going to continue to exist for the next three to four, five years, why would you want to change that what motivation to say, let us change now? In all probability we will finish drafting this constitution by next year and those reasons will still be there, I mean what would be the motivation?

PROF STEYTLER: There are two reasons for the motivation.

The one, as I understood the drafting of the interim constitution and why exclusive jurisdiction was given to the Constitutional Court, was that there was a distrust of the Supreme Court and that they will be able to pronounce upon the democratically elected body of the country, the Parliament that you could not get an un-elected, unrepresentative and illegitimate judiciary pronouncing upon the acts of Parliament of the legitimate organ of the people, Parliament. Now those reasons are going to disappear.

If one looks at the legislation that is going to be contested, for the first couple of years it is going to be contested, the legislation of the past illegitimate government and I, for the life of me, cannot see why an illegitimate court cannot pronounce upon the legislation of the previous illegitimate government. So there is no political reason I can see why the present Supreme Court cannot review pre-1994 legislation on its constitutionality.

A separate issue is reviewing the constitutionality of the present Parliament and there there may be strong arguments for the next seven years to grant that only to the Constitutional Court. But then,importantly, even if you give the Supreme Court power to review present constitutional or present Parliamentary acts, there is always the power of appeal to the Constitutional Court. That will be the final court of final instance, and I must really stress again, the immense difficulty which the Constitutional Court has to review matters cold. There is no argument like a proper argued judgment before them which they can see, well that was the decision of the prior court, this is the possible problems that we see in it, this is how

we/...

we want to go and it is really instructive to read other decisions by other supreme courts, how much they go into debate with what a prior judge said on the same issue and really they are deprived of that advance, the benefit of the wisdom that comes from other courts. So I think that there are very good reasons to change the present situation because something fundamentally has occurred.

CHAIRPERSON: The next question is Mr Willie Hofmeyr.

MR HOFMEYR: I do not know if am addressing senator Ngcuka's concerns but perhaps you could comment on this. I think one of the suggestions that we have heard as well is that if there is a sort of automatic right to appeal against the Supreme Court findings on the validity of legislation, so that in practice, the Supreme Court could only find legislation valid if they found it invalid it would not take effect until it in fact has been confirmed by the Constitutional Court, whether that may not also help to address the issue. I think the sort of division in time frames may that you suggested may be another way of looking at the matter as well.

PROF STEYTLER: Certainly, but I think it boils down to the same matter is that the Supreme Court is not going to be the final arbiter of the constitution. It is still going to be the Constitutional Court in whatever dispensation we have and giving the Supreme Court, the present divisions, the power, simply enables the process to go on and as the lawyers get more au fait with the constitution, the load on the Constitutional Court regarding past legislation is going to be a mess. It is literally looking at sixty years of legislation and the Constitutional Court will not be able to do justice because each of the cases that they are doing

now, they have got basically ten days between hearings, it is major issues, there is a tremendous lot of documentation, they will have to write judgments, it is not going to be a quick business and you are going to start clogging up and building up a backlog which should really be dealt with by the Supreme Court.

CHAIRPERSON: Mr De Lange.

MR DE LANGE: Professor Steytler, I think you were here when Judge Friedman dealt with the whole issue of the single split judiciary and I am not going to go into details of what was meant by that. Do you have any views on this in the light of the kind of structures you are suggesting and of course also more broadly in terms of personnel, in particular to address these issues of legitimacy and representivity. If you have any of the views please share it with us, if you do not yet, well maybe you can let us have it some other time, but I just want to, while you are here ask you that question.

PROF STEYTLER: As I understand, the split judiciary is between the lower court and the Supreme Court. Lots of studies were done, particularly in America, about the poor quality of the lower courts there and one solution was that you have one court and the same court would hear a murder case and a traffic fine in order to raise the quality of the lower courts, that never got much serious attention.
The difficulty I think, as Judge Friedman eloquently said, is whatever structure you are going to have, there is going to be a differentiation of courts. One may call every judicial officer a judge and it may be something which one could seriously consider but that on the name itself will not change fundamental issue that there would be a grading

of courts, but the grading of courts will be dealt with in terms of the competency of the judicial officers and what one will try to do is to integrate the courts much more harmoniously without denigrating and say, well this is lower court justice, therefore it is not very important but I think you will not be able to get away from a differentiated structure where jurisdictions are limited and increased as the competency of the personnel increases. One could try to make formal integration by calling every judicial officer a judge. That should not be any difficulty at all. That is the case in most other countries, in Canada, US there is no real difference, they are all called judges but a judge of the provincial court or a judge of the county court, a judge of the - ja and so on. So on legitimacy it's a question that you, a matter of obviously great importance but you cannot correct it in a constitution, or even in a piece of legislation, one has to create the structures like the Judicial Service Commission which can really work with the personnel with the operation of the courts. It is extremely difficult to correct those wrongs, the problems of the crises of legitimacy by writing it or thinking you can correct it by writing it in the constitution. There are limits as to what you can do with the constitution, put it that way.

