

**MEETING OF THE NEGOTIATING COUNCIL HELD ON 10 AUGUST**

21 August

**TRANSCRIPTION OF THE DEBATE ON CONSTITUTIONAL ISSUES**

**The technical committee presented their ninth report and the draft constitution respectively. What follows is the debate on their report and the draft constitution.**

Chair: I would like to take the suggestion of the technical committee and raise the debate accordingly. The introductory remarks of the technical committee in their ninth report deal with a number of issues that we find in the draft constitution. Instead of debating the various paragraphs and the contents thereof, it would be advisable to go to the text immediately since all the arguments will reoccur and we can then register progress as we move from one clause to another. What I will allow for is information, some questions on the introductory part.

Chief Nekonyane: On page 3 paragraph 5, I would like to know which decision was questioned and by whom.

Mr Chaskalson: What was intended to be communicated by that paragraph was the question of the role of the traditional leaders in relation to the legislatures at national and regional levels. The omission was questioned by Chief Nonkanyane and it was then made the subject of discussion and it was stated that this matter should be discussed further between the participants and it was not to be debated in the Council and for that reason we were not in the position to take it further.

Chief Nonkanyana: The impression that is conveyed by this paragraph is that the technical committee is acting on a wrong impression. Our view is that even the principle that they are quoting, they are clearly stating that their shall be a role for traditional leaders at all levels. But there is a proviso that that principle should derogate from principle 2.1.12 which guarantees the role of traditional leaders at all levels. Why are they restricting then the role at a local level?

Chief?? What gave the technical committee the notion that the role of traditional leaders should be restricted to the local level only because it is from my view not within their powers to restrict the role of traditional leaders.

Chair: In defence of the technical committee they are actually asking for our advice and the debate amongst the delegates haven't progressed to a point where we can give them clear guidance. So they have left the door open and that's why they say it was left over for discussion between the participants. As soon as we give them clear guidance they will implement that.

Dr Venter: We have no right to prescribe anything. We are here in an advisory capacity. As the Chairman has indicated we are pointing to this question that has been left over for further discussion by the Council on a political level.

Mrs Moroka: I would like to support Chief Nonkanyana, that the chiefs can contribute a lot at parliament at all levels because they have wide experience in participating at regional level even in the present. Has the technical committee thought that by letting the Chiefs act only at the local level would it be relegating their position to a lower level.

Chair: We will have to have this debate again clarifying the role of the traditional leaders at various levels of government. Could we conclude the discussion on 5? We move on to further questions.

Mr Ramaphosa: I want to correct Mrs Maroka. We don't refer to traditional leaders as chiefs anymore, we call them traditional leaders because they are leaders of a people in accordance with tradition. It is a very important and emotive matter.

Chair: We move then to the text itself. We turn to the bottom page 7, chapter 1, any comments?

Chief Nonkanyane: I want the views of the Technical Committee on why they omitted the preamble. Could they not have a skeleton of some kind. A preamble is having some element that is technical in nature and those that are of a political nature. But we would appreciate some form of a skeleton.

Chair: The Planning Committee who is now dealing with the matter could inquire for further advice in that regard.

Mr Mentz: On 1.1 is there any objection from the technical committee or participants to adding one word: The republic of South Africa shall be one sovereign federal state.

Chair:

We will not get consensus on that here. I will rule the discussion as we have done previously. That we try and give advise to the technical committee where we can get consensus. On matters where great divergence of views still exists we will debate it for a while and then move on. It will come back to us again and in this process we try and mould a final text. It would be to our advantage to move as far as we can. But there may be outstanding matters that we will not be able to conclude during this debate. I move to 2. **We have dealt with national symbols this morning when the technical committee was instructed to provide the Council with names of such a committee that could advise us on this matter.** Languages still outstanding. We move to the supremacy of the constitution. Clause 4. Agreed to? We move to chapter 2 which deals with citizenship and the franchise. Clause 5 .

Mr Webb:

A question to the committee on clause 4. I know that they have had a meeting of a variety of technical committees during lunch, is there nothing in the IEC bill that is in contradiction to paragraph 4? I am of the opinion that the IEC is superior to the constitution. Perhaps the technocrats can tell us?

Dr Venter:

We haven't made a detailed study of that proposed legislation but my impression is that that is pre-election. This constitution will apply post election. So there should not be any conflict except if the IEC law continues after the election than it will have to conform to the provisions of this constitution.

Chair:

**The question that should be investigated is whether the IEC bill does not conflict with the present constitution. We will ask the technical committee to apply their minds to that matter. We go back with Clause 5.**

Mr Mentz:

When last this was discussed, the issue of a South African citizenship as well as regional citizenship came up. Was this considered at all. We were given to understand that the Committee would look at this. Was this considered.

Dr Venter:

Chapter two deals with South African citizenship as it is provided for in South African legislation at this stage and in future probably. Whether provision should be made for a separate kind of SPR

citizenship is a different question. It may be dealt with under the Chapter dealing with the development of SPR constitutional dispensation in terms of a new constitution or that section dealing with the development of separate SPR constitutions. As we indicated earlier SPR citizenship cannot be anything else but a component of national citizenship.

Mr Mentz: I accept that. We are not arguing the question of South African citizenship. It was raised under this heading the last time. There is no suggestion by this committee on how this should be dealt with. If its going to be addressed than lets hear about it. We get the impression that it was cast aside.

Dr Venter: We did not cast aside the notion. But in our deliberations we came to the conclusion that this was not the appropriate way or place to deal with this issue. The issue is not merely a technical one. It is basically a political one. The question whether the nature of SPRs should be such that separate forms of citizenship should be possible and what the manner should be that that kind of citizenship should be coordinated with national citizenship. It can be complex and emotive and it may be useful for us if you could have further debate and discussion on this matter, possibly when you deal with the SPR's.

Chief Nonkanyane: Our problem is that they say citizenship in terms of legislation and some of us have been deprived of citizenship in terms of legislation. Did they consider other criteria such as birth, domicile etc?

Dr Venter: At some stage we had a draft before us when we worked on this thing which was more extensive which went some way towards the regulation of citizenship as a whole. We landed up with this formulation because the question of where and how citizenship should be dealt with can be quite complicated. At the moment citizenship is not regulated constitutionally, in its final details. Those things are normally dealt with by an Act of parliament. There is legislation at the moment. There may as we have indicated, be a need for the rationalisation of the present laws regarding citizenship especially around the question of the incorporation of the TBVC states. There is a basic statute of 1949 regulating South African citizenship which is not based on racial grounds, there is a law of 1970 regulating the citizenship of the selfgoverning territories..... all these things will have to be the subject of rationalising. There will probably have to be a law prior to the elections regulating a transition from the current citizenship dispensation to the one contemplated here. But to deal with that whole thing in this constitution may be very cumbersome.

Chair:

The detail is set out here and the details will have to be dealt with in legislation.

Prof Repinga:

We support the formulation as proposed by the committee but the issue of residency as we raised in our previous discussion, that also needs to be explored.

END OF TAPE BITS MISSING.

Section of Transcription of the NC on the 10 August 1993

Debate on Constitutional Issues - Chairperson - D De Villiers

Mr Chaskalson: Just a practical matter and that is that question of the citizenship law should be a subject of the work of some TC it may fall within the brief of the TC on IEC or it may fall within the brief of the TC concerned with the Repeal of Disc. Legislation but the somewhere the question of rationalising, repealing and co-ordinating the citizenship laws needs to be undertaken we didnt see it as part of our task unless you instruct us differently.

Chairperson: There is suggestion, Mr Titus, do you want to follow up on that?

Mr Titus: I just want to follow up on the response from Advocate Chaskalson. Just for purposes of facilitating the formulation of our future?? programme. I would like to make this plea to the TC that during the course of drafting of this particular interim constitution or constitution of or the transition period they need on a separate sheet of paper to identify all the legislation which is required, because as at present also gauging from the pace at which we are going I think we are of the view that what all we had to do is just to look at about six pieces of legislation that is going to be pushed through in the September session it appears from the reaction that we may end up to close to 10 Bills being pushed through the September session if they could be identified as early as possible so that we adjust our programme accordingly. That is my plea Mr Chairman.

Chairperson: **The TC will take note of your request, but the TC has also directed your request to the Council and that is that some instruction must be given to a TC, one of the TCs the appropriate TC to look at the rationalisation of all the citizenship laws, etc and I wonder whether we shouldnt decide to instruct the PC to identify the correct TC and then instruct them to deal with this matter. Agreed to Thank You. Prof Olivier**

Prof Olivier: Mr Chairperson I would just like to add to what you said. The purpose of section 5 is not to regulate all the citizenship provisions and number 2 the purpose of this section is not to retain the TBVC states citizenship laws if those states are incorporated into the rest of SA and thirdly Mr Chairperson this formulation does not exclude a possibility if a SPR citizenship. The more federal the character of the new state

will be the more appropriate an internal SPR or federal member state citizenship could be and this is a matter for debate in this Council.

Chairperson: We move then to clause 6, the franchise the details will also have to be worked out by the IEC these are the guidelines. Mr Rajbansi.

Mr Rajbansi: I agree the details will have to be worked but I think when you say the franchise is extended to every person over the age of 18 years. I want to share some legal difficulties, one is that when we had the voters roll the legal interpretation that if you are 18 even the day before the election you cannot vote if you were 18 when the voters roll closes that's the date you have the franchise, so we don't know whether we are going to have a voters roll how we are going to identify voters, but **I want the TC to bear this in mind that franchise should mean every person who is of or over the age of 18 on the date of the election shall be entitled to vote.**

Chairperson: **The TC take note of that remark.** We move then to chapter three. I'm not going to put the whole chapter up for debate today we are dealing with fundamental rights with the TC on that matter, so we move to Chapter 4 on page 21. Mr Mentz

Mr Mentz: I wish to raise a question here on fundamental rights when last this was discussed we indicated the question of fundamental right we wanted that to be incorporated in the legislation by the TC on FHR of persons belonging to national or ethnic, religious and linguistic minorities we wanted that included under the Fundamental rights that was however not done and we suggested then that there should be a chapter in the constitution because we think it's more appropriate to have it in the constitution on the declaration of the rights of persons belonging to ethnic etc groups. Now I do not know whether in fact this was considered or not..

Chief Nonkonyana: Point of order I think we agreed to follow chapter by chapter.

Chairperson: I'm very much aware of that ruling and I'm listening to Mr Mentz and he's making a somewhat different point and I just to give him the opportunity to give to speak.

Mr Mentz: It's not possible to raise it any other stage because it had to be included under this section. It is not included under FHR therefore we

suggested that it should be an additional chapter on the question of the declaration of the rights of ethnic groups and we suggested and we gave the committee our version now the question I pose is did the TC consider this for inclusion or not and if not why not?

Adv M Olivier: Mr Chairman this declaration dealing with minority rights can perhaps be dealt with under the status of international law under this constitution we havent dealt with yet but weve indicated the point under Chapter 12, so its one of the issues well have to come to.

Chairperson: So that will come back then under that chapter for a debate to the council.

Dr Venter: Mr Chairman I would think the appropriate TC to deal with that matter would be on fundamental rights under the transition because it is very closely linked to that matter, Im not trying to avoid on behalf of the committee any further work but that is actually very closely linked to that thing and it should be referred to them to my mind.

Chairperson: Prof Olivier

Prof Olivier: I havent been here for the past two weeks so I dont know to what debate Mr Mentz is referring does he refer to the Declaration, the international declaration adopted by the General Assembly or does he refer to a chapter in this Constitution with his own provisions not referring to International instrument??.

Chairperson: He's referring to that subject, not necessarily the wording of that International Declaration and was asking the question whether we can accommodate that.

Mr Mentz: Mr Chairman I was referring to the Declaration adopted by the United Nations in December 1992 as being a universally accepted principle and I wanted that included in the Constitution.

Prof Olivier: Than I can answer the first part of Mr Mentz question. It has not been considered by the Committee in my presence.

Chairperson: Could we deal with the matter in the following way. I think it has been clearly registered now with the TC Dr Venter made the remark and I think there is a lot of validity that it is not really a matter for this TC but could we ask this TC if it does not fall under their jurisdiction to communicate with the TC on FHR.

Adv Olivier: Mr Chairman I just want to reiterate that all accepted principles of international law will be dealt with in this constitution the manner in which it will be incorporated so it is a subject which fall within the ambit of both committees and when we come to that section dealing with international law you can evaluate to what an extent it satisfy Mr



Mentzs proposal.

Chairperson: We've identified that niche when we get to that niche eventually we can then consider the matter and then also address the question of whether this TC or any other TC will further deal with it. That concludes the chapter of fundamental rights. We will then deal with that separately we are on chapter 4 now clause 38; 1, 2 no problem.

Dr Rajah: Mr Chairman just a query on 2 whether it is normal practice for powers to be delegated from the centre to the local authority direct whether it should be delegated to the second tier of government because normally the second tier of government because normally the second tier of government is the custodian of local government first in this instance there is a link if the power is delegated from the centre to the local authority it not common practice for a local authority to have direct links with the central authority accept by the second level of government.

Dr Venter: Delegation need not really be specified in terms of the level of government or specific institution delegation can be done normally to any institution or person. I think, Im saying this under correction but I think its true to say that at the moment there are parliamentary laws allocating certain powers to local government directly without the intervention of a second tier.

Mr Webb: If a regional government is in place (inaudible)... and that I think it should be clarified because I think this is going to be a recipe for future disaster.

Chairperson: Can we hear views on that. Accordingly to Dr Venter its possible do we wish, the Council wish that to be changed then we muse give some direction to the TC.

Mr Rajbansi: Mr Chairman Dr Rajah has raised a very important point. Where a local government performs a function at present it doesnt do so with delegated authority it does so on an agency basis lets take housing the Durban City Council is a housing agency but I it would be better to re-examine this that where you have an SPR government it might be better to give responsibilities to local government from the centre through the SPR and I think this particular point needs re-examination.

Chairperson: Can we refer it back to the TC? Mr Chaskalson you want to respond?

Mr Chaskalson: I just want to point out that under the draft local government and p43 is treated as an area of concurrent power it is not an exclusive regional power and so one really has to sought that out before you begin to address this question.

Chairperson: Your suggestion is then that we look at the powers of local governments first and then reconsider it in the light of our decisions there

Mr Chaskalson: Well it would be inappropriate to say the central government should not have the power to delegate functions to local government if local government is a concurrent power and not an exclusive power.

Mr Cronje: I think it raises a very important principle as far as I'm concerned and perhaps we are discussing it under the wrong juncture, that amongst the concurrent and exclusive powers there is amongst others the issue of local government and I'm not quite clear exactly what central government's role and function is in respect of local government and what the exclusive nature of that power is to a SPR but maybe we should discuss that when we get there. I think we must note that there is general concern that a SPR government can be bypassed that is just the ??? and we'll come back to that once we've dealt with the powers and functions of local government.

Chairperson: Duration of parliament..

