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	1102 Heerengracht Centre Adderley Street Cape Town South Africa Tel.: 27-21-254590 e-mail: bbohle@aztec.co.za	P.O. Box 6550 Roggebaai 8012 Fax: 27-21-4191613
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Theme Committee 2

21 April 1995 - Tape 1

Chairperson Gentlemen, can we be seated so that we can start. A hearty word of welcome to everybody. We start off this morning where we left off yesterday, namely the Deputy Presidents/Prime Ministers. Do you have the issue before you? ANC believes in a Deputy President, the National Party in a Deputy President – 2, or at least 1. The IFP Prime Minister as head of government. And the Freedom Front a Deputy President; the DP a Vice President as head of state with a Prime Minister. Any comments? Nobody? I say that's the position of each party there. Are there any comments, how do we resolve, or what do we resolve?

??? Mr Chairman, I wonder if in fact the DP can clarify a bit more the relationship between their view of the President which has some executive powers, e.g. presiding over the cabinet, and then the role of the Prime Minister was very sketchily done within the proposal. Perhaps they can elaborate on that so there can be some clarity on the issue.

DP speaker??? With pleasure, Chair. How we see this thing working is that the President, as we state in the submission, is both head of state and head of government and in that respect can operate in both those capacities if he or she wishes to do so. The problem that we are experiencing at the moment, and I think everybody is aware of it, is that the business of being both head of state and head of government in South Africa is a fairly time-consuming business and our President at the moment finds himself in the situation where he is required to do an awful amount of work both outside the

country, inside the country, away from parliament and so on. We think that this is actually an unsatisfactory situation and accordingly are providing for two offices by way of deputy. One is a, what we call, Vice President who will deputise for the President in his head of state function; in other words, where it comes to the President's responsibilities, e.g. to accredit diplomats or whatever the duties are of a head of state. But the other more important one is managing government business, particularly in a parliamentary set and I think that we are all aware in various ways of how the parliamentary business of government isn't just co-ordinated as it could be. And the idea behind the Prime Minister is that the Prime Minister should essentially be the President's person in parliament who would then manage parliamentary business, would be the link between parliament and the executive, the cabinet, and when the President is disinclined to chair a cabinet, would do so in his or her absence. So the idea is that the President still retains all those functions if he or she wishes to exercise them, but that they are two deputies with very distinctive responsibilities, different responsibilities: the one has to deal with the head of state functions, and the other one to do with the management of government functions.

???

Chairperson, just to follow up. In terms of the deputy for the head of state business, do you reckon there is sufficient...? You only mention one instance, e.g. the accreditation of ambassadors, whether that has sufficient reason for creating such a post as opposed to clearly a person who manages the cabinet and parliament which is clearly a major activity and effort, but this deputy for just head of state business, is there sufficient work for such a

person?

DP speaker

I think you really need to direct that question to Mr Pahad. I would have thought that if one looked at the position of particularly a senior executive Deputy President, that person has a lot of head of state functions, foreign visits, trade delegations, here, there and everywhere, meeting foreign visitors, and its within that context that we think there is scope for relieving on both fronts, if you like, so that the President is in a position to, in a sense, direct the country without being encumbered by the day-to-day chock-a-block diary.

Chairperson

Anybody else on this? Dr Pahad.

Dr Pahad

There is little doubt that every government in the world, as presently constituted, wants to keep on examining how they can become more efficient in practice and similarly, I would presume, this would apply to our government. But in our view, it will be a very artificial separation to pick two people and then say: In some instances you are both deputies to the President, but your little function is to help with accreditation of ambassadors and maybe to go cut some ribbons or tapes on some road or hotel or something; you, the other one, really what you are going to do is you are going to be looking after the government. I think this creates more problems in the end than it will resolve. Our view is that you would need one person who would be the Deputy President who would deputise for the President when the President feels it necessary, especially when the President is not in the country, and at the same time, act as a kind of Prime Minister in parliament itself, being the leader

of the majority party in the National Assembly. In our view, at least the experience so far hasn't indicated that we would require two persons for the job. We think one person would be sufficient to do it. Professor Ranchod the other day was hinting at this partly too. There would be a need at some point I suppose to look at how government functions, not necessarily for the Constitution, the Constitution just makes certain Draft Principles... how government can function more effectively and efficiently, how there can be more co-ordination between different ministries, and all of those kinds of issues. But I don't think that's a matter for the Constitution, I think that's a matter for parliament together with the Executive to look at how we can make them more efficient and effective and even more accountable in that respect. To come to the issue at hand, we are not convinced yet that we need two people to do the job. We think that one would be sufficient, but we would need to look at how we can make government a more effective and efficient institution in this country.

DP speaker

I think, my impression is, that we would be reasonably flexible on the question of a Vice President provided that there was a very, very clear designated person to handle the co-ordination of government business and a link between the legislature and the Executive. That, for us, is a very, very critical issue and something which, I think, the Constitution actually had provided for so that, that person has very, very distinctive constitutional responsibilities that everybody knows, for which he or she can be held accountable. So I would say that there may be a degree of flexibility on the question of the Vice President, but I would say that the institution of the, if you like, the manager of

government, is for us very, very important.

Chairperson Dr Ranchod?

Dr Ranchod I would just like to address a question to the ANC. I think it does mark a change, namely that the Deputy President should be elected by the National Assembly, which is not the arrangement under our present Constitution. Is it envisaged then that, together with the Speaker, Deputy Speaker and President, the Vice President be elected at the same election?

ANC Speaker??? Yes, I suppose it would be envisaged that you would then have the election at the same time, presumably the person would be elected at the same time as you elect your President. Obviously if it is accepted, and after we have convinced the National Party that we are not going to enshrine power sharing in the Constitution, the majority party would then decide, and in this case the President would decide who is to be the Deputy President and therefore National Assembly should elect that person immediately after electing the President so that you don't have any gap between the two.

Dr Ranchod That, I think, does give rise to the possibility that if the National Party is going to persist in its view that some form of Government of National Unity is necessary in the years ahead, and if that is not agreed upon by the majority party, we could well see a contest for the position of Deputy President when the elections take place. I think that's something that we must envisage as a possibility.

???

There is a point of principle which you at least could concede as you come to that conclusion, which is a constitutional point. We did the same exercise when we talked of mandate and where the power emanates from. If the Deputy President is elected by the National Assembly it raises a few questions. He is not appointed by the President, and therefore the President cannot remove him, whether you are dealing with discipline, or whether in accordance with the Constitution. So he takes his mandate from the National Assembly and that might be an untenable situation: two people both nominated by the National Assembly. The President has no power over his Deputy, he didn't appoint him.

Dr Ranchod

In politics, as I understand it, these matters are sorted out by the party caucuses, or the leadership of the party will decide who party's nominees will be. So I can't envisage the possibility of the ANC putting up a candidate for Deputy President who would not meet the approval of the leader in chief of the African National Congress, for example. So the possibility of a conflict arising... If we continue to have the level of party discipline that we've had in this country – there is no reason to believe that it is going to change – I think it is extremely remote, I can't see the prospect of a Vice President or Deputy President being elected from the majority party who is going to do his own thing and believe that he is not subject to the discipline of the party because he is elected to this position by virtue of being nominated by the majority party.

Chairperson

Let's just hold on that – the election of the Deputy President. Let's deal with the question of the Deputy

President or Prime Minister. I would like to know the PAC's views in this regard because there is nothing stipulated as to what they believe in. We'll come back to this.

PAC Speaker??? Mr Chairman, as you would understand there, the PAC's position is that we should have a Deputy President elected by the National Assembly. That is the position of the PAC.

Chairperson I think we've exhausted this. The DP indicated that they are flexible with regard to the Deputy President. ...

DP Speaker Maybe.

Chairperson Maybe. So, in essence then, this issue is contentious, the ANC believing that there must be one Deputy president and the National Party believing there must be two Deputy Presidents, inter alia one coming from the opposition party, and the PAC believes there must be a Deputy President. And both the PAC and the ANC believe that he or she must be elected by the National Assembly.

??? The purpose of the discussion, other than recording what is contentious, is also add value to the debate and I would like to reply to Dr Ranchod. Two things: One, on the issue raised about the discipline of parties and the candidates would be appointed who are met with approval by the parties themselves, there is something called a "fall out". Those who are acceptable today, may not be acceptable tomorrow. That's my answer. Two, the Constitution is not intended for the ideal situation. On the contrary, it is intended for the worst. Now when you draw up a Constitution, it must be able to deal with those eventualities

so you don't conceive a Constitutional prohibition with an ideal or workable situation. You ask yourself if the worst comes to the worst, will this document stand the scrutiny of time and test? So I am saying if you let a Deputy President or Vice President, whatever you call him, from the National Assembly... and yesterday there was mention of the President having the ability to fire a member of his cabinet, and that Deputy President would be a member of the cabinet and the ??? at his discretion, I am saying he can't fire that Deputy if he did not appoint him because the background was he would have appointed, picked up his cabinet, therefore he'll fire his cabinet at his discretion. This particular member of his cabinet, is beyond his wish, he can't dismiss him because he's been nominated by the National Assembly. You might have that problem.

Chairperson

Dr Pahad?

Dr Pahad

Thanks to the Advocate who was supposed to bring in some money. I think I would say from the ANC's point of view that we would have to give very serious consideration to what Advocate Motimele just said. When we come back to some of these issues, even in relation to the Constitution Committee, that it may be that we would need to look at what are possible complications that arise from something that appears in the Constitution. Let me say it like this: Our position remains as it is now in terms of that should be elected on the National Assembly, but I shall take back to the ANC the issues, both the question raised by Professor Ranchod and the issues raised by Advocate Motimele for us to have a further consideration on this issue.

Dr Ranchod Of course there is a very easy way out of this dilemma and that is to have the President elected by popular mandate. The authority would be unmistakable.

Dr Pahad We'll take that also into consideration.

??? Mr Chairman, there is another possibility: indirectly the President can get rid of the Deputy President through the parliamentary or the majority party if its possible to institute a motion of no confidence in the Deputy President alone, as much as we can do in the (coughing), which would then be the ability to get rid of that person individually.

Chairperson We'll have to deal with a lot of motions of no confidence in that regard. So we're down to 1, and I think we're basically down to number 2 as well. There's also contention about whether the Vice President must be elected by the National Assembly.

Mr Andrew Mr Chairman, just one question. Both in the case of the President and of the Deputy or Vice Presidents, the ANC and the National Party feel that he must be elected from the members of the National Assembly. Why are the members of the Senate not considered for election, either as President or as Vice President?

Chairperson The National Party didn't say the Deputy must be elected from the National Assembly. The ANC said so.