CHAIRPERSON: Do you want to follow up Johnny?

MR DE LANGE: I do.

CHAIRPERSON: But first, are you finished? You look as if you are opposed to ...

MR DE LANGE: No I, can I just say, I just want to take that up with you? I mean, if you make the distinction as we do in our constitution between lower courts and superior

courts, which we do, because we said we keep the system as it is, then clearly that is a principle you place in the constitution and it is wrong to say that you cannot deal with in the constitution, of course you must deal with it in the constitution. You have to state as a principle whether there are going to be superior courts and lower courts. Unless you do not do that you have the same problem that you have now. You have shown the preference for one of the systems that exists now and to that extent I will disagree with what you say and with what Judge Friedman said earlier. Those are principles and you have to spell them out and they are in this constitution as it stands now. We have made that distinction in this constitution.

CHAIRPERSON: Okay, I do not think we must develop an argument, the next is Mr Ngcuka.

MR NGCUKA: Professor, I just want to take this opportunity that you are here and probably tease out some of your views on this. Especially the issue to me is not whether we have a split or a united judiciary or whatever, the problem that you have to deal with in our country is that insofar as the Supreme Court is concerned, you are dealing with a judiciary that caters for the first world, a magistrates court dealing with a judiciary that caters for the third world , we have got those huge imbalances, those differences and how can we improve on our law courts and bring it up to the same standard or better still, to be in a better position than our Supreme Court is? That essentially is what the challenge that is facing us is. What views do you have in that regard?

PROF STEYTLER: The distinction between, as a matter of principle, between the Supreme Court and the lower courts,

could/...

could be put into various ways. One can have a principle which simply says that there will be courts created to deal with appropriate cases, deal with requiring particular competencies with varying jurisdictions and not call it lower or higher or superior courts, but I think that the principle will be accepted that you would want to preserve the scarce judicial resources for the most difficult cases and not waste expensive human resources on matters which can be dealt with by other persons.

Now if you a have a differentiated system which, I cannot see that one will be able to escape it, the question would be, how do you make the status of those courts comparable? It is not an easy question and it is not something which simply through legislation one is going to achieve. What will have to happen is that it is the mind-set of the first department of justice which will have to change. Also that of the public because, within the lower courts, very often, what is called in the literature, the ideology of triviality is, people regard it as trivial and therefore treat it as trivial so that the professionals in the court would regard it as serious work. The Press regard it as serious that they do attend lower court cases and report on that and also the training of the personnel, they should be trained that these are serious matters that are dealt with and should be given the attention that they deserve.

A possible way of minimising the distance between the lower courts and the Supreme Court is the real possibility of elevating what now are magistrates to the Supreme Court, that there is the possibility of growth that you do not think that this is the end of the line, this is a type of

different/...

different justice but it is a step in the way up. This is what I am trying to argue is that the integration of the courts may be one way in which you can overcome this big gap that exists now, so that the judge sitting in a lower court now dealing with third world knows that there is a way up. He or she eventually can go to the highest court, and in such a way you minimise the distance by saying well there is a way that you can travel from one to the other, it just means more personnel. But it also means that the amount of money spent on the courts, the facilities, the libraries are given due attention by the Department of Justice. So it is a multi-approach, varied approach to deal on a number of sides, not simply by writing it into a constitution, that there will be a single judiciary.

CHAIRPERSON: We have another ten minutes or so to go and there are now three hands, Mr Schutte, then Willie Hofmeyr, then Mr Gibson.

MR SCHUTTE: Thank you, Mr Chairman. I wonder if the Professor could give us the benefit of his views on appointment procedures and particularly whether the procedures for the appointments of judges to the Constitutional Court and to the Supreme Court should be the same or different, particularly with reference to the experience in other countries as well where one on the Continent it appears to me that parliament plays a fairly important role as far as the appointment of judges to the Constitutional Court are concerned.

PROF STEYTLER: The appointment procedure clearly is extremely important particularly when judges in the Constitutional Court, in particular, are given this immense amount of power deciding on the legality or the

constitutionality of legislation and there are always the various models where there should be totally outside the executive, outside Parliament, I think at the moment the mix between the profession, the Parliament and judiciary, is a fair mix in terms of the persons in the Judicial Service Commission who will make the decision of whom to be appointed.