Dr Rajah: Just a clarification I must have missed it in all the documentation when parliament is dissolved it says both national assembly and senate shall still perform the functions, may I know what happens to the government at the SPR level, is it also suspended? On p41 it says the SPR legislature shall continue until parliament is dissolved under chapter 5 but it doesn't give it any life beyond that. Is that SPR also suspended also suspended in the interim phase?

Chairperson: Dr Venter

Dr Venter: The same kind of provision I think should be made for the SPR legislature as is made here for parliament it's not there at the moment.

Mr Cronje: I have a difficulty in that in that 3.4 and 2 forms part of the same argument. Normally if parliament dissolved it is with a view to the holding of a general election experience has been and I think there is a lot of reason to be critical of it that the period of 90 days is excessive if you decide on an election you announcing your election date when you dissolve parliament because that is the objective of its dissolution I think 90 days for campaigning is excessive it's costly and it leads to all sorts of difficulties. I think for a small country like ours in international terms it's too long then secondly I have a difficulty if parliament is dissolved it means that I am or whoever is no longer a member of that parliament because parliament no longer exists and the normal procedure is that the day to day government is undertaken by the executive council by the cabinet they do it in terms of the laws of the country I have a difficulty to understand how a parliament and

certainly it hasn't been so in my experience a parliament that has been dissolved I'm no longer a member of parliament. How that can be called back by the State President to act to the parliament after you've been dismissed as parliamentarians I'm sure there are examples in the world but I find it a strange phenomena.

Chairperson: I have two or three hands and they want to address the same point.

Mr Webb: I just wanted to pose a question of whether in fact the President was the right person to call it or whether he should refer the matter to the Chief Justice and the Chief Justice should summon it

Mr Rajbansi: What we should have had is a heading - What is the effect of dissolution? - You do not get rid of parliament in the true sense of the word. You dissolve parliament for the purpose of an election and you are not dissolving parliament is only for election purposes but the members of the legislature remains in office right until the time they are replaced that is universally accepted.

Prof Olivier: This provision is not strange we have more or less the same provision in the ??? section 40 of our constitution it reads notwithstanding the dissolution of any House in terms of this Act whether by dissolution of Parliament or otherwise or whether by a ??? or otherwise a) any person who at the date of dissolution of any such House shall remain a member of shall remain a member thereof; b) such House shall remain competent to perform its functions and then thirdly the State President shall have the power to summon Parliament or the Houses in question for the ??? for business and during the period of elections. so I think it is in line with the provisions they have in the present constitution, there should be some basis of continuity.

Chairperson: Have you got all those provisions in the draft bill, also regarding membership I think that is the concern that if you dissolve parliament now you really also terminate the membership of those members of parliament.

Prof Olivier: I think Mr Chairperson that it is clear from sub 3 what we can make it more clear for those who do not understand it.

Mr Cronje: I don't understand it if it's not written so I need it to be put in and secondly I would ask you to seriously consider the 90 days period. It gives an extraordinarily period of electioneering and it has its consequences. I think for a country our size 60 days will be more appropriate. The moment parliament dissolves the electioneering starts.

Chairperson: It does say within 90 days it could be a shorter period. I'll ask the committee to perhaps consider whether that's practical whether that's too long it is of course where in a situation where parliament breaks down

where it cant continue its work there is just a problem and then parliament is dissolved and you need then to arrange an election in a vast country like SA you require some time, but we will ask the committee to look at the debates and to have the full implications of this clause spelt out.

Mr Webb:

The way the constitution is prepared at present it may only dissolve on the happening of certain event and can only dissolve in terms of chapter 5 to pass a new constitution. Whats worrying if there is any intervening incident theres no provision for dissolution in the normal cause. And the technical committee could have a phrase allowing for dissolution in the same way as it does now so theres an option of continuity.

Mr Chaskalson:

We did actually discuss that and our view was that parliament had been appointed for a task to make the constitution within two years and that it would be wrong to dissolve it in the middle of that task. It would give the governing party at the time the capacity to dissolve parliament and reconstitute it when it is contemplated that during those two years the originally elected parliament would have to remain in tact and make the constitution. It becomes a question for this Council to decide whether it wants to keep the first elected body intact until the constitution is made or until a new election is called for or whether it wants to give the head of state the power to dissolve the parliament before thats being done and to start the process anew.

Chair:

Shall we leave it at that and review it when it comes back again?  
Clause 40?

Mr Eglin:

The DPs view is that the best form of representation will be the most direct one to constituencies and to people living within it. We recognise there are practical problems of having constituency representation at this stage. The other one is that it could perpetuate group areas structures because many of the constituencies may be based on group areas. The third practical problem is that constituency representation as a single member constituency doesnt give our proportional representation and therefore you require a certain number of seats on a national list in order to balance the representation. That would be desirable. Nevertheless we would have then preferred to have multi member constituencies to take an area and then do it on a proportional basis. It would involve drawing constituencies and all the practical problem...inaudible. We therefore believe that the most appropriate element to bring the voters in direct contact with members of parliament would be the boundaries of the regions and we would say the best way of seeing direct accountable representation in the central legislature would be to use the regional boundaries in the form of multi member constituencies on the basis of party lists within those constituencies. The only one snag would be in our formative period before regions are consolidated into viable political factors theres a

strong for saying there should be some national seats, national lists to top up and to see that people who do want to be involved with representation on the ground can be put into parliament via their parties on the basis of national lists. We argue that preference should be given to the regional dimension and that 300 of the 400 seats should be directly related to voters on the ground through the regional boundaries and the other 100 used so that political parties can top up the number to see that people of national stature who would not want to get involved on constituency representation through the regions do that.

Mr Rajbansi:

Taking Mr Eglins argument about the history of group areas and the history of movement of people beyond localised boundaries so taking the same arguments there are also arguments against regional lists. I support the proposal from the technical committee that 50% be from the national list and 50% from the regional list. We have to take certain decisions. We have to take a decision on the minimum threshold on the national and regional lists. We discussed this at CODESA. Those parties who obtain less than 5% of the votes would not be entitled to nominate any representatives in the national legislature. How are we going to choose the numbers from each region because in the senate the proposal is 10 from each region irrespective of the size and I want to propose that the number of seats should come through the regions according to the population size of each region and the question will be how do determine the population size. Some parties will not fight it on a national basis, they might want to get to the national list through the regional list. Further those parties that get less than 8% in a national list should not be entitled to nominate any seats on the national assembly.

Dr Venter:

These are details which we think should be dealt with in a schedule 5, we have given some thought there but we havent reached the stage where we can present you with a specific system. The question of the lowest percentages for achieving a seat must also be related to the number of votes which each seat could present. if you 200 seats for example and 20 million people vote it would mean that you need 100 000 votes per seat. So there is a natural kind of cut off point built into this thing. The higher the percentage is the fewer parties there will be having representation in parliament.

Chair:

**I wonder whether we should not deal with this clause as follows: The principle is being set out here the details will be contained in the schedule that we ask parties who want to deal with the principle, to make their views known, to make inputs to the technical committee as to thresholds and the way the two hundred on regional lists should be elected so that when we deal with the schedule we can deal the details.**

**Mr Webb:** Should we not ask the technical committee to prepare a schedule which we can then debate?

**Chair:** We can ask them as well as give them our views.

**Mr Ramaphosa:** I was going to ask what Mr Eglin proposed when he said 300 should come from the region. One welcomes the sensitivity that MR Eglin is displaying towards regions but he needs to bear in mind that the proposal is that we have 200 from regions but at senate level you are going to have an additional number of people coming from the regions and already there was the suggestion that you are going to overload the parliament with too many regional people. We think there is a good balance and also in favour of regions by having 200 in the national assembly from the regional list and the other people will be in the senate about 80 or 90 or so.

On the question of proportionality that is going to be on all the votes that have been cast and it cannot be on the population as such.

**Chair:** 41? No comment

**Mr Wessels:** On subclause 2, I have a difficulty with the wording as it stands. persons who are nominated as candidates on SPR party lists shall be ordinarily resident in the SPR. What we would like to achieve with that wording is to ensure that a person is representative from an SPR. By saying that he had to ordinarily reside in an SPR should be he associates with that particular SPR and will then representing them. Im not sure that is what we want to achieve. What we are saying is that his domicile must be in the SPR.

**Mr Moseneke:** We are open to what the preference of this Council would be. The words ordinary resident have been used in their normal judicial meaning and which differs from ones domicile which can be determined from a whole number of legal criteria which are entirely different from where one is ordinarily resident. You will not be ordinarily resident in a place if you do not have a home and in the normal cause of things where in some cases say you will end up sleeping and that will be your place of residence, Your domicile can be determined by anything from marriage right across to a number of legal circumstances which will change it from time to time and secondly domicile would normally refer to you in relation to a sovereign state as distinct from a particular part of that state.

**Mr Pahad:** If one is to make an assumption of the ownership of a home being the criteria for determining ordinarily resident than a who,e host of questions arises, if you are not able to afford a home, you could afford to have to or three homes in different regions and therefore in terms of ownership of property to be ordinarily resident. I'm not clear as to what would determine ordinarily resident. Also why is it necessary to

have as part of a constitution which says you will have a regional list but only certain people will be entitled to be on that regional list. Should that not be based on the competence of the parties fighting the elections as to who they feel should appear on the list.

Mr Moseneke:

There was no reference to the ownership of a home and the reference by Mr Pahad is erroneous it has nothing to do with an ownership of home its a place where you reside. You may or may not own the place. To make the decision again, your domicile is a product of a number of legal criteria which would accord to you a particular home as a place where you would be domicile. For example you could be ordinarily resident in London and be domicile in South Africa and theres a number of rules which you apply to determine your domicile. What motivated the provision was that legal representation should be regional representation as distinct from mere party representation and that those party representatives should at least have a link and represent people in particular geographical area.

Chair:

**I think we state principles in the constitution, details will have to be worked out by the IEC so if we have ordinary resident in here the electoral commission will have to specify what that means. Either we firm up the principle or leave it as it is.**

End of tape

Chairman:and define, because then we will have a long and endless debate and I am going to appeal to the 9 people here still addressing the subject, if we could not approach it in this manner, Mr Rajbansi, I am listening Mr Ramaphosa

**Ramaphosa:** If there's an issue that we can allow up to 9 people to speak, are't there are weighty issues that we should really be moving to

**Chairman:** I think they have listened to my request and I am sure many of them may weigh their opportunity to speak, so let me just repeat this, if you are happy with ordinary resident which indicates some string, some tie with the region, let the Electoral Commission work out the detail, if you want to some it out just say so you want it to be deleted, let us just address it that way, now I am going through the list and Mr Rajbansi is waiting his opportunity, Mrs Finnemore

**Mrs Finnemore:** Mr Chairperson I just want to declarify, I just want to give an example, if you have a migrant worker whose domicile is in Kwa Zulu that is where his home is, he actually stays in a hostel and he sleeps there 10 or eleven months of the year he ordinary leaves as a resident there, if then is being disqualified for standing for the regional legislature in Kwa Zulu or wherever he is coming from, they don't need to answer now but that was my question

**Chairman:**I think that is the kind of thing the Commission will have to clarify, remember this is not a voting rights this is where you are put up by a party to be as a candidate so it must indicate some routes in the area it already implicate a link and I think it assist to give it some umbilical cord, I am just going through my list, I think we feel we should not debate this any longer, I am going to give quickly those whose names I've got whether they want something urgent or they want to convey on this matter, we will deal with that once we get the details before us, agreed to, thank you.

**Mr Webb:** Is it possible in terms of this that we could appear or Mr Pahad's amendment that we could appear all in one list.

**Chairman:** I think the whole matter of list is something that will have to be dealt with, that is fairly for parties, quite a complicated matter with transfer ability of between lists all that aspect will have to be dealt with, I think it is not the appropriate time to deal with it now.

**Mr Cronje:** Chairman I believe there is a very fundamental issue at stake, fundamental issues are that normally if you have a constituency or you are a member of parliament representing your area, with a nationalist people who can be on that list from wherever they live, on the regionalist I think it is most important to have to give people in their regions direct access to their representative and I believe it is a fundamental importance that the person on a party lives on a regional basis they should live in that region, what leave me that is the question

**Chairman:** We move on to 41, though I am quite serious Mr Cronje I think that is what we must get more detail, what that this link means in practical terms, 41 we move to the speaker of national assembly 41.1, 41.2,41.3,41.4, 41.5,41.6, 41.7, thank you. Qualification of



members of the national assembly, Mrs Brink

**Mrs Brink:** Mr Chairperson may I please make a suggestion to the Technical Committee and that is that goes with section 42.1 should be amended, estimate position for the following, that no person may be nominated or become a member of the national assembly unless he or she qualifies as a voter as set out in clause or section 6, otherwise if we don't make provision for that, its not clear from that section whether eligible voters will qualify to become members of the national assembly or not, this argument also applies to members of the senate and is are legislators

**Chairman:** Thank you, 42.1 any other further comments

**Mr Eglin:** Mr Chairman I am quite sure that maybe from the government is quite correct, there has to be an intergration and a correlation between the disqualification or the electoral act and the disqualifications to stand for parliament, subject to the one number E, and that is that they are remunerated employees of the public service, which should not be a disqualification for the voter, absolutely essential that should be there, in respect of parliament to show there is a clear separation of powers between the executive and a legislature, some need to be taken by the Technical Committee of seeing that the other restrictive clause on standing there are some relationship to the restrictive or permissive clauses for being a candidate and a voter in the general election

**Chairman:** That concerns the disqualifications, you are quite right but the point was about the qualification as it stands right even a foreigner could come and become a candidate and it is not then a SA citizen.