??? In answer to Mr Andrew. I thought what we said generally, yesterday and the day before, was that in relation to the way the Senate would act, we would need to come back to

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that once we have finalised the composition of the Senate because, if you remember, yesterday there was some debate when the National Party spoke about parliament and Professor Venter pointed out that parliament then includes both the Senate and the National Assembly, as presently constituted. The ANC spoke only specifically about the National Assembly. So I think you are quite right. When we finalise the powers of the Senate, we would have to come back to this thing. It becomes a substantial issue about how we relate the two houses together, but I think we should note that with that too we need to return to it.

Mr Andrew Thank you. So that also applies to the Deputy President?

??? If the Deputy President is to be elected, which he presumably is, yes, then similarly for him.

Chairperson Any further matters?

??? Chairman, just as a point of interest. In the old Free State Republic they combined the two systems of electing a president. In other words, parliament nominated two members and then the people decided which one of those two members should become President and then the chap who came second immediately became Leader of the House. So you had this complete balance of power within parliament, which was rather interesting. In the case of the old Transvaal Republic, the two candidates were also nominated by the Volksraad, by parliament, but in their cases the second, the chap who lost the election – normally Piet Joubert as opposed to Paul Kruger – was then appointed Chief of the Defence Force, he was Commandant

General, which in actual fact was a minister. This is just an interesting anomaly. I think there was this matter of balance of power. In those days, of course, the old defence force played a very important role, but this is just for interest's sake. In the case of the Free State, it worked very well. The Free State had a very good...

Chairperson Can we clear now with regard to the Deputy President, the contention? And then with regard to the election of the Deputy President?

??? A minor point. The only party who didn't call the Deputy President, Deputy President, is the Democratic Party, who favoured Vice President. Is there any magic to that word? Or can we assume that it's just Deputy President, for the sake of clarity?

??? Yes, of course, we can.

??? And while we're on the DP, on their proposal on the Vice, which is really intriguing to me, might form part of the quorum, I want to know how we should record it. You suggest that the President picks up, nominates the Vice President, and then the parliament endorses it? Now, what have you in mind? Is that a confirmation procedure? Is the President ??? but the National Assembly should ??? Or the National Assembly can say who he must pick?

Mr Andrew??? Clearly, what one is trying to do... Well, it is a confirmation vote, OK, that's the first point. But clearly if the President chooses somebody who is unacceptable to the National Assembly, then they won't get the confirmation vote and

then the President would then have to search for somebody who did.

???

Would that then be regarded as a motion of no confidence in the President? I mean the person who goes and proposes somebody and the National Assembly turns the person down, on probably the most important post up to the President, then...

Mr Andrew

Mr ??? I told you yesterday that it is actually impossible in terms of our proposals to have a motion of no confidence in the President by the National Assembly.

???

No, no I'm just asking to get greater clarity of what could be the consequences that might flow.

Mr Andrew

Well, there would be no consequences other than that the President would go and choose somebody else who did enjoy the confidence of the National Assembly.

Chairperson

Mr Hendrickse and then Dr Ranchod.

Mr Hendrickse

..with the Democratic Party you're saying that your President will be directly elected, alone. What is being elected, he then comes with a Vice President who nobody would have known of until that stage, unlike the American system where the two run together.

Chairperson

Dr Ranchod?

Dr Ranchod

Just a very small point. The present Constitution is a mouthful referring to the Executive Deputy President, I

would prefer that we just settled for Deputy President. It may cause some confusion with the head of the Senate who is referred to as the President and his deputy as the Vice President, but it really is cumbersome describing the Deputy President as the Executive Deputy President.

Chairperson

The next issue is the powers of the Deputy President. We have now agreed it is Deputy President and not Vice President. It's stipulated there, there doesn't appear to be much contention except maybe a difference of accentuation as far as the National Party is concerned. Anybody to make any comments on that?

???

Mr Chairman, we feel rather strongly that the President should have the power to delegate to the deputy president whatever functions he deems fit. If he wants to deputise to him, basically the functions of the head of government, he could do this. Or just assist him in his duties. But it should be left up to the President as to how he utilises his deputy. But it is extremely important that the Constitution should stipulate that in case of illness or incapacity, that the Deputy President should be able to fulfil all the functions of the President.

Chairperson

Anybody else? So there's general agreement with regard to the duties of the Deputy President. No contention?

Dr Pahad

Mr Chairman, on the typed report, where it relates to the IFP and I am trying to check this with my colleague, the notes start: the IFP has suggested that in the event of the incapacity of the State President or the President, the Minister of Home Affairs should stand in. (Laughter) No, I'm

serious, yes.

??? Which document is that? (General checking around.)

Dr Pahad Page 26. "Should the President be incapacitated, the functions applied by this Constitution to the President are exercised by the President of the Senate while... The Minister of Home Affairs shall also act as chief minister of the government." Page 26.3 under "Powers of the head of state."

??? I think we should just note that.

??? We should also note that there is a typographical error which was corrected in the addendum. There's a mistake there. Home Affairs Minister, then Foreign Minister.

Chairperson I think with regard to the IFP we have decided that we stipulate their position vis-à-vis what has been agreed upon here. Number 3.2 the Executive Deputy President must be a member of the cabinet. That can be summed up with what we have dealt with under the powers of the Deputy President.

NP Speaker??? Mr Chairman, the National Party position is that this should be spelt out in greater detail. I think in the current Constitution there is no statement and, of course, one could debate whether the Constitution is the place where one should actually spell out which powers are to be delegated to the Deputy President.

Chairperson We've generally agreed now that the President must assign

substantial powers to the Deputy President, which must be stipulated.

NP Speaker??? The document says "may". He needed assign any powers according to the ANC's formulation.

??? I thought what we'd agreed was that the President should delegate functions to the Deputy President. If you want to spell out precisely, I think we'll have to come back to it. It is my point of view that the Constitution the leaner it is, the better it is. We don't have to put everything in a Constitution and therefore we thought we'd agreed with the position of the Freedom Front this whole time, that the principle should be the delegation of his powers. How precisely it is going to be reflected in the Constitution, I think we will have to wait and see when we do the actual drafting of this Constitution, which particular powers you may or not want to put in. But our view is that we must try to have it as lean as possible, the Constitution.

??? We take that point of view, but if there is going to be more than one Deputy President then, of course, this issue does become...

??? There won't be!

??? Dropped me in my tracks!

Chairperson You'll have to do a lot of convincing!

??? I'm merely trying to be the Devil's Advocate. If one does have two Deputy Presidents, one could find that he has

absolutely nothing to do and the other is in effect running the affairs of state.

Chairperson

The removal of the Deputy President. We dealt with it yesterday as far as the President is concerned and the positions of the parties here are the same. Now, are we going to handle these exactly as we handled the President? I'm thinking in terms of coming back to it with regard to whether it should only be the vote of no confidence or whether it should also be impeachment. Is that the situation? Thank you. Now, Prime Minister, that's the last point here. That is now the DP.

Mr Andrew

Chair, I think I have already motivated at some length the reasons why we see the institution of the Prime Minister being so important, but whatever might be the reasons for not having a Deputy President and Prime Minister, the point remains that the link between the executive arm of government, the cabinet, and the legislature at the moment is a link which is absent in the Interim Constitution and, in our view, creates problems in co-ordinating what might be called the business of government. Really, we feel very strongly that the institution... whether this was occupied by as it were a Deputy President or whether it is occupied by a Prime Minister, what would be important in our view would be that the Constitution duties and responsibilities of that person should be very clearly specified in the Constitution. As far as appointment and dismissal is concerned, I think our proposals are clear and I described earlier a person nominated by the President, subject to his or her enjoying the support of the members of the National Assembly.

Chairperson So the DP is going to stick to the question of a Prime Minister.

Mr Andrew Well, you know, subject to instructions to the contrary from Mr Colin Eglin. I think that there may be flexibility in our point of view about having two positions i.e. a Deputy President and a Prime Minister, but I would suggest to you that whether you call that person a Deputy President or you call that person a Prime Minister, what is important in our concept is that, that person should have very clearly defined constitutional responsibilities for the management of government business in parliament, that's the important point.

Chairperson So now we must formulate the viewpoint of the DP that feels there should be a Prime Minister and those functions must clearly be defined, /Deputy President? And the DP will come back to the committee in that regard. The rest was, the parties don't believe in a Prime Minister. Is that correct?

??? Except the IFP also want a Prime Minister.

Chairperson That deals with the presidency.

??? Chairperson, there are two, if I may just ask, other things which are in the current Constitution which haven't been dealt with here. Section 78, "???" of office" and 79 "Remuneration". Could we get any indication from the committee whether they want to deal with that? Or must it stand over?

ANC Speaker??? From the ANC side, we have no problems with 78 and 79.

FF Speaker??? The Freedom Front also feels that way. We had it in our submission.

Chairperson There is an addendum. We didn't deal with this addendum yesterday, did we?

??? Chairman, we did; sometimes there was support for a proposition and sometimes there was not. In terms of the nitty gritty of powers, there was basically one submission or two submissions and they didn't really add anything more than what we have already discussed.

Chairperson We must just reflect that in our report to the CC. Mr Groenewald?

Mr Groenewald As in the case of the combined or split office, where the general submissions by individuals was very much in favour of a split in the functions, I think our report should also indicate that in the method of election, the majority of submissions supports a directly elected President.

Chairperson That deals with that then. Next on our agenda is the cabinet. Who from the technical committee will deal with that? Professor van Wyk?

Prof. van ^{Wyk}~~Dyk~~ Mr Chairman, thank you.

Chairperson Just before you start. This draft is a little different from the two that we've just dealt with. They were nicely dealt with under different headings so that we could relate to them much easier, so you must assist us in this regard, as you go along.

Prof. van ^{Wyk}Dyk

A year ago there was a very popular series on national television called the "A-Team". The leader of this A-Team in the penultimate sentence of the specific night series, would say something like: "I like it when a plan comes together. Having dealt now with National Assembly and with the Presidency and moving to the cabinet, it becomes obvious that checks and balances are beginning to fall into place here and that the plan is coming together. You will see from the discussion of the cabinet, that there are a number of issues which have already been agreed to and decided by this committee which are still in the report, but they all had to be integrated. Second point, I have to apologise that there aren't nice headings. I was thrown in at the deep end. I wasn't initially assigned this job. Anyway, the wheels of technology are turning and I have in front of me a blocked or tabled version of the cabinet, with much of the headings, and I'll follow both versions and hope that we can take you through the reporting in a somewhat creative fashion. You will see on the first page that there are a number of headings listed and then, once again, just a reference to the submissions and the way in which they were referred to. On the second page, a whole number of Constitutional Principles listed, which the committee may discuss if they like, with a direct or indirect bearing on the matter. Then point 4, two issues there. Constitutional Principle 32 and Constitutional Principle 33 contain mandatory provisions for the Final Constitution.