As pertaining to the method of appointment by the Judicial Service Commission, I think the most important quality that it should have, is the recent appointment of persons. Much has been made of the issue whether the hearings should be open and closed and the distinction was now made between the Constitutional Court judges and those for the Supreme Court and the lack of being closed, and much of the attention was focused on that issue which I think was confusing the matter because the central issue there should clearly be the reasoning, the arguments why certain people are being appointed and that can only be done if the criteria which the Judicial Service Commission adopts in appointments are made clear and that decisions then are justified in terms of those criteria. It is said by a writer that the whole tenor of the constitution is moving, is the bridge from a culture of authority to a culture of justification and I would agree with that so that the appointment procedure should be one of justification of decisions being made. If one looks at comparable jurisdictions, that element of justification is an important component of the work. For example in the US when the senator makes appointments to the federal court there is a lot of argument why a particular judge is appointed and why not. So, if I would make comment then on the present

procedures/...

procedures, the Judicial Service Commission I think is a very important body, it is the correct way to move forward with a number of sectors represented on it, one will have to look very carefully at the way in which they proceed so that their method of procedure should also reflect the tenor of the constitution and one should not only look at the transparency, what they do, but also look at the arguments how they justify their decisions.

CHAIRPERSON: Could I have a follow-up on that question, a short one?

MR SCHUTTE: From your reply, it seems to me that you are more-or-less in favour of the present system of appointments or alternatively then, only the Judicial Service Commission?

PROF STEYTLER: Yes, as a form of appointment procedure, yes.

MR SCHUTTE: Yes. By actually following that procedure then you are in actual fact saying that the Constitutional Court is not another animal, it is not an animal with a far more political content than any of the other courts. Is that valid?

PROF STEYTLER: At the moment yes. At the moment clearly because of the constitutional jurisdiction of the Constitutional Court it is another animal because the other courts do not have this power of setting aside legislation. So because of this dramatic radical difference, clearly one can justify other procedures, but if one proceeds to the future, with more courts having constitutional jurisdiction, which I have argued for then your way in which you should go forward should be harmonious and it does not distract from the principle, that decisions to important positions like judges should be justified and it may be a

question/...

question of degree to what length one should go to justify those ones. But clearly it is a culture of justification and it should permeate the various levels of appointments.

CHAIRPERSON: Colleagues, after this session we still have to hold a theme committee meeting and thereafter a core meeting, so with your permission there are three more hands, I will then with your permission close this and have Willie, Mr Gibson and Bulelani. It is you, dit is nou jy, Willie.

MR HOFMEYR: Chairperson, I think we must object to the fact that the ANC members are called by their first names and all the other members by their surnames. Perhaps it is an indication that we are winning you over to our side. (Laughter) Professor Steytler, I wanted to revert back to the first issue that you raised, the whole question of the right to appeal, and whether the sort of present way of dealing with appeals is constitutional or not. I did not quite, and maybe my concentration was wandering, but if you can perhaps just restate for me in a crisp way what you think can be done without radically altering the present system of courts but what it is that you think can be done to remedy that difficulty if it should prove to be a difficulty?

PROF STEYTLER: The difficulty is that right of appeal requires a higher court and its as of right. An appeal requires a hearing, not necessarily an oral hearing as the minimum. Now how can we accommodate those two principles? At the moment in a non-capital case, I do not see that those two principles are in fact being met unless you say that you as a right can go to the appellate division and that theory is going to be hugely problematic. So for the short term, I do not have an answer on it unless you say well the

Appellate Division simply needs to change its modus. It will not have hearings. Simply it will be written arguments if you do not have hearings and one should say that in a number of other countries the right to an oral hearing is extremely restricted. In the German court something like five to ten percent of cases allow an oral hearing. The most is simply documents so there may be ways in which one can cut down on time to cope with the amount of appeal cases that may come through. But in terms of with the minimum count of manoeuvring with the present system, I am not sure precisely how one can overcome that problem.

CHAIRPERSON: Are you happy Mr Wilhelmus Hofmeyr esquire? ...(laughter). Duggie?

MR GIBSON: I am not sure whether that is a promotion or a demotion. Chairperson I would like to revert back to the important matter which Senator Ngcuka raised and this was the question of a perception that the Supreme Court is first world and the magistrates court is third world, and ask whether the Professor would agree with me in saying that no matter what cosmetic changes, or even radical changes between s split judiciary and a unified judiciary that there must always be courts, some of which will have a higher jurisdiction and some will have a lower jurisdiction. That is the first thing.