**Mr Shilowa:** I need clarity on point E, it is said unless they are remunerated employees of any public service within the republic, are they talking about the situation where, if you are working say for the municipality, you cannot be nominated to stand on an SACP list regional or otherwise or are they saying, once nominated you may have to vacate a city because what this means is that if we have a party member who are sensed to be a municipality worker and we believe that person will represent us, we are going to be told that you cant nominate because that person works for the state, so I think we would need clarity and I also would like to firm it up so that it does not exclude those of our people because we do not have full time politicians in within our own ranks, so we would need to ensure that those of our people who are working in Bophuthatswana for instance that we can put them up for the regional list in that area

**Mr Chairman:** Important point, I think it goes without saying so the Technical Committee takes note of that, it is not the intention to disqualify the permanent labour to make provision for that

**Dr Rajah:** Could I suggest that the Technical Committee applies the present rules because I think they have worked quite well, the people of the public service are eligible for nomination

**Chairman:** It is in line with the present rules, they have to resign to become candidates

**Mr Eglin:** Chairman as it stands it is not in line with the present rule, it says no persons may be nominated or become members, I think they should be nominated but they cant become members so in other words for an election they will have to vacate their other office, they can quite clearly be nominated but they cant be elected

**Chairman:** I think that's the sentiment of the council, Technical Committee please take note

**Mr Mentz:** Mr Chairman I have never understood why a man who is rehabilitated he is not allowed to qualify to become a member of the national assembly, Mr Chairman people becoming solvent for different reasons, he might become insolvent because of the act of God, he might become insolvent because of the fact that he cant get a job, in what way is he then penalised, why should he be penalised for that reason, if a man becomes involvement because of dishonesty or because some criminal element is involved in his insolvency then I understand it, if this is taken over ..from the provisions for the man not entitled to become director of a company of that kind, I cannot see why he should be disqualified on those grounds, I say that if dishonesty is part of it then qualified then became insolvent as a result thereof, that as I say people becoming insolvent for various reasons, therefor I think they should reconsider this and change and qualify on this issue of insolvency

**Chairman:** Thank you the Technical Committee take note of it

**Dr Venter:** Mr Chairman one reason why this is in here is that is the usual way to do these things I mean we can come back with a reason, argument for not including it, but I really think its not a Technical matter, it is a matter of whether the council wishes to change what one can almost call along standing convention, it can do sir,

**Chairman:** Others views that this should be changed

**Prof Wessels:** Mr Chairman I like to add something, it is an interesting question, it comes from British Colometry law, the reason was until not so long ago means...in his salaries, they did for the love of everything...that involvent such a person then they easily subject it in influence to bribery, but that came from that period the members could ask themselves whether it is still applicable in modern times, but it comes from a time until the beginning of the century that members of parliament and all elected bodies are not paid

**Chairman:** We move then to sub clause 2, not discussion on that then vacation of 6 clause 43, I put 1 a,b,c,b,d

**Mr Rajbansi:** Mr Chairman I notice 43.b is actually an anti-defection clause, now I want to suggest that there maybe situations where members may sees to be members of a political party, not in a manner that they want to defect now I suggest to the Technical Committee to study the anti-defection bill of India, and let's for an example we have a situation you might have in India if there is a break-away from the party, that breakaway group is not asked to resign the seats, but if an individual breaks away from a party and joins another party, then the detection clause bill is... then you have another situation where you might have a national patriotic front which will have their name on the list of election on the ballot paper, the national minority front for an example and if a cohelision or alliance breaks away because

a registration will be only on one name, let's say the patriotic front wins the election, they have got five or six constituent groups and one group is not happy or within a party you have ten or fifteen members who want are not happy that the policies are not applied, they break away as a group, the Indian experts thoughts that that's not defection, so the purpose of this lead, is actually to prevent defection you know a person just joins a party because of the purpose of convenience and want to leave so I suggest that this be revisited, then on D Mr Chairman, the present constitution states that if you fail to attend one session of parliament, it is six months then you loose your seat, and I think that should be re-examined the thirty days consecutive days should be re-examined in the light of what is in the present constitution

**Chairman:** Thank you Mr Rajbansi, we have listened to an expert in this field, any other comments Dr Rajah

**Dr Rajah:** I think I would like to revisit this clause schedule 1 because this also relates directly with Clause C and I think Mr Rajbansi only quoted out of conveniencing the Indian text because the electoral system is very different from what is proposed, even at the moment why the anti-defection clause is not written even in the SA legislature or in constitution is because all our election is based on a constituency basis rather than a proportional system, there is a question of the free choice of the individual acting according to his conscience rather than acting according to the dictates of his party, so therefore when it came to a constituent election there was this flexibility and this ...infection clause that ..but in the present circumstances then we have a proportional list it is essential that this clause remain

**Mr Shilowa:** If Mr Rajbansi is not going to argue anymore I withdraw, but I wanted to say that not having studied Indian or SA law, we think that B is actually very important if anything it must actually be firmed up because the elections are for the purposes primarily of drafting a new constitution also in terms of governing I think sir you can't have people coming on a party list for convenience and then once they've been elected they sit on the other side and implement other policies, what if you have a situation you have a break away is sort of maybe a majority in terms of whatever has happened they actually see this constitution away, we don't want to have that situation, what I am therefore suggesting that if you can make it more tighter members of the TC please do so, and going beyond that I want to deal with the question of D, again I believe, you cant have Moosa Valli or Valli Moosa rather being elected on an ANC list hopefully they will elect him and then he goes there now he is supposed to be there ensuring that the constitution represent the aspiration of the constituency that is put in there and for thirty days he doesn't go now you cant have that situation maybe in your final constitution yes you may say a full session of parliament but in so far as these transitional constitution is concerned I believe if you want to have a strong constitution to represent your constituency if you can't be there for thirty days you don't deserve to be there you have to go, thank you.

**(21.b)** A brief point, just for the purpose of recall, I don't know if Mr Shilowa was here the empty...was suggested by me alone, thank you.

**Chairman:** Thank you I think ladies and gentlemen we have consensus on this clause we feel that parties are related to proportionally and defection should be dealt with accordingly Mr Shilowa made one point which I think is a valid point of perhaps the thirty days with

absent without leave a long period even an unexpected case of illness a person could within a reasonable time make the necessary arrangements so perhaps the TC could reduce the thirty days to a fortnight, three weeks, we don't want absenteeism in parliament, I come to 43.2 I hope members will address the...I think one issue is always been a problem in the present legislature whether a person can hold a seat at a national level and also let's say at a local level at the same time

**Mr Mentz:** Mr Chairman I want to refer to the, when the seat is vacated the nomination on the list according to the order of preference, now Mr Chairman I can very well foresee the following you have a list, the preference is given that you for instance you have a man who is an expert on constitutional matters or all on economic matters, then you face the way it reads now, to go to the next man who might be qualified somewhere in the agricultural field and you would like to have a man replacing somebody that is qualified in the similar...this to me I think will lead to an unbalanced perhaps representation

**Mr Titus:** Just for the sake of consistency this might be a minor point to some but it is important as far as I am concerned, in sub-clause 1 may result in a ridiculous situation, I suggest that for the sake of consistency we use the singular as well, the singular in sub-clause 2 should also be singular in sub-clause 1, we are talking about members in sub-clause 1 should also be a member in sub-clause 1.

**Mr Meyer:** Mr Chairman, in connection with 43.2 if I am right the procedures with connection with the compilation of the lists have not so far being indicated to the constitution and maybe it would be in any case not be the correct place to deal with it, now we have here a particular reference Mr Chairman, in 43.2 as to how a vacancy should be dealt with I believe in terms of the procedure that is being proposed here we will actually only be able to judge whether this would be a practical procedure to follow, once the council has a clearer picture of how the initial compilation of the lists and the filling of the seats in the national assembly room would take place according to that for instance, just as an example Mr Chairman that could be to approach us and I am not suggesting the first one but there could be first of all the praise to say a list will be compiled by a party but it will after the election be in the hands of the party to determine its own way of appointing of filling the seats in parliament according to its own desires, the second approach could be to say it has to take place in accordance with the preference outline in the list, if I remember correctly when the discussion took place on the IEC this matter was dealt with but the point is that there is no reference here in point 43.2 as to that matter for that reason Mr Chairman I think the TC has to go back and ascertain whether either the procedure that has to be followed completely will have to be also referred to the constitution or otherwise the specific or practical reference will have to be made in this connection because I believe that the procedure now being suggested here is to a certain extent an impractical one also in relation to the example mentioned by Mr Mentz but one can also think of the possibility Mr Chairman that the list might be outdated to the extent that it is not really relevant any longer at the time of the falling of the vacancy so I believe the TC should do us a favour going to this whole matter and look at it again

**Mr Chaskalson:)?** Yes I think perhaps to my fear to open up the debate a little bit more to explain to you some of the reasons for these provisions, I think what we had in mind is that

the electoral act would require some form of internal democracy within the party itself, in other words that the members of the party would have a say in how the lists will be compiled, so if you have substantial support within your party you may be the higher on the list than someone who has had less support and it is designed deliberately to lead greater authority with party members and less authority if I may put it that way with party bosses because one of the complaints about the party system is that against two multi-power to the people who control the party now and then comes a question of principle of whether the election the compilation of party list should involve an element of internal democracy or whether it should be left to the party to do so, so it will have internal party democracy then you would follow the order because of person is keen or Mr Mentz if the woman on the list were No.10 and there were only 9 other women then the tenth woman would get the seat and that would be democracy in that sense when one woman would have to really address that fundamental issue which way is to be I think what we are asking for that council is a more flexible and practical approach as it stands here the lists remains rigid for five years and I think what is required is both party democratic system within the party but also flexibility to adjust the list Mr Rajbansi

**Mr Rajbansi:** Mr Chairman I agree with you, I think this is too rigid, but in respect of the point highlighted by Mr Meyer, before the election there should be a list supplied by the political party to the election commissioner in order of preference, after the election when vacancy occurs for the reasons highlighted by Mr Mentz there maybe other reasons I think the party must be given the choice to choose anyone from that list in the order in which the party he refers but that is in respect of vacancies but before they can cease, I believe Mr Chairman that the list must be given to the election commissioner and the list must be made a public document whether a voter will vote according to his party choice and he is also will vote certain voters will vote according to the names on the list

**Mr Cronje:** Chairman in terms of the party list system or election you have to submit a list because in terms of those lists the candidate will be decided upon in terms of the percentage of the votes that you have polled and it is certainly not unusual the way it is proposed that you use the next person on the list but I think we should be flexible whether whatever system whether it is the party bosses or the party deciding on the priority on the list, it could be that if you are confined to the list which was handed in at the time of the election, it could be that in three years time, the party itself may feel that the priority of determine three years ago is no longer applicable or desirable and I believe that they should have the right then whether a person is on the list or not to decide upon whom they want to be the person to fill that position as long as he is from that party, the flexibility I think is very important

**Chairman:** I am still going to give Mr Webb an opportunity but I think then we must then ask the TC to look at the more flexible way both and answering party democracy but perhaps suggest the list that could be updated more regularly to keep up with the changing times

**Mr Webb:** I live with the shifting sands? Mr Chairman would Mr Cronje is now stating gives an opportunity for shifting sands or other consideration regional and domestic etc should remain intact within that flexibility

**Chairman:** Thank you yes I think now we have exhausted this subject just before you go

ahead I want to understand in what areas are we asking a TC to look for flexibility because there is a number of different points that has been made in this discussion

....?In one point 43.2 where it actually refers to a list compiled for the previous general election which is very rigid three four years later you are still settled with that list and the feeling is that I knew what this reasons why this list should be flexible party should be able to update them and have certain preferences within the list, I just like to say that there has to be within certain limitations, you don't want to create directly the possibility where a party gets say ten candidates elected, they get in and for some or other reason after a few weeks they decide to resign or they become disqualified or whatever, that party then appoint ten other people who did not appear on the list at all so that at the end of the day you could have voters having no idea whatsoever who have been voted in and that would be quite undemocratic so then it has to be within very, very strict limits one can understand that if you say four years or three years down the line the priorities may have changed but we cannot leave the situation open where voters have a doubt as to whether the people who they are voting for will be the people that actually sit in that parliament

**Chairman:** I think the TC takes note of that all parties have annual re-organisation new chairmen are elected etc, it could well be that parties are on an annual basis re-constitute the list so that there will be lists that party democracy function on an annual basis, the TC will then deal with that and then come in the light of this discussion, could we move on sub clause 3, any comments, then we move to column 44.

**Mr Cronje:** Chairman someone in an earlier debate made a remark, we don't want absentee MP's and if one bears in mind that if you have a thirty percent for a cor.. and the majority of that thirty percent can vote on something very fundamental then I don't know how terribly democratic we are and I think the list one can ask are the parliament are supposedly responsible for fulfilling a national or regional responsibility should at least be fifty percent

**Chairman:** Thirty percent is incredibly low but Mr Cronje is'nt it a column mainly for debates, I think party discipline and party whips in experience will see to it that when voting take place they are there in as strong numbers as they can but it very frequently that it happens that during a long debate the column issue comes to the form then if you put it too high you have difficulty but it is open for debate to column question is a third not too low

...Chairman, voting is one thing people go there to represent and to have a situation where thirty percent of people sit in the house they may be there or may not be there it may be the debate is studious and long but I believe that thirty percent is very low for a forum of that nature we are not in a debating society I believe it should at least be fifty percent

**Chairman:** Is that a feeling we should look at increasing it to forty, fifty percent, is that a general feeling, I think the old parliamentarians are very hesitant to say

**Mrs Finnemore:** Can we just enquire from the TC what is normal in other countries or what is our region what other countries might give us some idea

**Mr Venter:** Mr Chairman it not much easier than that sometimes its much lower than that

for an example in the present SA constitution and some other Southern African constitution

**Prof Ripinga:** Chairperson I sympathise with Mr Cronje on this aspect, I think we should understand that the coram is actually there to address a very abnormal situation and I don't think you are going to have consistently that abnormal situation so that I fully agree on this one third that the meeting should go on we should not come to a situation where we cannot go on because we cannot achieve a fifty percent or whatever, so that on that particular day you implement a coram, mechanism to allow the meeting to go forward to address a very abnormal situation but I fully understand the problem

**Mr <sup>Desai</sup>Desire:** Mr Chairman, the government has become very complicated many, many ministers are appointed towards sitting MP's, they can't always be expected to sit in that chamber and debate ..what to do, one must bear that in mind, then there is a question of people who come into regions they have got work to do in their regions as well, so its a question of prioritising one third I believe is sufficiently high enough figure, there are very often occasions in the house of commons when one hardly saw twenty people in the debating chamber, so I will support one third

**Chairman:** I think Mr Cronje we leave it for the time being we come back to columns next time around, but it seems to me that there is a general feeling that we should keep it and move to clause 45, no debate on that, Mr ~~Desire~~ I am moving to 46 now yes please

.... 46 once said that the national assembly shall sit at the houses of parliament Cape Town unless the speaker directs otherwise on the grounds of public interest security or convenience, is'nt this putting too much power in the hand of the speaker as such, I know the speaker has to work by certain conventions but should'nt this be a collective decision of the representatives of the assembly will want to move parliament from Cape Town

**Dr Venter:** Mr Chairman this heading is a kind of division which deals with ... and this kind of situation, the speaker will not really have an unlimited discretion in this matter the speakers is after all the elected chairman if you wish of parliament and he would hardly deal with this if you know in a way which seems that he is exercising his discretion for purposes of his own, the speaker will necessary also be exclosed to the possibility of the vote of no confidence if he uses his power to do things that should'nt be done, it is just intended to make provision where parliament cannot sit in the buildings of parliament for some other reasons, Mr Chairman I withdraw, but I would like the parliament to remain in Cape Town

....Mr Chairman, just on that the use of words speaker as an individual I meant, assume is no formal convention for the New parliament would mean the speaker acting in terms of the standing rules it was normally when the speaker takes a decision, he has to take it in terms of the standing rules in which involves a certain modi.. of consultation withe the real..function is in parliament so my assumption is that it is'nt an individual speaker is the speaker acting in terms of the standing rules

**Mr Meyer:** Mr Chairman on your previous comment I believe the TC will also make provision that the seat of the capital will also be provided accordingly

**Chairman:** Thank you ladies and gentlemen, I want to adjourn for tea but if there are nothing more under 46 could we perhaps just complete 46 clause 46 D goes on to 2,3, and then 2,3,4, is that is in order then before we continue with 47 will have a break to 4:45 it gives you ample time that can we start promptly at 5:45

**Dr Rajah:** May I suggest that we continue and have tea....

**Chairman:** No body language say we adjourn for tea, thank you.



Continued

Chair: 3, 4, 5, 6 subclauses?