(end of tape 1)

Theme Committee 2

21 April 1995 - Tape 2

Prof. van Wyk So while it says "up until the 30th April 1999 the executive and national level should remain substantially the same as the Interim Constitution", no. 33 says "as long as there is no vote of no confidence in the cabinet there may not be a national election", and the Principles say that the Final Constitution will have to provide for that. Apparently that could go into the chapter on General Provisions. Then, once again, terminology. Once again a number of phrases listed there: cabinet, minister, deputy minister, president, deputy president. And there has already been agreement that it will be Deputy President and not Executive Deputy President. There would not appear, from the submissions, to be any contention; the terminology is not contentious, if anything the structure. Next point with a number of subheadings, is the composition and the size of the cabinet. The first question there is whether the President is part of the cabinet and it is said here that the ANC submissions are not explicit on this score, but could be read either way. The DP refer to the President and the cabinet, and in one place ??? that the cabinet will include the president. The IFP excluded the President. The NP supported the structure on the Interim Constitution, which suggests on the one hand that the question is separate from the cabinet, but on the other hand, it is taken that the President is part of the cabinet. The Freedom Front's submission contained similar ambivalence and the request is clarity on this issue as it is important for the formulation of the provision on the seat of executive power, President, cabinet, or President and cabinet and on executive accountability to the legislature.

This is a somewhat technical issue, Mr Chairman, but it is important. If one carefully reads the current Constitution it says that... It did make the distinction, for instance, that "a vote of no confidence can be put in the President separate from the cabinet" but in another place the Constitution says the cabinet is the President and the Minister and the Executive Deputy President. So it becomes a kind of ambivalent distinction here. How can you say: I put a vote of no confidence different from the cabinet, or worse, how can you say: We move a motion of no confidence in the cabinet, but not in the president. Maybe it's a moot point, I don't know. Next question, which is actually very minor, it's just a matter of clarity. "No party explicitly proposed that the Deputy Minister should be part of the cabinet, but an ANC submission is open to such an interpretation." On balance, I would say the ANC does not favour that, but this is just for clarity. The next point is the size of the cabinet. The Freedom Front proposed that the number of ministers should be limited to 24. There is also a limitation in the current Constitution. No other parties suggested a limitation, individuals did. Appointment to office and dismissal. "Most political parties agree that ministers on the cabinet should be appointed by the President." This has already been dealt with under the presidency. The Principles. A point of view was formulated that the President shall have the right to appoint ministers and deputy ministers. It says there the procedure is contentious but it was dealt with yesterday. This is just a cross-reference. The second point, two paragraphs lower down, that "the ministers should be drawn from the legislature" in other words, they should be members of parliament, whatever form parliament may be. Point of clarity: if there

are two ??? can be derived, can be drawn from both ???. The next point is the point about the Deputy President or Prime Minister, which is also contentious and has just been dealt with a few minutes ago. There was also an individual submission. Term of office and ??? ??? said the following factors would determine the term of office of a member of the cabinet. Membership of parliament. ??? of the president, a contentious point, or could be a contentious point. A vote of no confidence in parliament, in the cabinet, or in the President. Point (a) there, membership of parliament, of course, goes with the disqualification of membership, other qualifications. The next point, which has also been dealt with to an extent, national assemblies and the President, there is accountability to parliament. All parties support accountability of the executive to parliament. The IFP uses somewhat different language on a fiduciary relationship with parliament, but this has effectively been dealt with under National Assembly. The next point is a vote of no confidence in the executive. It has also been discussed under the Presidency. Parliament has a right to express a vote of no confidence in the executive, but the consequences of a vote of no confidence, if my memory serves me right, will have to be revisited. The role of minority parties in the cabinet is contentious. This is also being dealt with in principle under the National Assembly and under the presidency, whether there will be a forced or voluntary coalition. I think it was agreed, if I am not mistaken, that... I am not quite sure, but it is, especially for the National Party, a bone of contention. Then the next point, Code of conduct. The ANC referred to this aspect that a member of the cabinet may have no other paid employment or activities ??? position of a minister. The NP

in turn stated their approach, that they are satisfied with the Constitution ??? unless it's a state. Otherwise, also appeared to be in favour of this. I think this is a reference to Sections 8 and 9 of the current Constitution, which deals fairly extensively with special interests, behaviour which would be inconsistent with the office of minister, etc. Then 4.8 is Internal cabinet relations and decisionmaking. Ministers to be responsible to the President. Most of the submissions supported that. Second one, consultation between the President and the cabinet. There was a question whether the ANC saw consultation by the President as in consultation with, in the technical sense. And, I think, that was confirmed and agreed yesterday. A question under clarity there I think has been given. All parties see consultation here as consultation with each other, with the cabinet. President takes his or her decisions with the agreement of the cabinet. A question which has not been answered, under the presidency, and which needs to be answered here is whether all decisions should be taken in consultation with the ANC proposals that major or important decisions should be done that way. I assume the National Party is in favour of the current Constitution, which in Section 82 lists a number of powers which the President can exercise, not necessarily in consultation with; in other words on his or her own – technical point. 4.8.3 Decisionmaking. The question there is whether it should be by consensus, by majority vote. The National Party probably endorses the consensus-seeking spirit underlying the concept of the Government of National Unity. Clarity on that please. And then 4.9 Countersigning by ministers. ??? conventional but now in the Constitution. Method of making the head of state part of parliamentary accountability. His

ministers, or her ministers who are in parliament have to countersign to say: We take co-responsibility for all these executive actions. The party didn't really refer to this, but it is in the current Constitution and it is practised. Just confirmation that, that will also be in the Final Constitution. Then there are a number of other aspects, which have not been dealt with in submissions. Postal affirmation which, we gather, is not contentious. Remuneration which, we suspect, is also not contentious. Then there are two sections in the current Constitution, 90 and 91, temporary assignment of powers, transfer of minister's powers to another minister. That's the end of the official part. We've just listed a few other points raised by, especially individual submission. Point 5, qualifications. Some organisations and individuals proposed that members of the cabinet should have minimum qualifications. 6, Proposal by an individual that there should be independent central agencies. It's not clear whether they should be, instead of the public service, to perform actual state administration. The house of royal??? considered ??? also made submissions fundamentally different from the old overwhelming kingdom. All other submissions which might be dealt with under traditional authorities and the Volkstaat. Mr Steenkamp, and not parliamentary executive. And then two identical submissions proposed that taxes should be used for purposes listed on the Constitution. And there was another individual submission, also suggesting that there should be specific purposes for which public money can be used. And then we gather that the DP will find comfort from the fact that at least two individual submissions also proposed a Prime Minister in addition to the President. Thank you, Chairperson.

Chairperson Thank you. Just a general question before I put it to the meeting. We have submitted a different document with regard to checks and balances. How are we going to deal with checks and balances? Some of it is included, but how are we generally going to deal with it because we said we must revisit it under blocks 2 and 3.

Prof. van Wyk Mr Chairman, I've given it some thought. Perhaps at the end of the meeting, if there are 5 minutes left, the Theme Committee could apply their minds to the question how we take this here forward because to my mind substantial progress has to be made here in preparation of the reports. All of this is on computer disc at the moment, most of it is in table form, but will inevitably have to be merged. I would suggest, to answer your question, that at the end... Once we have a draft complete report, that the question of checks and balances we then put on the table and that parties such as the National Party and others who have made specific submissions can actually use those submissions as checklists and see to what extent their proposals have been covered and what matters are outstanding. There is one, for instance, in a National Party submission, and I think in another submission also, judicial control over the executive, which is not addressed in either the report on the presidency or on the executive, it goes without saying that it should be mentioned somewhere. Perhaps one should add a number of blocks dealing with outstanding checks and balances so to speak.

Advocate ??? Mr Chairman.

Chairperson Yes, Advocate?

Adv. Motimele While on checks and balances, I have had the opportunity to ??? on checks and balances. On page 9, 2, ??? perception there ??? report which you could passed and which is incoherently ??? and which has been up reputed to me. And I had the opportunity to go through it. I can't even read it, it doesn't even make sense to me. If that report can be...

Chairperson Which report are you referring to?

Adv. Motimele Page 9, Mr Chairman, of the confliction. You know, confliction of checks and balances. My colleague said to me: Do you want to change your permission? It's not the permission, Mr Chairman. You can see the typist didn't even know what all the words means, Sir. It doesn't read. Tried to introduce the ??? there.

Chairperson I am being told by Mrs ... that this was faxed to you.

Adv. Motimele Have you been told, that I ??? send it back, Mr Chairman?

Chairperson No, that I wasn't told. I just told you, you were faxed. Now you must just check on that, Mr Smit. Okay, we can deal with that separately.

??? Just a question on the checks and balances and the report on that lot and the report on blocks 2 and 3. Checks and balances doesn't exist separately from blocks 2 and 3 and the true instruction's balances are coming through in blocks 2 and 3. The only principle that the major block... Or the major principle that guides blocks 2 and 3 is the one on checks and balances on the National Assembly and so on.

So, I think, one would perhaps at the end of the report on blocks 2 and 3 then say to what extent have we met the demands of the principle on checks and balances. And then make a comment perhaps on that principle again.

Chairperson Because for the National Party that's very important. Gentlemen...

??? Chairperson, just on a lighter note. On page 15, there is a statement that is attributed to Advocate Motimele which is not in parliamentary language. I just wonder whoever edits these documents, 15 of these documents... I don't know if this is accurate, but you suddenly switched into Afrikaans and you...

Chairperson But that won't happen.

??? Should we not edit this out because these documents are circulated and I don't think it's for an advocate of the Supreme Court... (noise and laughter)

Adv. Motimele1 Mr Chairman, I know what the duties and the functions of an advocate of the Supreme Court are. I'm not having difficulty with that. All what the editing will do, will put it in contentious... ??? but in code, because that was ???, Advocate Beyers. I was ???
(laughter and many people talking at once)

??? The constitutional law will meet with the advocate other side.

Chairperson I think we start on page 2, if I'm not mistaken, Professor van Dyk, with the Constitutional Principles. A document will

be circulated just now. Must we wait for that document, or can we carry on? Can we carry on? Page 2, number 3, the Constitutional Principles. Are we agreed with what's stipulated there, with regard to the Executive?

(off-mike discussion)

???

It basically comes to the point with the multi-party democracy where, sorry, sorry...

Dr Pahad

Mr Chairman, I'm wondering why we need 4.1. Our task is not to say what happens to the Interim Constitution. That is somebody else's problem. Our task is to draft this new Constitution and I don't know how it helps us to say that "who can plan Constitutional Principles which remain". All the of the Interim Constitution remains in place. It is a mandate. This Constitution remains in place until such time... until parliament can amend it if it wants. I don't know why we need to speak about this in the report.

Prof. van Wyk

Chairperson, there was something inserted because Principle 33.2 reads: "the Constitution shall provide that ... until" so and so and so on. And 33, "the Constitution shall provide that unless parliament is dissolved". It's just for the sake of completeness, but it's...

Chairperson

On the other hand, the Constitutional Committee also indicated that reports must defer to the Constitutional Principles applicable in their report so I don't know why Mr Pahad is querying this.