Secondly, the question of representivity which is an important part of the perception of people about where the courts are and should be. Perhaps representivity cannot be addressed in a constitutional assembly or a theme committee or in a constitution, but it is something which can best be addressed by the government and right there in the ranks of the magistrates. We have thousands of law graduates in

South Africa, many of whom cannot get articles to become attorneys for example, and people of very good calibre and quality. Now is there a possibility that if one were recruiting them as professional magistrates, in other words not people that have to start as clerks in the magistrate's court and then become prosecutors and then become magistrates. If we were to recruit graduates and give them an accelerated training in order to get some judicial experience, that we would address at the coal face the representivity question and deal with the Senator's problem.

PROF STEYTLER: Just on the first question in terms of split judiciary or hierarchy of courts, now clearly the principle is even accepted by the constitutional assembly this committee is, with respect, is fairly low down in the hierarchy of bodies making the final decision. So everywhere ...(laughter) one gets the hierarchy of decision-making bodies, and so one cannot escape that matter, what one will hope is that this committee has got good, I must say there is harmony between this committee and the constitutional committee. So there is going to be this hierarchy of courts.

To resolve the problem of representivity one is simply to have accelerated appointments in terms of magistrates. The other would be they participate in terms of assessors. The process is not that quick. One will have to look at the universities, how many graduates are being produced at the moment, at the moment still the majority of graduates are white, so it is a problem that is not resolved overnight and it is not simply to look at, you know, how we are going to appoint magistrates, we like to look at universities, the output that they are doing, then to ...(indistinct) these

people/...

people getting into universities it is a fairly complex process. Clearly it would assist and it will clearly benefit the general population if there is greater representivity within the lower courts. I think the Department of Justice is giving serious attention to that, hopefully the commission on magistrates is doing similar work, but that is not an issue that is going to be resolved here in the constitution.

CHAIRPERSON: Last question, Bulelani ...(indistinct).

MR NGCUKA: Thank you, thank you ...(indistinct). Professor, it is a matter that I wanted to follow up on the question that was raised by the honourable Mr Schutte on the JSC. In the space of last week there were two criticisms of it. Firstly there is the criticism that as presently structured there are too many lawyers in it. I want to know what your views are and particularly if it has this important job that it has to do. We have also heard that the blacks were serving on it are just dummies, how then do you address some of those problems? Have you got any views how the JSC aught to be composed?

PROF STEYTLER: Right, the JSC as the important decision-making body should ideally represent a number of sectors which are intimately involved in the judicial process. Now clearly the lawyers should be represented there because of their intimate knowledge of the persons that there may be a point so there should be a number of lawyers present there. There should also be a fair amount of harmony between the constitutional judges, or the judge of the Constitutional Court and the other two branches of the executive and this harmony does not mean dependence. It is often said that unless there is a fair amount of harmony, one is moving

towards/...

towards a friction, you get conflict and eventually the break-down of the constitutional state. So important that Parliament plays an important role in the Judicial Service Commission. The only question still remaining out is should other bodies come in, other sectors of civil societies, a society which is not represented in Parliament and I am not always convinced that there should be even broader representation whether in greater insight, greater knowledge on the issue would be brought in by such sectors, one will have to know which sectors are being thought of and whether there would be great benefit derived of it.

So at the moment I think, the three core sectors involved there represent important sectors and that they would be an adequate group to resolve the issue who is going to be the guardians of the constitution and of law in general.

CHAIRPERSON: Thank you. We have come to the end of this section and I call on Miss Priscilla Nyala to say a few words.

MISS NYALA: Professor Steytler, I am privileged to thank you formerly on behalf of this committee. I must say that I think this choice had something to do with our chairperson's brave attempt at affirmative action....(laughter). Nonetheless, thank you sir for your time and your very incisive and informative input which certainly provokes serious and necessary debate. I also take this opportunity of congratulating you on your appointment as an expert on the team committee too and with your track record we have no doubt that you will play a meaningful role towards our new constitution. We recognise your invaluable research in contributing towards

a formalisation of justice and democracy in our country. Thank you sir.

CHAIRPERSON: Thank you. We now move over to our formal meeting but you are very welcome to remain to attend it because, as you know in the new South Africa, everything is transparent and open and moral and justifiable and dutiful and black and everything...(laughter). Do you want to go Judge?

...(indistinct)

CHAIRPERSON: We now go over to the core, to the theme committee meeting.