Mrs Brink: With regard to 48 (3), we would like to propose the election of a deputy president rather than to everytime select a new person to preside in the absence of the president especially bearing in mind 48 (2) where the president of the senate shall preside at meetings of joint meetings

Chair: That there should be a deputy president of the senate? Any other views favouring that? Should the Technical committee consider whether the load of the president of the senate is not of such a nature that as in the House of Assembly we should consider a permanent deputy? Can we move to the qualification of members of the senate, clause 50? Agreed to? Fine. 52?, 53? Mr Eglin?

Mr Eglin: **On 53 (1) (a) Do I read that as being the equivalent of the qualification under 50? It says they will qualify to be Senators if the are qualified to stand for the election as members of the SPR legislature by whom they are elected. Would it mean that in that specific instance. If so perhaps the word eligible should be changed to qualified or something else. The one is a very general phase, eligible for membership to the senate and the other is quite specific that if they cease in respect of a particular SPR they will cease to be members.**

Chair: The technical committee will take note of that. 53? No more on 53. We deal with the sessions of the senate. 54?

Labour Party: **There is no clause 49. Has been omitted.**

Chair: 54 then? No further comments 1, 2, 3, 4 subclauses? Privileges and immunities of members of Parliament?

Mr Rajbansi: May I suggest to the technical committee relating to immunities. There are certain additional points that require to be included. An example, serving a subpoena on a member of parliament while parliament is in session or in respect of a civil action where there are other matters to be considered

Dr Venter: The whole matter is an involved matter and thats why Subsection 2 provides for an Act of Parliament which deals with it further.

Mr Shilowa: Does this mean that this does not include corruption and maladministration? No immunities for members of parliament. We don't want to inherit what has currently been happening

Mr Moseneke: Certainly not. The new legislation will have to set out the full extent

of the immunities they would like to be in place. Obviously corruption will be excluded.

Chair: Clause 56? Public access? Clause 56? Then parliamentary procedures, rules and orders and committees, Clause 57 (1), (2), (3), (4) No debate? Clause 58? Subclause (1) ? (2), (3)?

Mr Meyer: We addressed this the last time without giving a clear indication to the technical committee of what we would like to suggest here accept to emphasise that maybe other mechanisms should be looked into, clause 58 (3) means that a total majority of the joint sitting of the two houses would effectively weaken the position that the senate has on such a decision making process. If one reads that in conjunction with clause 60 than that particular effect is even more important. **I would like to suggest that the technical committee can have a further look at how disputes between the two houses should be resolved.** We have looked into the provisions of other constitutions in this regard and we could not come up yet from our position with a better solution than the one provided here. But I suggest that the technical committee visit this again with a view to ensuring that this effect of weakening the position of the senate should be eliminated to the best extent possible.

Dr Rajah: I don't agree with Mr Meyer that this position weakens the functioning of the senate because it only refers to ordinary legislation. The senate has a specific purpose as the guardian of regional matters and if we turn to page 31 on 62 it gives senate the power... only shall be approved by the majority of the senators so the senate then plays a defective role when it becomes a custodian of matters that effect regional matters. Here we are talking about ordinary legislation and I don't think that the senate should be given any power of veto or a stronger position than the other house.

Mr Meyer: Dr Rajah is not correct in his interpretation of this clause, if you look at clause 61 it is clear that the sessions in regard to SPR functions and powers are to be taken with a joint decision making between the national assembly and the senate. That would be the case when it effects powers and functions of all SPRs jointly. 62 only provides for when one particular SPR is being affected separately.

Dr Venter: Section 61 is intended to mean that the two houses must sit separately for the adoption of that legislation, that's why in 58 (1) there is specific reference to that procedure as an exception to the provisions of 58 (3).

Chair: The technical committee has taken note because there is no proposal for something different because there is no particular proposal but the technical committee has to look at mechanisms that could resolve such

conflicts. We move to 59.

Mr Cronje:

Ordinarily this is fairly classical. Just one difficulty, in view of the fact that the legislative assembly has overriding powers as far as money bills are concerned and bearing in mind that the senate are composed of members from the regions and that in the money bills the distribution of funds in terms of the recommendations of the fiscal commission to SPRs are made should we in that respect not build in some mechanism in which the senate could have more say. Because as things stand, the ability of SPRs in terms of these proposals are dependent on the allocations of funds from the central government and the senate is there to look after the interests amongst others its national responsibility to those of the SPRs and because of the importance of the budget making provisions for the SPRS to enable them to fulfil their functions, bearing in mind that their functions are mostly in the social field they should have more of an input than just being ignored if they disagree.

Mr Chaskalson:

The point being made by Mr Cronje, one should have regard in that context to section 121 as well because that was a factor we took into account when we were formulating these provisions. We made provision in 121 for the SPRs to have a justiciable right to an equitable share of revenue collected. So they are not at the mercy of the national assembly. If they have a dispute they can go to court on it. When we were thinking of this we took into account that coupled with the fact that there would be a fiscal and financial commission which would give some objective criteria in regard to how may be distributed which would also affect court proceedings and that in the national assembly there would be 50% of the seats coming from the SPR lists. So we did not think that we had provided an unfair balance but the point made by Mr Cronje, there could still be additional powers given to the senate, it isn't technically wrong the reason why it was done in this way in accordance with usual rules where there are two houses is the one I have given and the protection which we thought necessary were included in other provisions.

Mr Cronje:

It clarifies the matter extensively. What would be the understanding or the criteria to be adopted to measure equitable against the background that there are counties in the world which has the same structure that the allocation of finances have been used to punish regions who hold a different opinion from a government.

Mr Chaskalson:

In the last resort that would be a question for the court to decide. The criteria would have to be taken into account in deciding whether the allocation has been equitable or not and are set out in those provisions which I referred to.

Dr Venter:

One must note that in 121 there is a specific role for the financial and fiscal commission which should be seen in terms of what is said later

in chapter 11 although it hasn't been formulated yet, that the commission must be representative of the SPRs.

- Chair: We have then dealt with 59.
- Dr Rajah: No. 4 subparagraph 4I am subject to correction, thought we were going to amend the 30 days to 14 days?
- Chair: Its a similar reference that we discussed earlier on and both will be dealt with simultaneously.
- Dr Venter: Mention was made of this by only one delegate of the possibility of reducing the 30 to 14. When we discussed it again we considered 30 days not to be unduly long because it is also a matter of the bills being redebated and they have got to be printed and that sort of a thing for the senate and theres no real difference between 2 weeks or 4 weeks regarding the urgency of the adoption of an annual budget.
- Chair: Shall we leave it at 30? Its within 30 days. Thank you. Subclause 5. Then we come to 61 and 2.
- Mr Eglin: Shouldn't it read to be approved by both the national assembly and the senate making it quite clear that they are dealing with it separately.
- Mr Cronje: In respect of the fact that in terms of other provisions the powers and functions of the SPRs are clearly defined in the constitution. Does this clause relate to the amendments of the constitution and does it mean that the legislative assembly and the senate will sit separately and in the event of the senate disagreeing what procedure is then followed?
- Dr Venter: The amendment of the constitution is dealt with elsewhere. This concerns 60 (1) that bills affecting the exercise of the powers and functions listed in chapter 9 and the procedure would mean that if there is not a required majority in either of the two houses such legislation is not adopted.
- Chair: Clause 61, subclause 1, clause 62?
- Mr Rajah: Was it not agreed to the last time that the word designed to should be deleted?
- Mr Moseneke: We had explained what we meant by that in fact it purports to be wider than what the amendment would do to it. I remember it was Mr Eglin who raised it an explanation was given to it. So we have not changed it.
- Chair: We move on to 62. No comments. 63? no one on 63. 64? Then we move onto the outstanding issues that have to be dealt with. We move

on to chapter 5. Clause 65, subclause 1,2,3,4,5 and 6. No debate on that. We move to 66, subclause 1,2,3,4. No debate on that.

Mr Moosa: **66 (3). We had raised the matter concerning the certification by the constitutional court. It appears that the technical committee has not taken into account the views that we expressed. We would like to request again that they consider the argument we raised for the purposes of the next draft.**

Chair: **Didn't Mr Moosa suggest a wording? Did you furnish the committee with those draft words?**

Mr Moosa: **I will furnish them with the wording.**

Dr Venter: There was no conclusion to that debate. The technical committee did reply to that possibility and we indicated that we consider from a technical point of view that to be a fundamental question to the notion of constitution writing, the nature of the constitutional principles to be justiciable and having to produce after the constitution making process legal certainty by closing any possible debate that could follow the constitution making process by having it certified by a constitutional court.

Mr Moosa **There is no such technical principle with due respect, that the constitutional court has to automatically certify the constitution. Certainty can be created by other mechanism. One of the mechanisms could be that within a specified number of days after the CA adopts the constitution any party in the CA or a specified number of the CA could request the Constitutional court to make such certification. That would provide for certainty. So there are other ways of doing it. So we are not arguing the principle simply the mechanism.**

Chair: Any other debate?

Mr Cronje: We must bear in mind what the purpose of the constitution is. One of them being gives the format in terms of which the court is being governed and the rules of the game. Traditionally in the western sense of the word it is also described as a mechanism to protect the people against the excess of a government. But if we have agreed that the constitution has to conform with the constitutional principles which we have adopted here and that the court in many countries plays an important role in seeing to it that the constitution is complied with for this once off exercise to give that certification, it will be a quick way to deal with it as proposed by the committee. It eliminates all verbatim argument.

Mr Pahad: We shouldnt reopen the debate. If Mr Moosa is prepared to submit a draft to the technical committee we should agree that he does so and then we can come back to it. There are more fundamental issues like who drafts the constitution.

Chair: There cant be any objection?

Mr Eglin: I am quite happy that Mr Moosa or anyone else submits a recommendation but those of us who feel that its adequate, that is in fact our recommendation, so the committee should weigh the general view of an automatic certification against a mechanism in order to get it certified.

Chair: The way I read it the technical committee is suppose to consider Mr Moosa's recommendation. There is a strong feeling for the principle to be retained. If we also prior to another round of discussion on the principle could try and get consensus on this issue. We move to clause 67. Subclause 1, 2. No discussion takes us to clause 68. Subsection 1,2,3.

Dr Rajah: 3, on the last line talks about chairperson for the advice. I suggest that we keep it consistent and use the word opinion.

Chair: Technical committee will take note. Subclause 4?

Dr Rajah: Clarification, it says that should a draft ... in accordance with the unanimous, whether it should be unanimous because what happens in the event of a minority point of view. Should a draft prepared in accordance with unanimous advice the panel of constitutional experts not be submitted to the CMB in 30 days. I want to skip the whole part. A constitutional text may be accepted by the majority of the members of the CMB. What text will the CMB consider if the constitutional experts do not submit a document to the CMB within 30 days.

Dr Venter: On the question of advise and opinion, especially in subsection 4 the idea is not that this technical committee should come up with an opinion whether the one or other text is a good or bad one but to try to facilitate in view of the debates in the CA come up with a text that they think unanimously can obtain the necessary majority. Therefore it would rather be advise than opinion. It is not a judicial kind of institution. If they fail to do or if they submit a text that does not meet with a two thirds majority supporting a constitutional text most probably produced by a party or parties having a majority in the CMB, it does not specify which text, it can be any text that can achieve that necessary majority.

Dr Rajah: If that is so than it ought to be clarified which text the CMB will consider and I presume there would be flexibility. It should be spelt out clearly in subclause 4.

Chair: 4? no other problems? 5?6? subclause 7? subclause 8? subclause 9?

Mr Meyer: **The technical committee has requested us to look into this matter of the final resolving of deadlocks in the ninth report they pointed out that they needed further direction from the Council in this regard. I would suggest that we discuss the matter further, bilaterally, multilaterally. I would suggest that we let this stand over for another discussion, but indicate to the technical committee that the process of discussing this is on the go and that we would come back to them.**

Dr Rajah: I would agree that there needs to be further consultation. I would like to make further additions at this stage. One looks at section 5 it spells out the steps that need to be taken in the event there is a constitutional deadlock. Going through the clauses it spells out in a democratic fashion the various steps that need to be taken and that before we get to the next stage the decision is taken by a fairly sizable majority in some instances as much as 60% and I go up to subclause 7 when we take the stage that the constitutional text is presented to a referendum and it must be approved by 60% of the votes cast in the referendum. There appears to be a gap in terms of the legitimacy and acceptability of the constitution by the procedure that is laid down and by the percentage necessary for the constitution to be a valid one. In 8 it says that parliament shall be dissolved and a general election to be held and that parliament shall have the right by a mere majority to pass a new constitution. I want to suggest that we have done well up to subclause 7 and where there appears to be a problems as far as the deadlock breaking mechanism is concerned is that after having gone through a long process we throw up our hands and virtually pass the death sentence on parliament and say we must now dissolve parliament and go through the process of election. I want to suggest that if we fail to get the 60% of the votes cast in the referendum, within two years of the sitting of parliament that we should allow parliament to sit for at least another period of one year. It is possible that during the election period that further defects might appear as far as the constitution is concerned not so much in terms of the principles but there could be points of differences which could be resolved in the interim, the cooling off phase of one year. I don't think that South Africa would be at a disadvantage because we already have a constitution in place, all we saying is that if we extend this period by another year by which time we give it has another shot where amendments can be proposed by the constitutional experts, it allows further flexibility in the entire process . The council should consider that after the referendum period the matter goes back to parliament for a further year and goes back through the loop that we suggested in 3 to the constitutional experts, seeing if some compromise could not be reached. If we fail at that stage than the country cannot be held to ransom than we may go to the next stage of dissolving parliament and empowering that parliament to

pass the constitution by a simple majority.

Also in 68 (1) while we all concerned that the new constitution must be in place as soon as possible, maybe the two year period could be extended to three years by saying that within 3 years or a shorter period, it allows flexibility and does not tie the hands of the CMB. But finding the gap between the referendum and the next stage is important.

Mr Eglin: I have got considerable sympathy with people looking for time frames and deadlock breaking mechanisms I must say that I am concerned with clause 9. If you have just had a referendum where more than 40% of the people reject a particular constitution, to have an immediate election and say irrespective of that even if 49%, 51% is going to proceed with the constitution. It could be dangerous from the point of view of constitutional stability. Therefore I will support the suggestion made by Mr Meyer that there should be bilateral on one understanding that Mr Meyer or somebody sees that these take place. Or else the Planning Committee should say that these bilaterals, multilaterals will take place.

Mr Pahad: I want to agree that the bilaterals should continue but it is important to say that those who are talking of having this election and 51% deciding, that would be a term of nearly three years of attempting to draft a constitution. I hope we are sitting here because we want to serve the interest of the broad masses. Three years is a long time to draft a constitution for which the people of SA have been waiting for a long time. You can have a referendum in which you say that 59% can vote. And that is democratic because it consists of a sizable portion of this country. So we should bear in mind why we are here and why we need to move rapidly so we can have a government which has legitimacy in this country.