Dr Pahad I'm not querying anything. I am just asking why we put certain things. I am starting from the assumption that this 1993 Constitution is in place. It only can be amended by this parliament if it wishes to amend the Constitution in terms of the majority. Everything in this Constitution remains in place, not only this particular Constitutional Principle if you like, so I was wondering why we single out these ones because we are starting from the assumption that this remains in place. I mean, that's all I was asking. I wasn't objecting. I was saying: shouldn't we just say this Constitution remains in place? I mean, that's the case. And all the provisions that are in it instead of specifically picking out one or two elements.

Chairperson I am now getting confused. I don't know what Dr Pahad is referring to. We are saying are we in agreement with the Constitutional Principles listed. No. 3.

Dr Pahad I'm sorry, I didn't talk about that.

Chairperson That is why I say I am getting confused. We are agreed on 3. OK? Then we go on to 4. Now we can discuss 4. Senator Groenewald.

Sen. Groenewald Could I perhaps just say that the new Constitution is bound by the present Constitutional Principles and the only thing that I think the professor said was that these two principles refer very specifically to the cabinet and we should just keep this in mind in formulating the Constitution as far as it concerns the cabinet. I think that's all it basically means.

Chairperson Dr Ranchod?

Dr Ranchod

Perhaps put this to the technical advisors, please. It's perhaps not the reason for stating this rather unique situation that we will have a final Constitution, hopefully, adopted and approved by parliament, a year from now. It is conceivable that, or it could be argued that those principles, once recognised in that Constitution, could be altered and hence the need to just re-emphasise these two points. The life of the President in parliament will be five years.

Chairperson

OK. So there is no further problem with regard to 4? Then we carry on to 4.2, Nomenclature. Ek kon nog nooit die woord... Is daar enige probleem daarmee? Ons het die ding uitgesorteer ten opsigte van die Deputy President in plek van Vice President.¹ 4.2? Thank you. Composition and size of the cabinet? Anybody wants to comment on that.

???

Mr Chairman, could we perhaps ask the technical advisors: What are the implications if the President is part of a cabinet and if he is not part of a cabinet. And the same applies to the Deputy President.

Adv. Motimele

???, inform which way or the other. Government is won by means of a collection of individuals called the cabinet. That is the executive, so he must be part of that. If he is not part of the executive, I don't know what will be the authority. If he is not part of the cabinet, what will be the authority of the cabinet and what will be their mandate because the cabinet is individuals picked by him in fulfilling his executive mandate. So I can't perceive of the cabinet apart from the

¹ Nomenclature. I have never been able to (pronounce) the word. Is there any problem with it? We have sorted out the question in respect of Deputy President instead of Vice President.

President.

Chairperson Professor van Wyk?

Prof. van Wyk Mr Chairman, this probably needs further investigation. Previously there was a third concept and that was the Executive Council which consisted of the President and the cabinet. In other words, the cabinet was separate, but they were together in the Executive Council and this is the thing that we inherited from the Westminster system where it would be the queen in council or the queen in parliament. That third element has now fallen away and I think this is why we ended up with the difficulty of having a cabinet which includes the President, but in the Constitution the President is sometimes referred to, quite often referred to, as separate from the cabinet. It says in the Constitution "executive authority vested in the President", but if one looks at the decisionmaking procedure, which is "the President in consultation with the cabinet" executive authority, as Mr Matumela just said, does not vest with the President, it vests with the cabinet. So there is a terminological problem here which, on the face of it does not create difficulties, but it does.

Dr Pahad Mr Chairman, if I may follow that. There is a difference. The President can act as the President or he can act through his cabinet.

Prof. van Wyk Mr Chairman, once again, looking at the hard reality. The President can act as the President in very, very few matters. In the vast majority of matters, it must be in consultation with the cabinet. I think Dr Pahad is quoted as

the in-house expert on... Anyway, if I can just complete the sentence, Mr Chairman. I think one just has to go through the Government Gazette to see that the President has "in consultation with the cabinet", that's the normal run of things.

Chairperson

Mr ???

Mr Hendrickse

Mr Chairman, before we get caught up in the language, can we just look at the concept. In terms of yesterday's discussion of Section 93, we spoke about the motion of no confidence in the President, the cabinet or the President and the cabinet. So, I have a problem when you talk about... Is the President a part of the cabinet? If you then express a vote of no confidence in the cabinet, are you automatically including the President? If the President is the chairperson, as head of government, would he be the chairperson of the cabinet? So there if we can just try and get the concept right. What exactly do we want? I think in terms of the Interim Constitution, a lot of the requirements of taking decisions in consultation is because of the concept of the Government of National Unity. That might not necessarily be the case in a more majoritarian or "winner takes all" situation.

Dr Pahad

Mr Chairman, in answer to that. There is a problem here, and it doesn't allow the debate to flow and the mind to flourish. You see, if you keep on going back to the Interim Constitution... Mr Hendrickse? I thought I was replying to your question. I say, Section 93 is ??? and I've told you why. And I said: You see Section 93 if you pass a motion of no confidence only in the President, then he must resign.

He can't dissolve the parliament. This is exactly the problem. And then Section 93.1 and 93.3 then make the provision that he will be in a position to dissolve the cabinet, only the cabinet or him with the cabinet; the idea being checks and balances. The Legislative Assembly cannot remove the man, we found that ??? and the other ??? But, you see, all what the National Assembly needs to do if they want to remove the entire cabinet, is to use Section 93.2 without facing the danger of being dissolved and say: We pass a motion of no confidence in the President. But what are you doing when you pass a motion of no confidence in the President? You are also dissolving the cabinet because you can't force the new President. You can't pick the cabinet for him. The new man will pick his own cabinet. You follow my difficulty with that section?

Mr Hendrickse I follow the logic of what you are saying, but I don't think it is a requirement that a member of the cabinet resigns when there is a motion of no confidence in the President. It is more a convention. It is expected that when the new incumbent take office that members of a cabinet would offer their resignation so as to enable him or her to make new appointments.

Dr Pahad ??? The incumbent is entitled to his own ??? conventionally. That section, we shouldn't be tied to it.

Chairperson Professor Steytler and then Senator Groenewald.

Prof. Steytler Just while we're on that. As the Section now stands, the parliament can have a vote of no confidence in the President. Say under the new Constitution, the President

resigns, a new President is elected. There's no election. He jumps into office and now, in terms of his discretion to dismiss ministers, he dismisses the whole cabinet, so effectively you've achieved the whole process of dismissing the whole cabinet and the President without acquiring an election. So you've circumvented both 93.1 and 93.3. So, I think it is a real problem with 93 and one will have to see what precisely you want to achieve by splitting the President with the cabinet.

Chairperson

Dr Pahad?

Dr Pahad

I suppose what we did agree yesterday was that there may possibly be problems with 93 as it presently stands, in terms of interpretation, but at the same time the position of the ANC remains that it would like to be in the position in which it's possible for a motion of no confidence to be passed against the President, but that must not necessarily lead to the President dissolving parliament, calling elections, because we would think that this might be an additional power given to parliament because otherwise a person can threaten to pass a motion of no confidence and to call an election and people will be frightened whether they will be re-elected or not. So, we needed to take that into account. But we shouldn't now look at 93. We've asked the technical experts to have a look at 93 and give us some kind of advice with regard to 93 in terms of how it should appear in the new Constitution, and I think we should leave it at that.

Chairperson

Senator Groenewald?

Sen. Groenewald I would like to support Mr Pahaad and I think if the technical advisors can give us an indication... If we should decide that the President should be part of the cabinet, how would that influence, for example, articles like 93, or other articles? And if we should decide that he should not be part of cabinet, what provision should we then make in the Constitution? And if the technical advisors could assist us on that I think we'll be quite happy. Mr Chairman, looking back and also talking from personal experience, the President normally acts very closely with his cabinet, in the present government, as well as the previous government. You will also find that very seldom can the President make any statement that does not specifically influence the terrain of some minister, whether this is on education, whether it is on defence. Normally his statement is associated with another minister and another portfolio and as a result you also find that cabinet meetings are minuted and most ministers are bound by the decisions made by cabinet. They can voice their objections within the cabinet, they can put their case, but normally once a cabinet decision is made on a particular subject it becomes the decision of the cabinet. So this also influences various other parts and various other statements and what specifically that we had some indication of previously. In other words, looking at 4.8.2 and 4.8.3 that also has a direct bearing on those stipulations. Even if you have cabinet subcommittees, then those subcommittees normally take a decision and it is ratified by the cabinet as such. So, I personally, I am trying to clear my own mind on this, I personally cannot see how the President could not be part of the cabinet. But I think... I have an open mind on this and we would really appreciate perhaps a bit of an input from the technical advisors. Thank

you.

Chairperson Dr Ranchod?

Dr Ranchod Chairman, I go on with what General Groenewald has said, but there could be a new style of government emerging where the President's direct involvement in chairing cabinet meetings could be less the norm than it has been in the past. My impression is that under our present arrangement, the President usually requests one of the Deputy Presidents to chair cabinet meetings so there is a new tradition I think coming to the fore, but whether this will really become well established remains to be seen.

Chairperson So the general opinion appears to be that we come back to this question of the State President being part of cabinet. Agreed?

??? I ask a question for my own edification from the technical advisors. Traditionally what is the function of the cabinet? Does power resort in the cabinet or in the Prime Minister, head of government, in this case the President? By what I hear, there is power resorting in the President. He then appoints a cabinet to assist him in the carrying out of his functions. They are doing it on his behalf. Or is that the cabinet has powers in its own right which they have to carry out? It doesn't in fact have to be answered now.

Chairperson General Groenewald.

Sen. Groenewald Could I just perhaps point out one important factor here. That is that most cabinet decisions, which means you have

to do something, are related to finance. And finances are allocated to a particular minister, in other words a particular government department and the minister is held responsible for the spending of those funds. We've had this in the past, for example, where some crisis occurs and you need money and the President might ask the Minister of Education: Look, we'd like to take some of your money to use for this crisis. And he says: No, it's my money, you can't take it. And, by law, it is his money. He can't take it. He can fire him and appoint another minister, who will be willing to give it, but, by law, he is responsible for those funds so in this respect... because the budget has been approved by parliament and allocated to a particular minister. So I think in this respect there is a very close relationship between the minister and the President. In that respect I also feel it is very difficult for the State President to act without the approval or the agreement of this cabinet.

???

Mr Chairman, you see, I think part of this problem is the use of this word "as part". The problem with this English language. Because if you look at the 1993 Constitution, it doesn't use the word "part". If you look at Section 81.2, to start with, it then talks about provide executive legislature. Under 81.2. If you then go to 88.1, it talks about ??? If you then go to 89.1 it says "shall be presided over by the President". Nowhere has this notion of "part" been used. I'm not sure we might not have to return to some of the issues that have been raised. But it seems to me that the way it is written here isn't all that bad to start with. Perhaps we should try to stick to some terms that don't drag like into different directions. That's the first point I want to make. The second point therefore is that if he

provides executive leadership, then the other things follow. He is the leader, you see? I mean, he is the leader of the cabinet. Whether in practice then after the budget vote is done, he can't do certain things, that's a matter of ??? The principle, in my view, is then established. So rather that we ... at least try and stick to some terms, which have some constitutional meaning, not only in terms of the 1993 Constitution, but we can apply another English word which has led to this absolute debate about what is a part and what is a whole. So I would rather that when we make a report we try to use the terms as they appear in the 1993 Constitution.