Mr Moosa: We have a number of our problems with this section. We wont enter the debate. I agree that we need to enter into bilaterals or multilaterals so we can sort out this matter. So I suggest you allow us as parties more time.

Chair: On that note can we close the discussion on the deadlock breaking mechanism . Clause 69, no comment, Chapter 6 and 7 and 8 still to be completed.

Mr Webb: Can I make a statement with regard to chapter 5 in toto. Notwithstanding our presence in this council and our participation in the debate, nothing should be construed as indicating that we agreed with or accept the provisions of chapter 5.

Chair: We move to chapter 9, Clause 100, 101, subclause (1)?



- Mr Meyer: In general on 101, if one looks at 38 the legislative authority of the central parliament is provided for. I would suggest that the technical committee consider something to that extent as far as the SPR legislatures are concerned to make it clear that they can legislate as far as SPRs are concerned.
- Chair: 101 (2)? (3)?
- Mr Cronje: Subclause 3 is sensible, but in looking at the recommendations which are being reconsidered of the boundaries and bearing in mind the size of the populations and that 50% plus of those populations are children under the age of 18. That reduces the potential electorate about half of that. And if we divide that by say a million in the case of 1315 thousand by 50000 we are going to end up with a small number of people. I know a provision is made for not less than and not more than, but we are going to have an artificial situation bearing in mind that ten of those people will be an executive and that a number of people of that region also has to go to the senate. I wonder whether we should give reconsideration to the formula.
- Chair: Could we not give more guidance to the technical committee on this matter. We also have to consider the financial implications of having too large legislatures.
- Mrs Finnemore: The regions that have been drawn thus far have very different sizes to them, geographically and therefore limiting the top number, it might be okay for a region like the PWV which is concentrated in terms of size, but when you have large areas it might not be conducive to the representatives getting around. Has that been taken into account?
- Mr Cronje: Shouldn't we make submissions besides the technical committee applying its mind.
- Chair: Shouldnt it be a guideline to consider the number of provincial councillor members who served the Cape and in the Transvaal previously.
- Mr Chaskalson: We did think about that but the electorate was different. If you took those numbers and multiplied them by the electorate you would get a large number.
- Dr Rajah: At the last debate the question of relating the number of seats to the votes cast, we pointed out the various difficulties which could effect the number of votes cast in a region. The only statistics which we have which is definitive at this stage and is not entirely accurate is that submitted by the commission on the delimitation of regions where they have given us some numbers as far as the total population is concerned. It might be more reliable to work although not all of the

total population are voters we can adjust its nominator of 50000 it will be more appropriate to work from a fixed position as far as the number of people who are going to serve rather than relating the seats to the total number of votes cast. Could happen that very large regions may not have the same number of seats or may have fewer seats than a smaller region and may not reflect the regional composition of the legislature in that region.

**Chair:** **Seems that we don't have clear ideas on this matter and the technical committee needs some guidance. I would like to recommend that every delegation goes back and do some mathematical exercises and see whether we cant come up with a formula and then pass it on to the technical committee and in the light of some of the recommendations made to them they might be able to improve this clause. Can we agree? That takes us to 102, subclause 1,2?**

**Dr Rajah:** Is there any provisions for the TEC for this provision? In the event of a conflict between what is suggested by the provisional secretary and the legislature who resolves the conflict?

**Mr Chaskalson:** Subsection (a) specifically says that it will be there unless and until the legislature of the SPR directs that the session goes to a different place.

**Chair:** **There is a clause 102 which the technical committee raised and is still in the text and unless we make a proposal in this regard this will become the term which we are going to use and that is premier. Instead off having a debate couldn't we ask delegates to consider whether they have any other proposal and motivate it. So it stands as premier unless some direction can be given to the technical committee. Any further comments? Not then we move to 103. 104? we have dealt with it. 105? 106?107?108?109?**

**Mr Cronje:** May I ask the significance between the clauses in 109 (1) and 111? because in 109 (1) that any valid Act that has been passed should be signed by the premier and in 111 it says the bill passed by the SPRs should be the premier and a member of the SPR executive.

**Mr Moseneke:** Thats a good question and we will take care of that.

**Mr Webb:** Generally speaking whether the filling of the legislation should be in the appeal court or in the court of the federal state. We have national legislation going through the appellate division and one would think that the federal state legislation should go through that court.

**Dr Venter:** We considered that problem. Its not quite clear yet what the court structure will look like . What is important is that it necessary in any country to have clarity on the content of the legislation of that country be it at national or SPR level. A good example not to follow is

Switzerland where they have a plethora of laws and have been struggling for years to make all those laws accessible to lawyers and citizens. There is much sense therefore for having a centralised place for the enrolment of such legislation. Its got nothing to do with the autonomy of an SPR.

Mr Webb: The perception is always that if you are filing your laws in another place means that there is a dissolution of authority.

Chair: Clause 110? 111? 112?

Mr Webb: We are opposed to this because this will last only until such time that parliament is dissolved and we believe that the SPRs will endure and therefore...inaudible

Chair: It does not terminate the SPRS only the legislatures.

Mr Webb: Thats a concern because once they elected they should live by their own life cycle. Not according to the CMB's lifecycle. We want to record our strenuous opposition.

Chair: Is there not merit in having SPR elections in between?

Dr Venter: In revisiting this specific provision we gave consideration to the fact the composition of parliament especially the senate and the CA is dependent on the outcome of the elections in the SPRS. Therefore if the SPR legislatures were to have a longer life than that of parliament it could create an unbalanced situation after a general election for the one part of the national assembly especially on the national list. If the political outcome is different from the one after the SPR legislatures were composed it could lead to strange imbalances. There is an interconnectedness that cannot be ignored. Where it is possible to have staggered elections for parts of legislatures on SPR or national level we havent considered. A consideration would be the duration of the bodies elected in terms of this constitution which could be relatively short.

Mr Moseneke: If ... a system which is intertwined with regional representation just imagine your senate for a moment... at SPR level you will have a situation where the senate will probably dissolve whereas the SPR from which it originates persists. When an SPR goes the senate continues. And with the transitional constitution and on a ... system you will not be able to have disjunctive elections.

Dr Rajah: Thought that the same provisions as in section 39 will apply to the SPR legislature. When we raised the question on the duration of parliament and when we asked when parliament dissolves what happens to the SPRS, the submission from the technical committee was

that they would revise and look into 112.

Chair: The point is that because of their interrelationship the technical committee argued that it should be kept as it is and that you cannot divorce the two and have different schedules for the SPR legislatures and the assembly.

Mr Webb: If we can't find some solution on 112 then there is some protection in 125 where the development of the constitutional provisions there may be a way in which we can be comforted or through this monstrous body of the SPR commission if we had some form of guarantees which would comfort us. We are concerned about this creation of the possibility of throwing SPRS out of the window immediately the new election takes place. The protection that is afforded by this constitution is only for 24 months or 36 months. SPRs are not guaranteed beyond that time.

Dr Venter: In terms of this constitution and the constitutional principles the throwing out of SPR dispensation can't be done without contravening the constitutional principles and acting unconstitutionally. The other point is that there would be nothing preventing the CA to provide as a transitional measure in a new constitution for the continuation for the time being of elected bodies as though they were elected under a new constitution. That is quite a viable scenario. To require at this stage in this kind of constitution the continuation of bodies and parts of a constitution of this nature beyond the constitution making process except the constitutional principles would require an enhancement and expansion of the constitutional principles, if that is the wish of this council it can be done.

Mr Moosa: I think that Mr Webb's concern perhaps comes from a misreading of what this clause says all it says is that if there are to be new elections held under this constitution then simultaneous elections will take place for both SPRs and national government. We would agree that in future you wouldn't want a situation where SPR elections take place at the same time as the national elections. You wouldn't want a system where the term of office of SPR legislatures is with the term of office of national government. In fact it is preferable that it should not be the case that you should have those elections at a different time provided the constitution ensures that all SPRS do have regular elections. We are concerned about the present experience. Because we are moving into a new situation it is preferable that we do not at this stage talk about a separate time for elections for SPR government. Hopefully this would not happen where there would be a dissolution of parliament and regional legislature that a new constitution would be adopted and that constitution would then say at what point elections would take place for SPR legislatures. It may well say that in immediately in terms of this new constitution elect new SPR legislatures, it could say

that existing SPR legislatures could go on for another two or three years whereafter elections could be held. But those are provisions that would have to come into the new constitution. If new elections are held in terms of this constitution then the provisions of this constitution insists that SPR governments must be elected. So I don't know where the insecurity comes in.

Mr???

It would seem that if there is a change regarding the time of the elections of members of the SPR and of the national body and it happens that they occur on different days the confusion could arise where one person could hold dual membership of both houses of parliament whereas when one looks at the present draft that cannot happen. It must be imperative that a clause be included to forbid a single members from holding dual membership.

Chair:

Provision is made for that. 113?

Mr Cronje:

Could I enquire that members of the executive would either be appointed by the premier or they will in terms of their proportion in the SPR could be nominated by the various parties. I find it unusual that they be elected by the SPR.

Chair:

That was the system of the old provincial councils which require that parties did not appoint members but members elected to the executive had to be acceptable in a certain way to other parties.

Dr Venter:

We left these provisions as they were. You should read what we said on page 41 in conjunction with this. The SPRs executive may be influenced by the way the national executive eventually emerges. We would like to be allowed to come back to you on this configuration.

Mr Cronje:

I am quite happy with that. I want to say that in other countries where you have an executive or government that consists of more than one party, normally the parties are allowed to nominate the people to serve on the executive.

Mr Moosa:

There is a convergence between ourselves and Mr Cronje. We are of the view that it would be preferable that the legislature elects the premier or governor and that premier would make the appointments of the executive but the appointments would have to be in proportion to the strengths of the parties in the legislature and that the leaders of each of the parties in that legislature could then make the nominations for the premier to appoint. This would be a better system than to say that the executive should be elected.

Chair:

Subsection 3?, 4?, 5? 6?

Mr Wessels:

I have reservations with this subclause. One might well say that that

is within the ambit of the SPRs to decide what they going to pay the premier/executive etc but they may run into financial difficulties and the bill will have to be taken care of by central government. I am not sure one could ride roughshod over that clause because one would have to look at the scenario of public officials being paid etc.

Mr Pahad: It needs closer examination. You couldn't be in a situation in which you have already agreed that there would be an equitable allocation of funds from central funding to all the regions and than have a situation where the region pays its premier half a million rands a year or because it happens to have a majority at that time. So you would need to have some kind of mechanism that would prevent this kind of overspending. It would be easy for a political party to bribe people to join them on this basis that if you are the regional executive you would be paid three times the amount than if you were on the national executive. So we need to ask the technical committee to revisit the issue to ensure that there isnt such a wastage of funds.

Chair: Subclause 7?

Mr Moosa: **The proposal on that subsection was that there should be uniformity as far as salaries and allowances etc of all members of the regional legislatures are concerned. I think that isn't the guidance that needs to be given to the technical committee.**

Chair: **Can I ascertain is that the general feeling that there should be some coordination in that regard? Seems to me technical committee that is the guideline and we will come back to it once they have formulated it.**

Mr Cronje: Legislatures are not kindergarden classes why should the SPR consult the commission to appoint a secretary? And other officers of the SPR legislature? Surely many would have experience. Why should they consult with the commission. The commission has to be consulted on so many issues. Surely they have the ability to appoint their own secretary?

Dr Venter: The only reason for that is that we have the impression that this commission gets off the ground it will have a good idea of the needs and what is available in terms of personnel and qualifications etc. After consultation it doesn't mean that the government of the SPR needs to appoint a specific person which this commission suggested. This is an important post. It should not be a political post and should be dealt with objectively like the secretary of parliament who has an administrative function.

Mr Cronje: We are creating in the constitution three levels of government. Who better than the people in the SPR would know the abilities of the

people who are there and who have had experience within that SPR within any level. Its also the question of the SPR having the autonomy to appoint its own staff without having to refer to a commission which has been appointed by central government. Of course the secretary will be non political.

Mr Moosa: We think Mr Cronje has a point. We would like to discuss the matter bilaterally with him and come back o this issue (laughter)

Chair: We have completed clause 113. 114-117 is still outstanding. Before we enter a long debate on 118 which is an important clause it is an appropriate time to call it a day.

Meeting adjourns

## MEETING OF THE NEGOTIATING COUNCIL HELD ON 11 AUGUST

Chair: When we adjourned yesterday we had disposed of section 113. We are going to discuss section 118.

Mr Cronje: We are pleased that the committee has made a division between the concurrent powers and given exclusive powers to SPR governments. But having read through the document there is some confusion. These powers are not as exclusive as they seem to appear. I would as we have done previously ask that as has been done elsewhere that the relative responsibility in respect of the exclusive powers and the concurrent must be clearly spelt out in the constitution so as to avoid the situation where there has to be litigation or disagreement. In fact there are certain constitutions where it has been done tediously and ad nauseam and we must make sure that there is great clarity between where the ones function starts and the other begins. I am asking for a clear distinction between concurrent powers and exclusive powers, where the responsibility for the SPR begins and ends and where the responsibility of the central government begins and ends. At the moment we are just given the powers.

Chair: Inviting speakers for 118 (1)?

Dr De Villiers: I have mentioned this before. I would like to reiterate the approach of the technical committee to indicate the exclusive competence of SPRS and when we deal with the next clause subclause 4 I will refer to the various functional area. I would like to register that we would like to create an opportunity to make further suggestions as to some other functional areas where SPRS might have either exclusive powers or where the concurrent powers of SPRS and the national government are more clearly spelt out. A case in point is education which is regraded as a functional area for concurrent powers. That is correct but there are certain important elements of education that can very clearly be identified as ....

tape blanked out for a while

Chair: Are you suggesting that you would put that in writing Dr De Villiers?

Dr De Villiers: We will make such a submission to the technical committee on a number of these items also those mentioned in subclause 4.

Mr Pahad: As the SACP it is clear that we are in favour of strong regional government and that the institutions of power has to be as close to the toiling masses as is possible. But is necessary for us to be cautious when examining this notion of the kind of powers that you're giving so that we do not reproduce apartheid under different circumstances



and end up with a situation where we have apartheid under the guise of strong regional government and these are connected to the kind of boundaries and powers that people want entrenched in regions. We need to be clearer therefore when parties are saying that they are going to make additional submissions, what these additional submissions are. We have to be careful because at the end of this process what we are going to bring about is a non racial democratic SA. There is a large majority of people out there who want to see real change both in terms of the physical composition of the kind of structures we want to develop but also in terms of the kind powers relations that must develop.