???

Mr Chairman, I think just following on that it may be that he does have to use it consistently when you talk about cabinet that it all must include the President, so for one purpose then it may be separate, for other purposes it may be together, so one will have to argue whether there is a real need for a total consistent use of the term cabinet.

Dr Pahad

Chairperson, in reply to that to what my colleagues say. It might well be that you need consistency. It is a conventional principle, Constitutional Principle called collective responsibility of the cabinet. Now you'll have difficulty if at some stage he is a member, at some stage he is not a member. When you talk of their collective responsibility, when you put him in, when you do not put him in.

Chairperson

OK. We'll come back. After this discussion, it's clear what is expected and we'll deal with that. The last portion is the size of the cabinet. Are we in agreement that the size of the

cabinet should be 24 as proposed by the Freedom Front?

Dr Pahad

Mr Chairman, I think, not for now. I mean, you can put it in, but from the point of view of the ANC there are two issues. The one is whether the Constitution itself should prescribe how many cabinet ministers there should be and we are open to debate. We will put that in this Constitution, I know that in Kempton Park because of a whole lot of different questions, but when we did put it in, I can assure you, except maybe for the National Party, none of us was sitting down and working out how many ministers there are and which one we would need and which one should merge and so on and so forth. So our own point of view would be that it is not necessary to put that in the Constitution. You might find in ten years time that you only need three brooms just to run the country. You might find that you need more. And that should be a matter for the person and the cabinet at that moment in time to decide, how many they need. I am just saying that we don't have to prescribe this now. When we put it forward, we should say that there are different views on this question, 24 members as contentious.

Chairperson

Senator Groenewald?

Sen. Groenewald

Mr Chairman, I mean, 24 is rather arbitrary. The principle is that there should be a limit on the number of ministers appointed. We feel basically that there has been a gradual growth in the cabinet and somehow you must have limits on the size of a cabinet. I think this is the principle. We looked at this and thought that there is no reason whatsoever. We cannot foresee the reason why a cabinet should be bigger than 24. We don't mind if it is so, we

would prefer it if there were only 10 cabinet ministers, but I think the important thing is that there should be some limit imposed on the size of the cabinet.

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Tape 3

Gen. Groenewald In the past it was not only the number of ministers, but even our Deputy Ministers, and even this becomes bigger and bigger and bigger and bigger. And somehow or other we should be very careful that the cabinet does not eventually take over the role of parliament. This is the reason why we basically say that the executive should be limited in numbers, not to place them in a position where they can slowly take over the role of parliament and this is the basic idea behind this.

Chairperson Professor Steytler?

Prof. Steytler The question is whether, in principle, it is viable to put in a Constitution any particular number as you would not be able to predict how things developed. That's the issue. How to arrive at a particular number and it may well be that, that is to be done in separate legislation.

Chairperson Mnr Hendrickse en dan...(Mr Hendrickse and then...)

Mr Hendrickse Are there any other constitutions in other countries where they have a number specified? The size of their cabinet.

Prof. Steytler I could just mention that a country like India with a population of over 900 million has 18 cabinet ministers. The state governments are well established.

Chairperson General Groenewald?

Gen. Groenewald Mr Chairman, our alternative to detailing the number would

be to determine a procedure under which additional ministers should be appointed. That would also be an alternative which we could look at.

Chairperson

We haven't got contention on this. It's agreed there'll be 24. I just want to mention, half of 48; the cabinet grew tremendously! Unnecessarily to my mind. And this is what we must try and prevent in the future because you can willy nilly, and that is what almost happened, appoint a minister for anything, even go and see whether people are making roads.

Gen. Groenewald

Just a final remark. In 99% of the cases where the minister was appointed, a new government department was created. It decreases in bureaucracy; it just goes on and on and on, there is simply no end to it. That was the argument.

???

Mr Chairman, we don't have a problem with outings??? proposed by the Freedom Front. I still repeat that the matter is a matter of contention because the ANC is not convinced that the Constitution should stipulate a specific number of ministers. 24 is plucked from the air. 18 is plucked from the air. 27, as in this Interim Constitution, is also plucked from the air. That's what I was saying that the numbers are plucked from the air. There is no analysis made to say that over the next 15 years, these are going to be the requirements of government and therefore these are the ministers you are going to require. Those numbers, I am saying, let's not discuss the matter here. The ??? has put 24, the ANC's position is that it is not a matter for the Constitution and that it is a matter of contention.

Chairperson I then asked the question earlier on and you said it's not a matter of contention.

??? No, I said, that it's not contention in that sense; not something that will make or break this constitution-making process.

Chairperson OK. We put it down as 24 and regard it as contentious. Thank you.

??? Mr Chairman, I follow that up. We put it as 24 and that's contentious?

Chairperson No, the Freedom Front proposed 24, that's what I am trying to say, that it's contentious because the ANC don't agree with keeping put within the Constitution.

??? Could we rather say: that the question, whether or not the number, should be part of a Constitution, is contentious. It's not the actual number.

Chairperson OK. Is that clear?

??? Mr Chairman, I just want to check that Deputy Ministers are not members of the cabinet?

Chairperson No. Appointment, term of office and dismissals for 4. We appear to have general agreement and, I think, it's not necessary to debate. OK? Everybody happy? 4.5, Accountability to parliament, including the vote of no confidence. It appears that we are in general agreement as far as that is concerned.

??? In terms of what we agreed earlier, about that Section 93?

Chairperson ... Section 93 and impeachment. OK. Is that clear to the technical advisors? 4.6, that is contentious. Anybody wants to remark on that?

??? Mr Chairman, the National Party's view on this is well known. We support a multi-party cabinet and it has also been given now by the technical experts, so this still stays our view. I just want to reiterate that.

Chairperson I think we've discussed this on the previous occasion so the technical advisors just note that the National Party favours a multi-party government and the other parties not. Code of conduct.

??? Mr Chairman, before we go onto a code of conduct. I don't think your English is entirely correct. What we are saying there is that whether it should be enshrined in the Constitution or not, that is the contention.

Chairperson OK, thank you. Whether it should be enshrined in the Constitution, a multi-party government, that is the contention.

??? Just a further point, Mr Chairman, and that is when you do have a coalition form of government it is desirable to have, you can use the Dutch word, a "regeer akkoord" - an agreement of principles on which the government will conduct its affairs, which we have not had under the present arrangements. If the technical advisors could just take note of that. If that option is pursued, we should look

at the desirability of having an agreement reached by coalition partners on party programme, or programme for government.

??? You should have the constitutional requirements. Isn't that just something we should work out in a day-to-day... of the two parties coming together to form that coalition, to reach agreement among themselves?

??? That's the danger and you end up with many problems. What I'm asking the technical advisors is to perhaps look at those countries which have established coalitions, whether it is a constitutional requirement or not. I'm not insisting that it should be, but the manner in which the Government of National Unity has conducted its affairs has at times been worrisome because you don't have this agreed, programmed principle, according to which government is conducting itself. In other words, ministers from different parties may be sending out very different signals.

Chairperson Code of conduct. Any disagreement? General Groenewald.

Gen. Groenewald Mr Chairman, I agree that the Constitution should determine that there should be a code of conduct. I don't know whether the whole code of conduct should be part of the Constitution - this is a matter to be argued - but that there should be one, I agree with. But I very much like Mr Conroy's proposal that "ministers should submit statement of gross assets and liabilities to an ombudsman at the beginning and at the end of their term of office". Perhaps in looking at a code of conduct that is something which should be considered.

???

You know, anyone, they can phone the rules committee – a committee set up to prepare a code of conduct. I personally am not over zealous that we should make provision for this in the Constitution. I think that this could be adequately dealt with by the rules of the house. It's not an issue which I really want to belabour. Perhaps, again, our technical advisors could indicate whether this is something not normally included in a Constitution. I'm of the view that it's not necessary. That's a personal view.

Chairperson

The proposal by General Groenewald that Mr Conroy's submission be part of the report? Where it says "assets and liabilities be declared before and after"... To the Constitutional Committee, to be included in the Constitution. OK.

???

Chair, sorry. So, can we ask if the technical experts are going to do that because in the last three weeks there have been serious problems with regard to Jonathan Aiken(?) in Britain, about whether or not he had made sufficient declarations and he was claiming that in terms of what was asked of him by the British parliament, he had done enough. So, the Constitution, I think, should well say that, yes, something like this must happen. But the details will certainly have to be worked out in an act of parliament and not the Constitution.

Chairperson

OK. 4.8, Internal cabinet of relationship and decisionmaking. I think we also dealt with that yesterday.

???

No, can I come back to that because of what Professor van Wyk said. Professor van Wyk was quite correct that what

I said to him in a whisper, that it was in consultation. Let me just come back now. You see, I'm not even sure whether the question posed, if I understand it correct... posed the question whether we need to say "in consultation" or "after consultation". If you look at the present Constitution, the 1993 Constitution, you will see in Section 82.2 that it says the President shall... it doesn't tell you whether it is in or after consultation. That's it. I'm just using that as a question of consultation. If you look at 88.4, it then says the President "shall after consultation with leaders of the participating parties" and a whole set of things with regard to portfolios and everything else. But even the 1993 Constitution didn't give the strength to such important elements as 88.4, which says "after consultation". I cannot see... The National party will, of course, obviously explain why they want it to be "in consultation". So, I want to say here quite clearly, from the ANC's point of view, to the meeting, all the ANC have said so far is that the President shall consult. It has not pronounced on whether that consultation is "in consultation" or "after consultation". That's the first thing. Secondly, we will come back to that if the question is forced on us in the Constitutional Committee, but we would say that it has to take into account what we have been discussing all along about the powers and discretions of the President, and he is the executive head. What power does he have to have? So, I just want to make clear the ANC's position. The ANC's position is not that consultation should be "in consultation". At present we are just saying the President shall consult with the cabinet.

Chairperson

General Groenewald?

Gen. Groenewald Mr Chairman, 82.2 and 88, that's formulated in this Constitution, related very specifically to a Government of National Unity. In other words, if that stipulation is removed from the new Constitution, then 88.2 would not be necessary, 88.2.2., and 88.4 would also not be necessary.

??? Mr Chairman, that's correct. What I was saying was that ??? use of the word I am not... the content of the sections. I was saying that on such an important issue if the Government of National Unity could have been satisfied with the word "shall" then I don't see why we shouldn't be satisfied with it in the new Constitution where you might not have a coalition of the Government of National Unity.