Mr Mentz:

Want to suggest that one of the legislative competences should also include SPR citizenship under 118. This is nothing normal and apart from the previous arguments I want to refer to certain instances internationally where it is recognised that there can be state citizenship and that it is a function of the SPR or constituent state. First there is the USA constitution section 14 which reads: All persons born or naturalised in the USA subject to the jurisdiction thereof are citizens of the USA and of a state wherein they reside. This was interpreted in a court of law and I wish to refer to the very case which is quoted in the modern constitutions, cases and notes???? and the whole case is quoted in here and I am going to quote from there: The first section of the 14th article that I refer to opens the definition of citizenship, not only citizenship of the USA but citizenship of the states, no such definition was previously found in a constitution. It is quite clear that there is a citizenship of the USA and citizenship of a state which are distinct from each other and which depend on different characteristics or circumstances in the individual. We think this distinction and its recognition in this amendment is of great weight in the argument. I also have the constitution of the state of Michigan which clearly refers to the fact of citizenship of that state. Likewise want to indicate that a similar situation is prevalent in the federal German state wherein the following is said: referring to the legislative powers of a federation and where it is said specifically, as far as powers are concerned of the states :Among the affairs of ?? etc public welfare and citizenship, that is in concurrent legislative powers of the various states, it is a specific power that is given to a state in the German constitution, Similar provisions are to be found in the Canadian example, and therefore it is beyond dispute that there is sufficient examples and the necessity **thereof giving such citizenship for SPRs. I propose an amendment to include under the competencies of SPRS, SPR citizenship.**

Chair:

**Will you give this to the technical committee in writing?**

Mr Mentz:

Okay

Mr Cronje:

In the previous draft that we received no provision was made for exclusive powers but amongst the concurrent powers which it indicated that the SPR had a right to was the right to taxation. I know that in clause 126 provision is made for a degree of taxation as long as it is not... as long as it is not... that's a lot of limitations and qualifications. It is important that the constitution should make provision for SPRs to have other sources of revenue besides what is allocated to it from the national government. He who holds the purse strings controls. You can give me all the powers but if I do not have the funds to implement those powers then those powers mean nothing. In terms of the proposals the SPRs will have responsibility for the most important and costly human related responsibilities such as hospitals, schools and teachers. These are expensive things. I also believe that we should give SPRs initiative. We should avoid a situation where they sit with a begging bowl asking and waiting for central government to make an allocation and a central government can make its allocation in terms of certain criteria that is being laid down. So SPRs should be given initiative to raise as much funds as they possibly can on their own initiative. Let them show some originality and entrepreneurship. Instead of building 7 schools if they can raise funds to build 12 builds, give them the ability to do that. It could be argued that we do not want to limit the ability of the central government to its access to resources but those resources are distributed at the discretion of the central government on the recommendation of the fiscal commission. It is important that the sources of revenue and taxation be clearly defined between that of the national government and that of the SPR legislature. For instance if you give responsibility for the collecting of taxation from multinational and national government and give for instance an SPR the ability to raise taxation on the people living in its area and on local companies. That differentiation of taxation on what and how much should be clearly identified in the constitution to avoid possible friction and misunderstanding. Whether we deem it or term it citizenship, there is an important principle that is being enunciated by Mr Mentz. For the simple reason if there is not some form of identification of members of a specific SPR who are going to have access to your hospitals and schools, one is going to have difficulty but more important when you have an SPR election if you did not have some form of identification or citizenship how do you identify that the voter casting his vote for the SPR legislature is from that SPR? If you do not do it it is possible that voters of a nearby SPR could be bussed in and vote at another SPR for political reasons and it is not unusual, if one goes to Moscow you are not allowed to buy in a Moscow shop food unless you have a Moscow citizenship identity card. There are specific needs for either identification citizenship in order to deal on a practical basis with practical matters.

Mrs Fynnemore:

Several organisations in the Eastern Cape have asked me how do we interpret this constitution, the bill of rights in terms of religious freedom. 'My problem is that under the bill 'of rights page 5 it says on par 14 (2) Religious observances may be conducted at state or state aided institutions under rules established by the appropriate authority for that purpose. 'Par f says SPR cultural affairs. Are regions going to have a religious policy in the same way that they have language policy. Is this going to be a national level thing where religious policy will be decided ? How do all these things constitutional principles, human rights and these levels of government and their powers, how does this link up with religion.

Dr Venter:

I'd like to reply to various questions and my colleagues would possibly want to add to them. The basic question regarding the clarity of the distinction between the exclusive and concurrent powers functional areas and so on and the question of specific functions allocated in this constitution. In our ninth report we tried to lay the foundation for the theoretical distinction between exclusivity and concurrency and we tried in the text to give constitutional substance to those distinctions. It was done in such a way that one can say that the list of exclusive powers in 181 are the powers of the SPRs. Parliament is not supposed under normal circumstances to be involved in those functional areas. Parliament is empowered however in subsection 3 to do certain things according to those specific criteria mentioned in subsection 3 to act but exclusively for those purposes enumerated. The exclusivity is exclusivity in favour of the SPR. Regarding the list of concurrent powers in subsection 4 the concurrency is with parliament. 'Those are original powers and functions in which SPRs have original competence. Parliament may become a concurrent legislator and the national government can become a concurrent executor within those areas and the way in which it can do so is also specified. There are limitations to that and it cannot be done in terms of these provisions by the national government in such a way that the SPRs are destroyed or that their competence to do the things that are indicated in this constitution are engaged. The integrity of the SPRs is protected. To take this further it is indeed so that there are many constitutions in the world where you have a very fine delimitation of specific functions. But I would like to remind you of paragraph? in our fourth report. That was the report in which the whole idea of SPR functions was raised for the first time. We concluded our list of functions with the following par: The allocation of specific elements of these functional areas of the SPRs and other levels of government requires expertise in the field of public administration, such detailed allocations should be done at the time of the drafting of the transitional constitution.

I am reminding you of this not only to remind you of the fact that this technical committee was not composed because of its expertise in public administration but for other reasons. The way we propose that the council deals with these matters is to identify the functional areas

in the way that we did, provide criteria, methods and procedure for the evolution of the specifics within each of those functional areas as soon as it is practicable after the election and in the process of the establishment of this new dispensation. It is possible on the fringes to be more specific in some of these functional areas but it may be premature to be as specific as some other modern constitutions of other countries are because it is not clear exactly what the outcome of the rationalisation process is going to be and what SPR will be capable of handling the finer details of each of these functional areas. It also drafted this section 118 in such a way that it won't be true to say that SPRs would wish to obtain and retain its autonomy are in danger. The safeguards, the justiciable criteria provided we thought are sufficient to ensure the result of those who are in favour of SPR autonomy should be satisfied. But that does not exclude the possibility of some refinement. On the question SPR taxation there are various provisions in this draft that are relevant. Firstly the provision in section 118 subsection 4 a says that as a concurrent power subject to the provisions of 122 SPRs have taxation powers. 121 is important in this respect, (a) gives expression to the constitutional principle. An SPR shall be entitled to an equitable share of revenue collected nationally in order to enable it and the local governments within its boundaries to provide basic services and to execute their functions. That does not refer to SPR taxation as such but as an overall criterion, it is made clear that SPRs can't be shortchanged and that's also something that must be justiciable, but subsection 6 says that an SPR government shall be competent to levy such taxes and surcharges as may be recommended by the fiscal and financial commission and approved by the national assembly which approval shall not unreasonably be withheld. There are naturally then ??? protecting the SPR capacity to tax and to raise surcharges and one should note that it is the national assembly that plays a role which according to these proposals for 50% composed of people elected from the SPRs so one could expect that those representatives on the SPR lists would certainly keep an eye on what the national assembly does with these things. Even if that were not the case there are the safeguards of the commission composed of representatives of the SPRs and the criterion of reasonableness. There is also section 118 (a) which for clarity sake deals with the appropriation of SPR revenue and monies for financing the government and services of an SPR. On a proper interpretation this would mean all the financial resources available to an SPR. Those raised by the SPR itself as well as the allocations made by the national government for example in terms of section 121 according to those criteria. On the question of SPR citizenship. It is indeed so that there are many examples of citizenship at various levels of the state for example in Switzerland you have even local citizenship which is the foundation upon which federal citizenship is built. It is technically viable. But it is necessary for the purposes of this Council and this is not a technical matter this is basically a political matter to decide if this Council were to decide that there were to be SPR citizenship, what the constitutional and political purpose for

such SPR citizenship would be. We have listened carefully what various people have said regarding SPR citizenship but what is still lacking is the motivation for establishing such citizenship constitutionally and politically. The question of the need to identify people belonging to an SPR, naturally there will be such a need for the purposes of the franchise and access to services delivered by SPR institutions. The question that must be confronted by this Council is not only the technical way that this can be achieved but also the constitutional manner which is indicated for this. It is not absolutely necessary that citizenship for SPRs should be the vehicle for that. There are other ways that this can be achieved. On the matter of religion and religious freedom is an important one. The structure of the proposed text is such that religion is not a function of any level of government. The draft set of fundamental rights in chapter 3 deals with this matter the effect of which is that religion is isolated from the states interference in the exercise and freedom of religious expression. It should therefore not be a function of the national or SPR governments. Some of the functions for example those relating to education and culture and some of the others would have an impact on the matter of religious freedom but that would be covered in an umbrella fashion by the requirements of fundamental rights. I think it would be a mistake to allocate in the constitution powers to interfere or manage religious activities in any way.

Mr Chaskalson:

I want to add to what Dr venter has said. I want to refer particularly to the questions of citizenship and taxation. It is no use sending those issues back to us. These are issues on which you would have to make a decision because they are not technical issues. If you come to the aspects raised by Mr Cronje on voting you could of course say that the vote is dependent on citizenship but we have had systems of provincial elections for years in SA without provincial citizenship. The question is do you wish your right to vote to be dependent on residence or citizenship which would call for criteria in addition to residence and that is essentially a political question. The same regarding the use of facilities do you wish that facilities as regards health and other matters Mr Cronje referred to citizens who have to meet special criteria. Do you want them to be available to residents or should they be available to all South Africans who happen to be there and have a need to call upon them. That is a political question. The same with taxation. The whole structure that is being put forward is put forward consistently with the constitutional principles which were agreed upon which were designed to secure and equitable distribution of wealth throughout the country and to avoid the situation of rich regions and poor regions where room is left for regions to top up their sources of revenue by imposing their own taxation. Its a political question again as to whether the bulk of revenue should come nationally or whether the bulk of the revenue should come regionally. We put forward proposals which we saw as being consistent with the constitutional principles. But if you wish to refine them or develop them you must give us the instructions

- what you want us to. We cant solve the political problems in these three matters.

Mr Moseneke:

Want to remark on two areas which have been raised. During the debate we would urge Council to make the decision that has already been made between residents , the identification of residents and citizenship itself. These are three distinct concepts and any one of the three may be decided upon and I agree that this decisions will have to be political. Residents alone might or might not suffice or mere identity of ones residence might or might not suffice. On Citizenship, you will have to make a political decision of what sort of disability will you attach to a non citizen, an example would be movement, use of facilities, the franchise, so one would have to attach specifics to the notion of the constituent state citizenship and identify the disabilities that flow from such citizenship equally to ??? to, the rights that would flow from such a state or SPR citizenship. I would like to emphasise the observation that the structure of the constitution is such that religion is a non governmental function. You need to look at the principles and fundamental rights, 14 (1) in particular in both cases religion is referred to only in a protective context. The freedom to association to associate around religion is protected but that is not injunctive that is governmental in nature around the question of religion.

Prof Devenish:

On the issue of taxation and the relative competence of the central government and the SPRs, quite correctly it has been pointed out that this is a political matter. One must bear in mind however that in deciding this political matter this Council should also be guided by experts in taxation and finance and we are certainly not that and we are not in a position to do that. But this issue is an esoteric matter and that guidance form persons who are experts in that matter may be necessary. It has been indicated that the SPRs will have very great financial burdens to meet. One must bear in mind that central government should not be denuded of essential taxation powers because it also have enormous responsibilities to fulfil.

Mr Cronje:

I don't disagree on what has been said about the issue of taxation. While in terms of clause 121 it is possible. But the difficulty is that this draft constitution doesn't prohibit from raising taxes, but is totally dependent on the recommendation from the fiscal commission and it is dependent on approval given by the central government. I know one cannot denude central government but than one must bear in mind that most of the costly services have to be exercised by the SPRs and if an SPR in terms of the criteria laid down is given an allocation of funds to use to provide the services to people in that SPR that it becomes important because a number of criteria are being used to decide what allocation of funds should be used by a specific SPR. If there is no way that there is some form of identity and we are aware of some of the differences of residents and citizens etc you can have a situation where

services in one SPR may be better and you have a flock of people to that SPR but its got limited funds. What I am asking for is not that the SPRs should have the ability to generate the bulk of income tax, that is illogical but their ability to do so should not be dependent on a commission which is totally overloaded in terms of its responsibilities. That the level of and the ability to gain revenue to top up what is granted by central government should be spelt out in the constitution as it is done elsewhere.

Tape ends. Bits missing.

Chief Nonkenyane: I would like to propose is that we should decide whether we are having the states, the provinces or the regions. Because the question of citizenship is relevant after we have considered this matter. The technical committee should provide a general idea where we could debate this issue.

Ms Manzini: I would like to state that we are happy with the work done by the technical committee in identifying certain functional areas of the SPRs to have exclusive powers and in identifying those concurrent powers and also in stating some of the conditions under which parliament will have to legislate on certain powers based on minimum standards which have to be maintained throughout the country. It has been a difficult job for the technical committee to identify these. If we look at where we come from a situation of unequal development of the country it is difficult when the issue of SPRs is to be introduced for the first time in the country which has been ravaged by inequality on the delivery of services in the provision of services to on the onset start debating that we should be specific on saying that these powers will be exclusive and these will be concurrent. I think already the speakers from the AVU and partly from Bop presupposes that we will actually be having states starting on the same level. 'In many instances, take education and the delivery of services like water, many states will be starting from a position which is unequal. We will thus have to prioritise certain issues and devote a lot of resources on some services and not on others. It would be premature to start demanding that we must spell out the exclusive and concurrent powers because it is not clear to what degree the SPRs will have exclusive and concurrent powers. 'In order for us to ensure that we don't reintroduce apartheid, we don't continue with the uneven development of certain areas what the technical committee has done is enough.' On the question of citizenship, we haven't decided that in this Council whether we are going to have regions, states or provinces, whether the states would be autonomous but we have agreed that we will have a bill of rights and a constitution which will be applicable to all parts of the country. 'if you look at the first clause of the constitutional principles: SA will have a common citizenship, a democratic system of government, .... How at the moment can we start debating the question of citizenship and equating it with citizenship in the USA, in Germany etc, given the background we come from and given that this is the first experiment

in the country. I have a problem in this because yesterday when we looked at the question of elections whether people would be allowed to vote in an SPR based on the question of residents or identity we couldn't reach a conclusion on this and because of our history, the question of migrant labour where people have been forced to stay in places they didn't like to stay, people have been forced to work in one part of the country and still 'maintain a house somewhere else.' Thus it's going to be very difficult for most people in this country to make a choice as to where to vote and where they regard their home. It would be problematic if the question of citizenship is going to go with the question of services. We can deny so-called non-citizens of that state certain services given the background that we come from? In looking at this question we must look at where we come from and what type of SA we want to build where all of us would be equal and benefit from the resources of this country.

Mr Saloogee:

What we want to achieve is a non-racial democracy. That democracy must be socially just. There is no doubt that the new government will inherit a country where the overwhelming majority of the people are economically disadvantaged. Where there are massive inequalities in areas that affect the lives of people in a fundamental way, in housing, education. If we are going to give too many exclusive powers in the area of taxation to the regions we say that it would undermine the capacity of the national government to deal with these problems at a national level. The powers of taxation in the period that we are entering, must be substantially in the hands of the national government. This is a political principle we say must be accepted. On the question of citizenship, we have lived for decades with the consequences of a divided society. Many of us want to believe that the exercise that we are going through is to establish a situation where we can all have a common loyalty to one common land. If we are going to have citizenship in regions this can only lead to a situation where we would develop regional royalty at the expense of the country. It can also encourage those divisive forces that led to the fragmentation of our country. We can have strong regional features but the one thing is that we must not deviate from the principle of the idea of one single sovereign SA. The whole notion of regional citizenship is divisive, and dangerous for the future.

Mr Webb:

On the first of April this year it was decided that we would have sufficient checks and balances in order to monitor the type of process that we were going to model. The decision on checks and balances did not extend to the kind of control that is being introduced in the constitution by the fiscal and SPR commission. For that reason we need to identify what kind of control we are permitting or what kind of autonomy we are going to permit the SPRs. Services are going to be delegated on an agency basis. The regions are going to be the authority to deliver and they should be given the right to taxation. We



are beating about the bush. Lets say it as it is SPRS shall have the right to tax without reference to any other commission and take away those controls. We must look at the consequences of what is being written in this constitution the controls that is going to militate against the proper management of regional affairs. I urge that we define in clear terms the ability to tax. To refer to Mr Mosekenes' statement yesterday, about domicile and residents the crucial test should be where do you pay your taxes. If you pay your taxes in Bisho than you should be able to stand for elections. And you may go to a hospital if you want. The essence is that maybe that is an appropriate formula for identifying many other things. We cant kid ourselves that the people should have free access to everykind of social institution in any place because we won't be able to afford it. If you move in a territory you should have the rights of a citizens in that territory. I urge that the powers and functions be clearly stated and that the political decisions be taken and to instruct the technical committee to define those aspects of tax, citizenship, of breaking the stranglehold of the fiscal and SPR commission to allow for more moderate checks and balances.

Dr Rajah:

On 118, To go back to the statement in 118, that SPR governments shall have exclusive legislative competencies, I want to appeal to the NC to remove doubt if we mean that exclusive power is original power than for the sake of clarity state it in the document. I don't think we should create these doubts and deflect from the merits of the constitution. C should read as town and regional planning. I want clarity on l public media. What role does the regional government have in terms of this? Section 3: provide clarity on a and c because a says it is necessary for the setting of minimum standards and c says uniformity of minimum standards. A and b could be compressed in a single statement by saying it necessary to meet uniform minimum standards. We raised this matter yesterday whether local government should be an exclusive power. We should relook at this and the function of local government should fall as an exclusive power in the competency of the local SPR rather than as a concurrent power, which means that section 32 states that parliament shall be competent to delegate any matter within its power to thew local government. If it does so than how can that power be regarded as a concurrent power when there is a direct delegation of power from parliament to the local authority. This is an unhealthy practice. As far as housing is concerned the current thinking is that the function of the Local authority is not only to provide housing but also to develop a community, perhaps it should be housing and community development. And 3 Localpolicing becomes a concurrent matter. If at all it should be a function that should rest between the SPR and local government and not between parliament and the SPR and the local government. On the question of citizenship. i want to suggest to Mr Mentz that the necessity and circumstances that exist to identify citizenship in the USA does not prevail here. We are living in different circumstances. in the USA the rights of citizens vary fro, m place to place. In one state

citizens have a certain right to public education which is given free. If you are from outside the state you have to pay the full academic fees. Driving licences recognised in one state is not recognised in another. It is not an urgency or a priority at this stage of the development of a nation of South Africa.on taxation. There has to be a check and balance. But we are interpreting the check and balance as a denial of the right of the SPR to impose taxation. These are wrong analogies to make. We need these checks and balances. What we need is greater flexibility but there has to be some form of control which the national government must impose. SPRs cant be given the right to raise taxes willy nilly.

Dr Venter:

Regarding the question of the originality of powers. It is not a term used in the constitution. In the text of the constitution. The fact that a function is allocated in a constitution makes it original. So it would not contribute towards any further clarity if one used the words in the text. In section 181, not to refer only to town planning but to regional planning, that is actually done in B where we say SPR planning. On the wording of section 118 (3) we would agree that the improvement of the language is possible especially between a and c. On the question of the delegation of powers by parliament to local government and the fact that local government is allocated as a concurrent power these two things dont have anything to do with each other. Parliament is in power in the relevant position to delegate to other levels of government whatever it has within its power it would therefore be possible for parliament to delegate the exercise of a power or function which is not listed under the exclusive or concurrent powers of the SPR. Local government is one of the functional areas where parliament can also legislate, so no change should be necessary there.

Mr Moseneke:

It is conceivable that there would be regional media of all kinds and that those would be rightly related with an SPR, regional TV etc.

Mr Eglin:

On exclusive powers as they are stated here together with 3 would satisfy us on the basis that we are dealing with a transitional constitution. I would be far less comfortable for these powers as they are stated and particularly the intrusions that the central government can make if this was a final constitution. If you look at the criteria for national intrusion under three they are very much the definitions in most other constitutions of the right of national intrusion in order to exercise concurrent power. So they are close in terms of their definition to becoming concurrent and I would argue now why am I not dissatisfied with it. Because I believe that we are in a formative period, we are starting to reshape regions and national governments, the cohesiveness that is provided for the national government is more important than it would be in a final constitution. Secondly we are dealing with rationalisation and reconstruction and for all these reasons in the formative period there is a greater case for national intrusion

than there would be in final constitution. So we would support these but also because we understand that they are based on legally definable criteria and they are not arbitrary and they are justiciable and could be challenged in a court of law, and thirdly in this clause the intrusion of parliament into exclusive powers does not affect the executive competence of the SPRs. On the question of financial powers SPRs must have the right to tax. But they cannot be done totally arbitrarily in relation to national ones. More important is the constitutional right of SPRs to central government funding. On citizenship for a society we are in a stage of trying to create a new national loyalty, be careful that the introduction of regional citizenship and it coincides with ethnic mobilisation, could detract from the concept of overall national loyalty. Nothing that is attached to regional citizenship should be available to deny the normal rights of SA citizens to access to its services. You cannot use regional citizenship to deny SA citizenship the rights they would have were they not regional citizens. To say that the rich states can keep out the people of the poor states and people from the poor states shouldnt have access to services.

Dr Venter:

Regarding the effect of subsection 3 of 118 these are not typical qualifications where concurrency comes into play. Concurrency in some rigid federal constitutions is much less regulated than this. In subsection 3 those are rather stringent qualifications in a comparative manner in some jurisdictions the concurrency is not regulated at all. It is possible for a federal government to do what it likes. But they do not do so for political reasons for the fact there would be an outcry at the state level. In Canada for example there is the doctrine of paramountcy which means that federal legislation is paramount and overrides the legislation of the provinces and there are few issues which the Canadian federal legislature in which it cannot be active. Thus in subsection 3 the way in which exclusivity is structured in this draft is a strong indication and limitation on the national legislature comparatively speaking.

Mr Chaskalson:

Its really a response to Mr eglin. There shouldnt be a misunderstanding. On subparagraph 8 there is a provision that executive power relating to all functional areas in which SPR governments have legislative competence to the extent the national government can never take away the SPR executive competence. But it is not that clear that the national government could never have any executive competence in a field covered by subparagraph 3. Does Mr Eglin understand it as if there is an intervention in sub 3 that it would be legislative intervention and with no executive component attached to it or is he saying that you cant intervene to take away executive competence. If its the latter than thats clear if its the former than we will have to think about it before we answer.

Mr Eglin:

Dr Venter drew a distinction between the exclusive competence under 118 and how that gave executive competence which could not be

removed and competence which you received under par 5 which is a concurrent competence which could be changed to the extent that the national legislature legislated under 5. There is a difference between detracting from legislative and executive competence which flows from 1 as opposed to detracting from it under 5

Dr Moseneke: That observation is accurate because the intervention would relate to legislative competence and whatever concomitant executive powers that flow therefrom would remain in place. But Mr Chaskalson makes a further distinction to say whether there is a need once you have an intervention there may arise circumstances where you may have an executive component and he wanted to clarify whether you wanted the interpretation extended to the second distinction that he made.

Dr Venter: One should contemplate a situation where parliamentary legislation actually allocates executive functions to SPR executive level. That is not unusual. But in the area of concurrent functions would not necessarily mean that the SPR government which has executive powers retains all or any of the legislative powers on that specific matter.

Mrs Kruger: For the past 40 years in SA we have had a form of restricted democracy in SA in that people were classified in racial groups and their rights were given to them in terms of which group they belonged to. In this constitution people would be taken into consideration as individuals that their rights would be tied to their person and their individuality. But as we had a restricted democracy for the past 40 years, let us not create a restricted democracy which would only be restricted to the rights of individuals because the reality is that they are certain interest groups in this country and we cannot run away from this. It is therefore important that those who say they want government closer to the people but also closer to the community. The chickens have come home to roost since I have been in the Council we did agree on one thing and that is we want government closer to the people. Our intention should be to give people on the ground the most access to their representatives .....

tape ends bits missing

Mr Pahad: A whole set of issues have been raised and we have to state our position clearly. When we began with the negotiating process we also began with a position and our position was clear that we wanted constitutional principles we wanted to limit the whole question of exclusive powers to regions. In the process of the negotiating process we conceded to the demands of other parties for an extension of these rights and in that sense the SACP moved away from its starting position. In our view some of the exclusive powers now being proposed may be going too far. The issue is not whether it satisfies us as an individual party in the process. The central issue is that it takes the process further to arriving at a new democratic dispensation. Because

we think it will help us arrive there quicker we will agree with the kind of exclusive powers proposed. But people should understand that others have already made huge concessions with the kind of exclusive powers being proposed. Secondly one can sit especially if you have left this country and draw bits and pieces from different constitutions and legal procedures. The question is in SA what is the central issue? It is that we need to build a national consciousness and identity if we are to develop a SA in which all our people will feel that they have a place in it. In this kind of situation to introduce issues such as SPR citizenship based on ethnic considerations can make no contribution towards developing a national identity. In any event the USA constitution was one of the slave owners but the fact that they gave states the right to have some kind of their own citizenship did not prevent a great movement of the Afro American people from the southern states to the northern states where they thought they might have a little more freedom. What is important is that we must move from here with a position that says there's going to be one citizenship for all the people of SA. Yes we need a kind of mechanism for identity. You could have a voters roll which could be an indication of where you are resident. There are other mechanisms to find for that identification aspect to achieve other objectives than the ones raised. People must have the freedom to move to seek work. In SA for too long we have had a history of people being prevented from moving from area to another. On services you can use different examples from countries, but what is fundamental is what other health, educational water facilities available to the vast majority of people. If you take Ciskei, given the present economic infrastructure of that area for that area to be able to raise sufficient revenue to do that kind of work. maybe some elites will benefit but the masses of the people will not benefit from that approach. That's why those who speak most of taking power to the regions, are they talking in their interest or on behalf of the interests of the people they represent if they are then you would want to develop policies where these services would be made available to the vast majority. You may you are ??? and try to prevent a migration from the poorer areas to the richer areas or from rural to urban areas. You will not succeed. the only way to prevent that from happening is to ensure a more equitable balanced regional development in which you make it possible for people to stay in that area because they can live in that area and they don't need to move, but no law is going to prevent people from moving from area to another. Lastly on the fiscal commission in our constitutional principles no 23 we have already adopted the setting up of a financial and fiscal commission representing inter alia the SPRs. To then say that you are giving powers to the commission is not correct, because in terms of the principles they will have representatives from the SPRs.

Prof Repinga:

It's very necessary to clear cobwebs in regard to the SPRs, we are talking about a second level of government. This must be clear because in this regard you will be able to confine the powers. These will be

exclusive because they refer to that level of government. We support the technical committees proposal therefore. But there seems to be a suggestion from some that the exclusive powers of the regions should override the exclusive powers of the national there are no speakers who seem to be grading the exclusive powers of national government. ...inaudible...

Mrs Mangope:

I wish to speak in support of regions being empowered to determine their own destiny and this we can do by granting them adequate rights and control to taxation. Under 118 are functional areas. How can SPR start panning if they dont have the right to taxation. Listening to Mr Pahad talk of toiling masses his point that apartheid should nit resurface in the guise of regions, I begin to think that lack of apartheid to him will be when the SACP is in government. What I consider to be a lack of apartheid is when the people in the regions are empowered to determine the destiny through strong exclusive and original powers entrenched in the constitution. About what has been said about inequality of services, the reality of the situation is that all of us victims of apartheid nobody is more a victim than the other. Some areas are more developed than others through their own efforts and initiative are we saying that those areas that have development should stagnate. I have a problem building a national identity based on destabilisation and liberation now and education later. there are parties here preaching destabilisation. It means destruction of property. And we want to punish areas that have maintained development by saying that money should go to areas that have been ravaged. Unless we are talking about original powers we are wasting our time.

Mr Botha:

Would like to make a comment on exclusive powers on the delivery of water and other essential services could the committee explain that they have taken into account involves...infrastructure where is the national grid for electricity infrastructure provided for if that was not provided for than water should be placed under concurrent powers because otherwise it exclude the national grid. On the issue of taxation the committee has done a good job of covering many areas but I would like to dispel some of the myths that have come up. the notion that devotion will bring government closer to the people that is not necessarily correct. inaudible. It is essential that the commission be given the right to decide which taxes are devolvable and which taxes can remain within the centre. In our view the question of equalisation is important we dont agree with the notion because we are all victims of apartheid we have been effected by apartheid equally. For that reason we would want to ensure in the allocation of resources from the centre care is taken of the inequalities that have been created by apartheid. provision should be made within this constitution to ensure that central government will ensure that there is equality, that the standards set by the centre are met by all regions. if the centre decides that there shall be minimum standards of education , there shall be

free and compulsory education for all some regions wont be able to meet that minimum standard there centre therefore must ensure that all the SPRs are able to meet the minimum standards. that can only be achieved if the centre is going to be able to finance the minimum standards. What we asking for is not equality in a crude sense we accept that some regions are more endowed with resources than others. We also accept that regions will have to collect revenue. But if you have a simple formula which says that every region will receive funds on a per capita allocation basis, it means that the PWV which has the larger population will continue to receive larger allocations. Therefore you will have to devise a formula which ensures that the Northern Cape which may have a lower population and poorer than other regions received sufficient resources to help it develop. It is that kind of concern that we have rather than simply looking at cultural identity and population density.

Ms Olivier: To answer some of the questions. The first one dealing with electricity and water. 118 (j) exclusive legislative competence to the SPR is only granted with regard to the delivery of services that leaves the rest to the central government. With regard to education section 33 of the fundamental rights chapter will go along way for ensuring equal standards for education.