??? But the National Party's view will still be in relation to their multi-party cabinet, that they would like to have the words "shall after consultation", so we will abide by the present Constitution.

Prof. van Wyk Mr Chairman, clarification, maybe just a point of information. There are certain functions which, regardless of whether it's the Government of National Unity or not, fall within what one can call the ???ary sphere of the present, traditionally to appoint ministers, for instance; traditionally to, in the event of a change of majority in parliament, choose a new, or to appoint a new head of government. That is under the old Westminster system. Those things were not done on what used to be the term, and which is still used by the DP, "on the advice", which means with the agreement of the cabinet. Then there are other functions which are performed with the agreement of the cabinet and this is where this story of "in consultation" comes in. From

Constitutional Committee, that the NP said "in consultation", that the ANC just has "consultation" and the DP said "act on the advice of" so that it's clear that we are saying different things. That's the first point I wanted to make, we are not saying the same things. Secondly, of course, Professor van Wyk is trying to, but only to some extent, ??? that there is no ??? Constitution and what the Prime Minister does have pretty unlimited powers. There is still the notion of collective responsibility of government and cabinet. So, I don't see it as a direct one-to-one relationship between the notion of "in consultation" and "consultation" and the notion of "collective responsibility" of cabinet or "collective responsibility" of government, because in the end I thought you were making this connection as if that was the only connection that existed. I don't think we should take our time. I think the technical experts should put forward to the Constitutional Committee that there are now these three or more positions with respect to this and then some decision has to be taken.

Chairperson

General Groenewald?

Gen. Groenewald

Mr Chairman, it will appear to me that perhaps we haven't done our work properly here. If we look at the present Constitution, then you'll find that the responsibilities and the powers of the President are specified. To just mention one particular stipulation. In 83: "in the instrument signed by the President in the exercise or performance of powers or functions referred to in Section 82.3, which is very wide, shall be countersigned by a minister." In other words, there are certain powers which the President must exercise according to this Constitution "in consultation" with the

what I understand, Dr Pahad is saying is that there will be certain things which may be done, and more discretionary, by the President, but there will also be certain things where the agreement of the cabinet will be required. I don't understand him to say that – maybe he should correct me here – consulting here has just one meaning and that is that finally it is the decision of the President because that would make very little sense of collective responsibility.

Mr Chairman. There are no hard and fast laid down rules. It depends on the government how they will need to become... the wisdom of that decision. I'll give you an example. In Namibia, with the enclosed quarters like the Politburo of SWAPO, we asked them: What do you want? Do you want it to be in consultation with the President or with the advice of the cabinet? And they said: What is the difference? And we said: Constitutionally it means two different things. If it's on advice of the President, you'd ask the advice, but it's not bogged by the advice, he'll act as he wishes, but that he must ask the advice. If it's in consultation with the cabinet, he cannot do that unless he has consulted his cabinet. But they are not hard and fast, it's the wisdom. Do we want the President each time to consult if he needs to appoint the Attorney General or somebody? Do it in consultation with the cabinet? Or do you give him the power to take such a step because of his ??? as the head of the executive. There are no rules. It depends on the wisdom and what the country wants.

Chairperson Dr Pahad?

Dr Pahad I just want to say here, in terms of the report of the

cabinet or that particular minister. But there are other powers which the Constitution gives him which need not to be "in consultation" with the cabinet plus the appointed ministers, for example. And I think we should really have sat down and determined what powers does the President have on his own without consultation with anyone and what other functions should be exercised "in consultation" or even with greater restrictions. If we have done it, then fine, but I think perhaps we should just look at that because I don't think we've done our task properly. I haven't.

Chairperson

There is now a different perspective put on those issues. Do we frame it the way Mr Pahad has suggested or do we suggest that we re-visit it in terms of what General Groenewald says?

???

I mean, yesterday and today we went through this document. We, I thought, had agreement in general about what the powers of the President should be. Where there are some problems of interpretation or unclarity, we should ??? that. We should then ask our technical experts to look at that and bring that to our notice so that we can bring it to the notice of the Constitutional Committee. There might be these discrepancies that exist and that need to be resolved. But not to go back to the discussion of the past because we have completed that.

Chairperson

I didn't say we must go back to the past or the present. I said what the professor said, and in general said. Let's record it as Mr Pahad has indicated because we are, however, going to deal with the full report before we submit it to the Constitutional Committee and then we can look at

that again. Thank you. Then 4.9, Countersigning by ministers. Do we agree? OK, agreed. 4.10, Other aspects.

???

Sorry, Chair. The general has just spoken about one element where it is in the Constitution. It is assumed that the NP supports ??? signing of the presentation action; the DP is, by implication, in favour of this, by endorsing Section 75. As I understand it, nobody except the IFP has made an express position. The ANC hasn't said anything about this. So, I certainly would need to go back and ask our own people what is the meaning of the countersigning and how would it affect the powers of the President or head. We're waiting on some party, for some kind of response from the technical experts. Can we just say that the ANC puts that in contention? We don't have to discuss that now, but I would like to ???

???

Mr Chairman, the DP is present here and why should we call on implications when the DP is here to state the position because the report says "by implication the DP supports" by endorsing Section 75.

???

My understanding is that the implication arises from the words "on the advice of". Am I correct?

???

No. 75 (c) "that the President shall exercise with the full legal(?) functions in accordance with the Constitution, the Constitution provides for a countersigning."

Chairperson

So, there is no problem with regard to that? The ANC puts this matter in contention, the rest of the parties agree. The last, ladies and gentlemen...

???

Mr Chairman, maybe I've missed it. 4.8.3 about decisionmaking, consensus seeking etc. Was there agreement on this?

Chairperson

That's in contention because it's only the National Party that's proposing that. Other aspects, number 4.10, oath of affirmation. No problem? Remuneration. It is to be dealt with by the commission. I think then it's general agreement with other aspects. Gentleman, a caucus please. I need a caucus of ??? Other aspects, are we in agreement with what is stipulated there? That brings us then actually to the end of this meeting. Just the Core Group must remain behind. Tea will be ready, according to the secretary, at quarter past 11. Just before you leave, there is a document to be circulated on the Senate for our discussions on the 8th. Sorry, on the 5th. May I just inform the Theme Committee that the National Party is going to submit a new document with regard to the Senate. We submitted our document long before certain other things happened and we've got to adjust it accordingly. Mr Shabangu?

Mr Shabangu

(mike not on)

Chairperson

Now, now, it's here, there it is.

???

When I say ??? the ANC we haven't decided where we are going to submit this specific document. As you will note from the press, the ANC itself has some very specific views about the Senate and its relationship to provincial governments so at some point the ANC will be making its submission, if it hasn't already submitted to Core Group 3, I need to check that.

Chairperson

Let me just listen here.

???

Just a further request just to make it official, a request to the secretariat that they number our documents and how they do it, we leave to them. It's becoming quite complicated to find all the documents.

???

And a second request: If a document replaces a previous document, to also please mention this.

Ms???

Another request. In the next coming session, the secretariat must ensure that we get documentation on time that all the items put in our pigeon holes are taken to our offices because it can get very difficult. For instance, this ??? document which is supposed to deal with ??? Some of us didn't even get ???. We didn't get that documentation which created a problem.

Chairperson

We take note of the requests from the dear lady that they've got difficulty with the documents that are prepared a day before our meeting and they've got to photostat it during the night, or perhaps an hour before the meeting and then they've got to bring it here. We will have to re-arrange our management as far as that is concerned so that we get the documents that they've got to reproduce in time so that we can get it timeously.

Ms???

That's not the point I'm raising now. I'm raising the point where you find a few people having particular documentation and some don't have, which means the documents have been distributed but not the same ???.

Chairperson Right. That must be rectified. General?

Gen. Groenewald Perhaps just a hint. If a document is circulated a week before the time, it can go to pigeon holes. But the closer you get to the time of the meeting, consideration should be given to giving it to the person personally or taking it to the person's office. I think this is the important criteria.

Ms Mr Chairman, are we meeting on 8th May again?

Chairperson We are meeting on 8th May and the 8th is the question of the electoral system. The 5th is the Senate and there's also some business thing. I don't know what this is all about. Business sector, can you explain it first?

??? Chairperson, the memorandum that was distributed yesterday for information on the sector hearings with business, is also scheduled on 8th May.

Chairperson Who is involved?

??? This was apparently mandated by Management Committee and the Community Participation Department circulated the memo. coming from there. We understand the difficulty, but if it is possible for a few people from this meeting to go to the hearing that would help.

Chairperson I haven't received my Senate document yet. The meeting is now adjourned, tea is ready.

??? Mr Chairman, just to conclude. The 5th of May are we having a meeting with the ???

Chairperson On 5th May we are having the discussion...

??? Sorry, of this Theme Committee to discuss the...

Chairperson ...electoral system. And the CPG is also invited to come and clarify their input.

??? That's the 5th of May and then the 8th of May is the electoral system?

Chairperson That's right. The meeting is adjourned. The Core Group must just remain behind for a few minutes, please.

person?

DP speaker

I think you really need to direct that question to Mr Pahaad???. I would have thought that if one looked at the position of particularly a senior executive Deputy President, that person has a lot of head of state functions, foreign visits, trade delegations, here, there and everywhere, meeting foreign visitors, and its within that context that we think there is scope for relieving on both fronts, if you like, so that the President is in a position to, in a sense, direct the country without being encumbered by the day-to-day chock-a-block diary.

Chairperson

Anybody else on this? Dr Pahaad.

Dr Pahaad

There is little doubt that every government in the world, as presently constituted, wants to keep on examining how they can become more efficient in practice and similarly, I would presume, this would apply to our government. But in our view, it will be a very artificial separation to pick two people and then say: In some instances you are both deputies to the President, but your little function is to help with accreditation of ambassadors and maybe to go cut some ribbons or tapes on some road or hotel or something; you, the other one, really what you are going to do is you are going to be looking after the government. I think this creates more problems in the end than it will resolve. Our view is that you would need one person who would be the Deputy President who would deputise for the President when the President feels it necessary, especially when the President is not in the country, and at the same time, act as a kind of Prime Minister in parliament itself, being the leader

so you don't conceive a Constitutional prohibition with an ideal or workable situation. You ask yourself if the worst comes to the worst, will this document stand the scrutiny of time and test? So I am saying if you let a Deputy President or Vice President, whatever you call him, from the National Assembly... and yesterday there was mention of the President having the ability to fire a member of his cabinet, and that Deputy President would be a member of the cabinet and the ??? at his discretion, I am saying he can't fire that Deputy if he did not appoint him because the background was he would have appointed, picked up his cabinet, therefore he'll fire his cabinet at his discretion. This particular member of his cabinet, is beyond his wish, he can't dismiss him because he's been nominated by the National Assembly. You might have that problem.

Chairperson

Dr Pah~~ad~~?

Dr Pah~~ad~~

Thanks to the Advocate who was supposed to bring in some money. I think I would say from the ANC's point of view that we would have to give very serious consideration to what Advocate ^{Mokhele} Botumela just said. When we come back to some of these issues, even in relation to the Constitution Committee, that it may be that we would need to look at what are possible complications that arise from something that appears in the Constitution. Let me say it like this: Our position remains as it is now in terms of that should be elected on the National Assembly, but I shall take back to the ANC the issues, both the question raised by Professor Ranchod and the issues raised by Advocate Botumela for us to have a further consideration on this issue.

Dr Ranchod Of course there is a very easy way out of this dilemma and that is to have the President elected by popular mandate. The authority would be unmistakable.

Dr Pahad We'll take that also into consideration.

??? Mr Chairman, there is another possibility: indirectly the President can get rid of the Deputy President through the parliamentary or the majority party if its possible to institute a motion of no confidence in the Deputy President alone, as much as we can do in the (coughing), which would then be the ability to get rid of that person individually.

Chairperson We'll have to deal with a lot of motions of no confidence in that regard. So we're down to 1, and I think we're basically down to number 2 as well. There's also contention about whether the Vice President must be elected by the National Assembly.

Mr Andrew Mr Chairman, just one question. Both in the case of the President and of the Deputy or Vice Presidents, the ANC and the National Party feel that he must be elected from the members of the National Assembly. Why are the members of the Senate not considered for election, either as President or as Vice President?

Chairperson The National Party didn't say the Deputy must be elected from the National Assembly. The ANC said so.

??? In answer to Mr Andrew. I thought what we said generally, yesterday and the day before, was that in relation to the way the Senate would act, we would need to come back to

would prefer that we just settled for Deputy President. It may cause some confusion with the head of the Senate who is referred to as the President and his deputy as the Vice President, but it really is cumbersome describing the Deputy President as the Executive Deputy President.

Chairperson

The next issue is the powers of the Deputy President. We have now agreed it is Deputy President and not Vice President. It's stipulated there, there doesn't appear to be much contention except maybe a difference of accentuation as far as the National Party is concerned. Anybody to make any comments on that?

???

Mr Chairman, we feel rather strongly that the President should have the power to delegate to the deputy president whatever functions he deems fit. If he wants to deputise to him, basically the functions of the head of government, he could do this. Or just assist him in his duties. But it should be left up to the President as to how he utilises his deputy. But it is extremely important that the Constitution should stipulate that in case of illness or incapacity, that the Deputy President should be able to fulfil all the functions of the President.

Chairperson

Anybody else? So there's general agreement with regard to the duties of the Deputy President. No contention?

Dr Pahlad

Mr Chairman, on the typed report, where it relates to the IFP and I am trying to check this with my colleague, the notes start: the IFP has suggested that in the event of the incapacity of the State President or the President, the Minister of Home Affairs should stand in. (Laughter) No, I'm

Motimela

Advocate ???

While on checks and balances, I have had the opportunity to ??? on checks and balances. On page 9, 2, ??? perception there ??? report which you could passed and which is incoherently ??? and which has been up reputed to me. And I had the opportunity to go through it. I can't even read it, it doesn't even make sense to me. If that report can be...

Chairperson

Which report are you referring to?

Motimela

Adv. Motimela

Page 9, Mr Chairman, of the confliction. You know, confliction of checks and balances. My colleague said to me: Do you want to change your permission? It's not the permission, Mr Chairman. You can see the typist didn't even know what all the words means, Sir. It doesn't read. Tried to introduce the ??? there.

Chairperson

I am being told by Mrs ~~Madima~~ that this was faxed to you.

Motimela

Adv. Motimela

Have you been told, that I ??? send it back, Mr Chairman?

Chairperson

No, that I wasn't told. I just told you, you were faxed. Now you must just check on that, Mr Smit. Okay, we can deal with that separately.

???

Just a question on the checks and balances and the report on that lot and the report on blocks 2 and 3. Checks and balances doesn't exist separately from blocks 2 and 3 and the true instruction's balances are coming through in blocks 2 and 3. The only principle that the major block... Or the major principle that guides blocks 2 and 3 is the one on checks and balances on the National Assembly and so on.

So, I think, one would perhaps at the end of the report on blocks 2 and 3 then say to what extent have we met the demands of the principle on checks and balances. And then make a comment perhaps on that principle again.

Chairperson Because for the National Party that's very important. Gentlemen...

??? Chairperson, just on a lighter note. On page 15, there is a statement that is attributed to Advocate Motomela(???) which is not in parliamentary language. I just wonder whoever edits these documents, 15 of these documents... I don't know if this is accurate, but you suddenly switched into Afrikaans and you...

Chairperson But that won't happen.

??? Should we not edit this out because these documents are circulated and I don't think it's for an advocate of the Supreme Court... (noise and laughter)

Motomela
Adv. ~~Motomela~~ Mr Chairman, I know what the duties and the functions of an advocate of the Supreme Court are. I'm not having difficulty with that. All what the editing will do, will put it in contentious... ??? but in code, because that was ???, Advocate Beyers. I was ???
(laughter and many people talking at once)

??? The constitutional law will meet with the advocate other side.

Chairperson I think we start on page 2, if I'm not mistaken, Professor

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(laughter and many people talking at once)

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Chairperson I think we start on page 2, if I'm not mistaken, Professor van Dyk, with the Constitutional Principles. A document will

van Dyk, with the Constitutional Principles. A document will be circulated just now. Must we wait for that document, or can we carry on? Can we carry on? Page 2, number 3, the Constitutional Principles. Are we agreed with what's stipulated there, with regard to the Executive?

(off-mike discussion)

??? It basically comes to the point with the multi-party democracy where, sorry, sorry...

Dr Pahaad Mr Chairman, I'm wondering why we need 4.1. Our task is not to say what happens to the Interim Constitution. That is somebody else's problem. Our task is to draft this new Constitution and I don't know how it helps us to say that "who can plan Constitutional Principles which remain". All the of the Interim Constitution remains in place. It is a mandate. This Constitution remains in place until such time... until parliament can amend it if it wants. I don't know why we need to speak about this in the report.

^{Wydik}
Prof. van Dyk??? Chairperson, there was something inserted because Principle 33.2 reads: "the Constitution shall provide that ... until" so and so and so on. And 33, "the Constitution shall provide that unless parliament is dissolved". It's just for the sake of completeness, but it's...

Chairperson On the other hand, the Constitutional Committee also indicated that reports must defer to the Constitutional Principles applicable in their report so I don't know why Mr Pahaad is querying this.

Dr Pahaad I'm not querying anything. I am just asking why we put certain things. I am starting from the assumption that this 1993 Constitution is in place. It only can be amended by this parliament if it wishes to amend the Constitution in terms of the majority. Everything in this Constitution remains in place, not only this particular Constitutional Principle if you like, so I was wondering why we single out these ones because we are starting from the assumption that this remains in place. I mean, that's all I was asking. I wasn't objecting. I was saying: shouldn't we just say this Constitution remains in place? I mean, that's the case. And all the provisions that are in it instead of specifically picking out one or two elements.

Chairperson I am now getting confused. I don't know what Dr Pahaad is referring to. We are saying are we in agreement with the Constitutional Principles listed. No. 3.

Dr Pahaad I'm sorry, I didn't talk about that.

Chairperson That is why I say I am getting confused. We are agreed on 3. OK? Then we go on to 4. Now we can discuss 4. Senator Groenewald.

Sen. Groenewald Could I perhaps just say that the new Constitution is bound by the present Constitutional Principles and the only thing that I think the professor said was that these two principles refer very specifically to the cabinet and we should just keep this in mind in formulating the Constitution as far as it concerns the cabinet. I think that's all it basically means.

Chairperson Dr Ranchod?

Dr Ranchod

Perhaps put this to the technical advisors, please. It's perhaps not the reason for stating this rather unique situation that we will have a final Constitution, hopefully, adopted and approved by parliament, a year from now. It is conceivable that, or it could be argued that those principles, once recognised in that Constitution, could be altered and hence the need to just re-emphasise these two points. The life of the President in parliament will be five years.

Chairperson

OK. So there is no further problem with regard to 4? Then we carry on to 4.2, Nomenclature. Ek kon nog nooit die woord... Is daar enige probleem daarmee? Ons het die ding uitgesorteer ten opsigte van die Deputy President in plek van Vice President.¹ 4.2? Thank you. Composition and size of the cabinet? Anybody wants to comment on that.

???

Mr Chairman, could we perhaps ask the technical advisors: What are the implications if the President is part of a cabinet and if he is not part of a cabinet. And the same applies to the Deputy President.

Adv. ~~Matumela~~

Motimela

??? inform which way or the other. Government is won by means of a collection of individuals called the cabinet. That is the executive, so he must be part of that. If he is not part of the executive, I don't know what will be the authority. If he is not part of the cabinet, what will be the authority of the cabinet and what will be their mandate because the cabinet is individuals picked by him in fulfilling his executive mandate. So I can't perceive of the cabinet apart from the

¹ Nomenclature. I have never been able to (pronounce) the word. Is there any problem with it? We have sorted out the question in respect of Deputy President instead of Vice President.

President.

Chairperson Professor van Wyk?

Prof. van Wyk Mr Chairman, this probably needs further investigation. Previously there was a third concept and that was the Executive Council which consisted of the President and the cabinet. In other words, the cabinet was separate, but they were together in the Executive Council and this is the thing that we inherited from the Westminster system where it would be the queen in council or the queen in parliament. That third element has now fallen away and I think this is why we ended up with the difficulty of having a cabinet which includes the President, but in the Constitution the President is sometimes referred to, quite often referred to, as separate from the cabinet. It says in the Constitution "executive authority vested in the President", but if one looks at the decisionmaking procedure, which is "the President in consultation with the cabinet" executive authority, as Mr Matumela just said, does not vest with the President, it vests with the cabinet. So there is a terminological problem here which, on the face of it does not create difficulties, but it does.

Dr Pahaad Mr Chairman, if I may follow that. There is a difference. The President can act as the President or he can act through his cabinet.

Prof. van Wyk Mr Chairman, once again, looking at the hard reality. The President can act as the President in very, very few matters. In the vast majority of matters, it must be in consultation with the cabinet. I think Dr Pahaad is quoted as

the in-house expert on... Anyway, if I can just complete the sentence, Mr Chairman. I think one just has to go through the Government Gazette to see that the President has "in consultation with the cabinet", that's the normal run of things.

Chairperson

Mr ???

Mr Hendrickse

Mr Chairman, before we get caught up in the language, can we just look at the concept. In terms of yesterday's discussion of Section 93, we spoke about the motion of no confidence in the President, the cabinet or the President and the cabinet. So, I have a problem when you talk about... Is the President a part of the cabinet? If you then express a vote of no confidence in the cabinet, are you automatically including the President? If the President is the chairperson, as head of government, would he be the chairperson of the cabinet? So there if we can just try and get the concept right. What exactly do we want? I think in terms of the Interim Constitution, a lot of the requirements of taking decisions in consultation is because of the concept of the Government of National Unity. That might not necessarily be the case in a more majoritarian or "winner takes all" situation.

Dr Pahad

Mr Chairman, in answer to that. There is a problem here, and it doesn't allow the debate to flow and the mind to flourish. You see, if you keep on going back to the Interim Constitution... Mr Hendrickse? I thought I was replying to your question. I say, Section 93 is ??? and I've told you why. And I said: You see Section 93 if you pass a motion of no confidence only in the President, then he must resign.

He can't dissolve the parliament. This is exactly the problem. And then Section 93.1 and 93.3 then make the provision that he will be in a position to dissolve the cabinet, only the cabinet or him with the cabinet; the idea being checks and balances. The Legislative Assembly cannot remove the man, we found that ??? and the other ??? But, you see, all what the National Assembly needs to do if they want to remove the entire cabinet, is to use Section 93.2 without facing the danger of being dissolved and say: We pass a motion of no confidence in the President. But what are you doing when you pass a motion of no confidence in the President? You are also dissolving the cabinet because you can't force the new President. You can't pick the cabinet for him. The new man will pick his own cabinet. You follow my difficulty with that section?

Mr Hendrickse I follow the logic of what you are saying, but I don't think it is a requirement that a member of the cabinet resigns when there is a motion of no confidence in the President. It is more a convention. It is expected that when the new incumbent take office that members of a cabinet would offer their resignation so as to enable him or her to make new appointments.

Dr Pahad ??? The incumbent is entitled to his own ??? conventionally. That section, we shouldn't be tied to it.

Chairperson Professor Steytler and then Senator Groenewald.

Prof. Steytler Just while we're on that. As the Section now stands, the parliament can have a vote of no confidence in the President. Say under the new Constitution, the President

resigns, a new President is elected. There's no election. He jumps into office and now, in terms of his discretion to dismiss ministers, he dismisses the whole cabinet, so effectively you've achieved the whole process of dismissing the whole cabinet and the President without acquiring an election. So you've circumvented both 93.1 and 93.3. So, I think it is a real problem with 93 and one will have to see what precisely you want to achieve by splitting the President with the cabinet.

Chairperson

Dr Pahad?

Dr Pahad

I suppose what we did agree yesterday was that there may possibly be problems with 93 as it presently stands, in terms of interpretation, but at the same time the position of the ANC remains that it would like to be in the position in which it's possible for a motion of no confidence to be passed against the President, but that must not necessarily lead to the President dissolving parliament, calling elections, because we would think that this might be an additional power given to parliament because otherwise a person can threaten to pass a motion of no confidence and to call an election and people will be frightened whether they will be re-elected or not. So, we needed to take that into account. But we shouldn't now look at 93. We've asked the technical experts to have a look at 93 and give us some kind of advice with regard to 93 in terms of how it should appear in the new Constitution, and I think we should leave it at that.

Chairperson

Senator Groenewald?

provides executive leadership, then the other things follow. He is the leader, you see? I mean, he is the leader of the cabinet. Whether in practice then after the budget vote is done, he can't do certain things, that's a matter of ??? The principle, in my view, is then established. So rather that we ... at least try and stick to some terms, which have some constitutional meaning, not only in terms of the 1993 Constitution, but we can apply another English word which has led to this absolute debate about what is a part and what is a whole. So I would rather that when we make a report we try to use the terms as they appear in the 1993 Constitution.

???

Mr Chairman, I think just following on that it may be that he does have to use it consistently when you talk about cabinet that it all must include the President, so for one purpose then it may be separate, for other purposes it may be together, so one will have to argue whether there is a real need for a total consistent use of the term cabinet.

Dr Pahlad???

Chairperson, in reply to that to what my colleagues say. It might well be that you need consistency. It is a conventional principle, Constitutional Principle called collective responsibility of the cabinet. Now you'll have difficulty if at some stage he is a member, at some stage he is not a member. When you talk of their collective responsibility, when you put him in, when you do not put him in.

Chairperson

OK. We'll come back. After this discussion, it's clear what is expected and we'll deal with that. The last portion is the size of the cabinet. Are we in agreement that the size of the

what I understand, Dr Pahaad is saying is that there will be certain things which may be done, and more discretionary, by the President, but there will also be certain things where the agreement of the cabinet will be required. I don't understand him to say that - maybe he should correct me here - consulting here has just one meaning and that is that finally it is the decision of the President because that would make very little sense of collective responsibility.

Mr Chairman. There are no hard and fast laid down rules. It depends on the government how they will need to become... the wisdom of that decision. I'll give you an example. In Namibia, with the enclosed quarters like the Politburo of SWAPO, we asked them: What do you want? Do you want it to be in consultation with the President or with the advice of the cabinet? And they said: What is the difference? And we said: Constitutionally it means two different things. If it's on advice of the President, you'd ask the advice, but it's not bogged by the advice, he'll act as he wishes, but that he must ask the advice. If it's in consultation with the cabinet, he cannot do that unless he has consulted his cabinet. But they are not hard and fast, it's the wisdom. Do we want the President each time to consult if he needs to appoint the Attorney General or somebody? Do it in consultation with the cabinet? Or do you give him the power to take such a step because of his ??? as the head of the executive. There are no rules. It depends on the wisdom and what the country wants.

Chairperson

Dr Pahaad?

Dr Pahaad

I just want to say here, in terms of the report of the

???

Mr Chairman, maybe I've missed it. 4.8.3 about decisionmaking, consensus seeking etc. Was there agreement on this?

Chairperson

That's in contention because it's only the National Party that's proposing that. Other aspects, number 4.10, oath of affirmation. No problem? Remuneration. It is to be dealt with by the commission. I think then it's general agreement with other aspects. Gentleman, a caucus please. I need a caucus of ??? Other aspects, are we in agreement with what is stipulated there? That brings us then actually to the end of this meeting. Just the Core Group must remain behind. Tea will be ready, according to the secretary, at quarter past 11. Just before you leave, there is a document to be circulated on the Senate for our discussions on the 8th. Sorry, on the 5th. May I just inform the Theme Committee that the National Party is going to submit a new document with regard to the Senate. We submitted our document long before certain other things happened and we've got to adjust it accordingly. Mr Shabangu?

Mr Shabangu

(mike not on)

Chairperson

Now, now, it's here, there it is.

???

When I say ??? the ANC we haven't decided where we are going to submit this specific document. As you will note from the press, the ANC itself has some very specific views about the Senate and its relationship to provincial governments so at some point the ANC will be making its submission, if it hasn't already submitted to Core Group 3, I need to check that.

Theme Committee 2

21 April 1995 - Tape 1

NOTES

Is it Dr Pahaad???

0428:

Who is speaker?

0533:

Who is DP speaker?

1129:

Who is speaker?

2620:

Who is speaker?

3058:

Who is PAC speaker?

3273:

Who is speaker?

3476:

??? at his discretion

3705:

Advocate Botumela???

3770:

Who is speaker?

4024:

Mr Andrew

4160:

Who is speaker?

4195:

Who is speaker?

4427:

Who is speaker?

4474:

Who is speaker?

4533:

President ??? but the National Assembly should ???

4604:
Who is speaker?

4963:
Who is speaker?

5284:
Who is speaker?

5292:
Who is speaker?

5432:
Who is NP speaker?

5511:
Who is speaker?

5529:
Who is speaker?

5632:
Who is speaker?
Who is speaker interjecting?

6225:
Who is speaker?

6246:
Who is speaker?

6260:
??? of office

6311:
Who is ANC speaker?

6324:
Who is FF speaker?

6412:
Who is speaker?

7018
??? that the cabinet will include

Theme Committee 2

21 April 1995 - Tape 2

Pahod
not
Pahood

NOTES

Correct.

Is it Professor van Wyk or Van Dyk/Van Dijk? First time it sounded like van Wyk, but on this type at track 3626 it could more like van Dyk????

Who is first speaker???

1088:

are two channels? can be derived, can be drawn from both channels?

1149:

Term of office and ??? ??? parties said the following factors

1182:

??cation of the President.

1615:

??? position of a minister. ??? unless it's a state.

2108:

citizens??? conventional but now in the Constitution

2416:

the house of royal??? considered ??? also made

2939:

Who is speaker? Advocate ??

2952:

opportunity to peek here at the courts? on checks and balances. ???perception there ??? ???

3132:

tried to introduce the ??? there

3212:

told that I ??? ???

3266:

Who is speaker?

3413:

Who is speaker interrupting Chairperson?

3436:

Is it Motomela(???)

3555:

??? but in code

3600:

Who is speaker? The constitutional law will meet with the advocate other side

3803:

Who is speaker?

3950:

Who is speaker? Is it Prof. van Dyk?

4500:

Who is speaker?

4605:

Who is speaker?

4666:

??? which way or the other.

4954:

Who is speaker?

5292:

??? and I've told you why.

5380:

we found that ??? and the other ???

5505:

??? The encumbant is entitled to its own ??? conventionally.

6212:

Who is speaker? Is it Mr Hendrickse?

6437:

Who is speaker? Is it Mr Hendrickse?

6510:

talks about ???

6628:
that's a matter of ???

6736:
Who is speaker. Is it Dr Pahaad?

Theme Committee 2 - 21 April 1995
Tape 3

NOTES

0454:
Who is speaker? Is it Prof. Steytler?

0755:
Who is speaker?

0915:
the ?? has put 24?

0970:
Who is speaker?

1032:
Who is speaker?

1106:
Speaker? Groenewald? or Steytler?

1173:
Who is speaker?

1366:
Who is speaker?

1518:
Who is speaker?

1675:
Who is speaker?

1768:
Who is speaker? Groenewald or Steytler?

1924:
Who is speaker?

1968:
Who is speaker? Groenewald or Steytler?

2276:
Who is speaker?

2502:
Who is speaker?

2592:
Jonathan ???

2644:
Who is speaker?

3140:
Who is speaker?

3150:
??? the use of the word

3236:
Who is speaker?

3281:
Professor van Wyk??

3352:
persifactionary??? sphere

3600:
Who is speaker?

3788:
??? as the head of the executive

3896:
??? that there is no ??? Constitution

4298:
Who is speaker?

4350:
we should ??? that

4508:
Who is speaker?

4544:
??? signing of the

4658:
Who is speaker?

4698:
Who is speaker?

4729:
Who is speaker?

4745:
shall exercise with the full legal(?)

4809:
Who is speaker?

4936:
a caucus of detention/assension?

5133:
Who is speaker? ??? the ANC

5238:
Who is speaker?

5285:
Who is speaker?

5300:
Who is speaker?

5338:
??? document

5342:
to deal with ???

5348:
even get ???

5480:
not the same ???

5545:
Who is lady speaker?

5623:
Who is speaker?

5729:
Who is speaker?

5735:
with the ??? Committee