Mr Chaskalson: If you have regard to the provisions of section 118 (3) which empowers the national government to make provision for minimum standards and read that with 121 (1) which gives SPRs the right to an equal share of revenue to provide basic services and to execute their functions and powers. As far as the Committee was concerned that would be sufficient to see that SPRs are provided with the funds to carry out the services which they have to carry out which would include meeting minimum standards where they are prescribed.

Mrs Manzini: As a mother and women. There are some SPRs which are disadvantaged with disadvantaged people including women and children. the need on p36 is that the recipient of the services are going to women and children. With regard to citizenship for the SPRs I hope we are not going to make it more difficult for women and children to have access to services. People are already crossing borders to get the things they need. we should not be left in this disadvantaged situation.

Ms Olivier: The position of women and children are important to the technical committee. the constitutional principles makes provisions for people in such positions. I refer you to principle 11..The bill of rights also serves this purpose. if I can refer you to article 83 which deals with equality.

???

We are satisfied with the list of 118. These are local matters. The question of taxation and other concurrent powers. Services are in a poor position if you give this exclusively to regions before you have corrected the imbalance you are likely to have problems. on citizenship, I would appeal to those who feel that there must be citizenship of SPRs to revisit it. We had a practical problem with the citizenship in the selfgoverning territories which had to be suspended after people resisted strongly having such local citizenship. if you come with this again you are going to stir the emotions of people. The question of citizenship should be excluded. We believe that taxation should be concurrent power with the national government.

Mr Titus:

The wording used in 118 the term traditional authorities - does this encompass local government within rural areas because in 118 (4) the term local government is used without any qualification. WE have a homeland system and in setting out the functions and powers of the SPRS we need to learn from the current problems emerging from those homelands. With regard too roads and public transport, those are not controversial powers , but the TBVC states have been saddled with a difficult assignment in trying to assure uniformity. There are disparities in those areas. I request that the technical committee look at the possibility of accommodating all those powers under 118 (4) under concurrent powers. My concern is that there are a number of political decisions to, be taken, we need to take those decisions.

Mr Desai:

I have listened to the debates on regions and the more I listen the more I think we are making a witches brew. For the Federalists I want to say that the federal rep of government has worked because in its constitution it has a clause whose objective is the equalisation of standards where this has not occurred federations have fallen on hard times. I have proposal - L in 118 be excluded because we do have an IBA Act in preparation which has its primary objective to promote the provision of diverse range of sound TV broadcasting services on a national, regional and local level which caters for all languages.....(outlines the aims of the IBA) isnt there a contradiction between the exclusive legislative competence that you give the regions or SPR public media.

Dr Venter:

The question of local government - the Council should eventually provide us with an answer. There has not been consensus at what level of government and in what form traditional leaders may form part of the structures of government. I dont think there is an inconsistency in having traditional authorities in the list of exclusive functional areas and local government in the concurrent ones and even if it should be decided that traditional authorities should be partly handled as local authorities, these things dont clash, in the list of exclusive powers traditional authorities and indigenous law is much broader than an indication of the level of government. In general I must ask if there are



proposals for shifting these proposals from the one list to the other it would be useful if those proposals are not directed to us, we need decisions we cant deal with proposals from individual participants.

Mr Moseneke:

**Perhaps Mr Titus should add the decision on the level of operation of traditional authorities on the list of matters which require political decision.** It may be very well be that there will be conflict between some provisions that are here and those in proposed legislation. if you fine comb most of the proposed legislation you will have to finetune all the legislation to make sure that they are consistent with the provisions of the constitution or if there is some technical necessity which compels changing the position of a particular competence say from 118 (1) to (4) which may well be necessary, its a decision that will have to be made here, but my attention has been drawn to a possible conflict between SPR public media competence and the provisions of the ACT. Its something that can be finetuned to avoid the conflict.

Chair:

Is there any of the delegates who is against the principle which has been raised here in terms of the exclusive powers. Do we accept the principle that there should be exclusive powers? We do agree on that? We are agreed. Secondly there is a list of exclusive powers which has been listed, do you accept them all or are there problems.

Mr Cronje:

It is internationally accepted that apart from your national media as with national papers a rural area, a region has a newspaper confining itself to the interest of the people in that region apart from national matters. Throughout the world you also have a situation where you have the national broadcasting media but you also have regional media giving attention to that. Its a logical thing and I will plead that it remains.

Ms Kruger:

Theres been a couple of proposals on some of the powers listed under the concurrent powers in subsection 4. Our party has also a number of these powers listed under concurrent powers we would like to be shifted to exclusive powers. We should formulate some mechanism to deal with these two lists.

Chair:

Maybe we should put these submissions in writing and refer them to the planning committee

Mr Gordhan:

**Can we go through each of these and identify those that we have difficulty with. Identify those that we have no difficulty with so we dont have to come back to them and those that we have difficulties with refer them to the Planning Committee and is there are additions to that lets make some proposals on that.**

Chair:

Can we go through them and see which we have a problem with. Do we have a problem with A? B?C?D?E?F?G?H?I?J?

- Mr Rajbansi: Can I have a clarification on J, besides the ??? of electricity and water within a confined area what happens in a case where a region for example if Natal water goes to the Transvaal, would you regard that particular aspect as exclusive or concurrent
- Dr Venter: This is a good example where subsection three will have a role to play because of the essential nature of water delivery in this country.
- Chair: We note that I must go to the concurrent powers as Mr Titus has said. K? L? M and N - Titus has also noted his concern, O no problem with O. Are there any additions to exclusive powers?
- Ms Kruger: SPR Citizenship.
- Mr Botha: I would like the technical committee to explain how language policy is put as an exclusive power and education as a concurrent power how do they reconcile the language policy which has a lot to do with education and with education as being concurrent.
- Dr Venter: The consideration is that it is more likely that you will have particular regional language interests than particular regional educational interests. Its not only a matter of language policy but also the question of languages to be used for official purposes in the SPR which could vary between the different SPRs.
- Mr Botha: That doesnt satisfy me the fist part of that sentence bothers me because language cuts across boundaries and if we are going to have national standards of education and we have one single economy and a person who passes matric in one area will go to another area, how do you reconcile these things across the boundaries. That doesnt preclude the fact regions may decide what language it wants to use. But there other implications for language it doesnt only apply to communication at parliamentary discussions.
- Mr Moseneke: Mr Bothas concern will be taken care of under 3. If there was a need to either set minimum standards in regards to certification where language is a requirement, 3a can be used. An if there is any other necessity that arises to bridge whatever other differences that may be such necessity in regard to minimum standards for economic unity or maintenance of national security can be dealt with under b. There is a potential conflict but its one that can be resolved. On the other hand languages of the regions differ. In the Norther TVL potentially there could be 6 languages in that SPR whereas in Natal there may be 3 languages. These differences can best be dealt with at an SPR level and if you want to standardise anything along languages you will use the override in 3a, b or c.

- Mr Cronje: There is not a conflict because if we look at concurrent powers in education, it will be the responsibility of the national government to lay down the standards, curriculum etc to ensure that there is a common approach and but as far as implementation is concerned, bearing in mind that a special committee will be appointed to deal with national symbols among others language, you may have a language for record purposes which is common than you allow for an opportunity for a second language which may be part of that region, so theres no conflict and it only democratic that it should be so.
- Chair: Can we list additional exclusive powers?
- Mr Shilowa: I thought the issue raised by Mr Botha was to say that that aspect of language should be under concurrent. Whether people agree or dont agree we need to note that point because we also agree with them.
- Ms Kruger: I take it that you dont want us to list in the exclusive list those that appear in the concurrent but have to be brought to the exclusive list. We would like Local government, housing, education, welfare services, SPR and local policing and health services.
- Mrs Jajula: I think we all start pointing out and listing whatever we want to transfer from this list to that list we will end up at 8pm being on this 118 portion. I will suggest that you go back to what you suggested that we hand over the matter to the Planning Committee with a list and they look into it and bring it back to us for discussion.**
- Chair: **You want the individual parties to write a list and hand it over to the Chair of the Planning Committee. Is council agreed to that? Agreed. I rule than that those individual parties who are affected compile lists and send it to the Planning Committee who will review it and report back to the Council.**
- Mrs Kruger: Would you like brief notes as motivation.
- Chair: Brief notes. So that concludes discussion on 118 (a 1)
- Nkosi: We would like the Planning Committee to come up with a recommendation for the SPR
- Chair: 118 (2)? (3)?
- Mr Cronje: We have agreed that regions should have exclusive powers and now in clause 3 we are putting in certain limitations where there could be involvement from central government. Normally, when we talk about concurrent powers and services delivered closer to the people, the responsibility of the central government to determine standards in respect of those, could I have a clearer understanding, in 3a we appear

to be setting minimum standards under exclusive powers, what do we mean when we say the setting of minimum standards and then we say or effective exercise of control over the quality and delivery of services?

Dr Venter: One should consider the operative word to be necessary. If its necessary for those things not in merely the discretion of the national parliament, objectively on a justiciable basis for making some legislation to have proper control of the quality and delivery of services, if for example in specific SPRs, it becomes clear objectively, that the quality of the delivery of services is not what it should be. The national parliament will be able to defend itself in a constitutional court by saying it is clearly necessary.

Chair: **Can we pass subsection 3? Subsection 4? can we follow the same procedure on concurrent powers. if there are parties who feel there are concurrent powers to be added or subtracted, compile your list and send it off to the Planning committee. Will that mechanism be accepted here as well? Agreed**

Mr Eglin: On the text of 3.3, it says uniformity across the nation it doesnt have the words uniformity of minimum standards which occurs in 3a, one should check if there is a textual amendment to be made.

Chair: Subsection 5? Subsection 6?

Ms Kruger: A number of sections have an impact on 6. Section 112 - 6.8 previously in the constitution, it goes to the deadlock breaking mechanism when the new constitution is being accepted as well as to the majority which is necessary in such instance and the results of such an acceptance of a new constitution. In effect when a new constitution is accepted parliament will be dissolved, including the senate and legislatures of the SPRs according to section 112. or problem is that all these sections are interlinked, we are not satisfied that if the deadlock breaking mechanism will remain we cannot see how it can dictate that SPR legislatures should be dissolved in an instance where 50% plus one in accordance with the new constitution that is being drafted legitimates the disbanding of the parliament. What we are saying is that are unable to discuss section 6 if we don't have clarity on the deadlock breaking mechanism because this boils down to when the SPR legislatures will be able to function and when they will be dissolved.

Mrs Wagner: Is the first part of this sentence necessary, it states the obvious

Mr Cronje: On clause 112, in terms of this constitution the CMB apart from its function as a national parliament will have the responsibility to draft a new constitution. the SPRs have no function in constitution making

at the national level. the senators may but the SPRs do not. The SPRs have a specific responsibility at regional level. I dont understand therefore why if parliament is dissolved in terms of chapter 5 SPRs should also be dissolved. If a new constitution is introduced and the provisions of that new constitution impacts on the powers and functions and the role of the SPRs it will have to be adjusted accordingly.

Dr Venter: The reason for that is that SPRs owe their existence to this constitution until this constitution is replaced.

Mr Chaskalson: If the senate is to be dissolved and the SPRs remain the same than the same senate will be returned. So if you contemplate a change both in the senate and the assembly to constitutive a new CMB one should then have to have elections in the SPRs as well because its from there that the senate arises.

Mr Moseneke: The principle of proportionality would be effected thereby. What you have at SPR level at national level will differ radically and you dissolve for the reason that you cannot find agreement and therefore you will disturb the relationship of the parties because your proportionality at one level will not be the same at another level.

Mr Cronje: So it therefore deals with the representatives of the SPRs and not with the structures of the SPRs

Mr Chaskalson: Yes, that is clear its the legislature not the existence of an SPR.

Ms Kruger: What does it mean in subsection 6: Shall not be amended or diminished without the consent of such an SPR legislator. What type of consent is envisaged. We would like to reiterate our concerns about changing the numbers, boundaries and powers and functions of an SPR after they have come into existence. It will cause havoc in the SPRs.

Dr Venter: Consent of an SPR legislator will require a decision for making dissolutions in such an SPR legislator which will probably be by ordinary majority vote.

Chair: Subsection 7?

Mr Wessels: Is there not an alternative to the way the TC has formulated this clause. As far as encroachment of the geographical, functional and institutional integrity of an SPR is concerned, this is a clear statement that there shall be no encroachment. When one continues to read that subsection and one looks at the competence, one discovers that the SPR competence shall not be substantially deprived of their competence, I have difficulty with the word substantially. Cant you play this at a lower key.

Dr Venter:

The first is an encroachment upon the integrity of an SPR which is a clear kind of criteria, for example a constitutional court could use in deciding whether a parliament is beyond its powers in terms of its provisions. The second thing is that parliament should not act in such a way that it would deprive the substances of the competence, now concerning the concurrent powers, parliament is empowered to act in such a way that it diminishes the area in which such an SPR can act, but the substantially would mean that it can't negate the nature of the SPR and its functions, it cannot be used to take it completely away. Substantially is not very precise but judicial discretion comes into play it would be sufficient to allow for clear judicial decisions on that matter. If it should be strengthened it could possibly go too far by making it impossible for parliament to exercise its concurrent powers.

Mr Eglin:

**On the issue of parliamentary encroachment on the competence of the SPR legislature, that is an essential feature of concurrent powers. It starts off by saying that they shall have full legislature competence and therefore you are now encroaching on it. This 7 does give a limitation on the degree of encroachment in terms of the integrity and substantial competence, but what it doesn't say is whether the central parliament in encroaching has to apply any criteria. It is silent on criteria and the only limitation is that it shall not go further than these limits. We would argue that in exercising concurrent powers, parliament should be bound by criteria. If you look at the principles we evolved for the final constitution there are criteria which have to be complied with in respect of concurrent powers. These criteria are relevant to concurrent powers.**

Mr Moseneke:

**We will take note of the point and debate it internally.** There is an argument to be made for what Mr Eglin says. Concurrency implies common area of competence, so if any one party exercises a competence by its very definition will encroach upon that one and the same area. One should understand that the clear starting point there is a commonality, an area where both have powers and one or the other may enter the area first. But we say that this national government may not legislate in such a manner as to occupy the whole area, substantially means using up the entire legislative competence, that would eventually negate the powers of the region.

Dr Rajah:

Parliament shall not exercise its powers under section 3 and a) says it can legislate if it is necessary for the effective exercise of control over the quality of delivery of services, if it so on the one hand you give a right to intervene and on the other in section 7 you say it shall not deprive the SPR substantially of any of its competencies in terms of subsection 4. Is there a conflict?

Mr Chaskalson:

I don't think it is. I think there are still ways of exercising control over the quality of services without taking away entirely or denying the integrity of a region in regard to all the matters listed under a to n. So I don't think there is an inconsistency. To respond to Mr Eglin, I'm not sure that I understand your query. Are you suggesting that there should be only one list of powers that everything should be treated the same way, that instead of breaking it into two components there should be one list of powers subject to three. Because if 1) and 4) are made subject to three then there seems to be no difference between 1) and 4). I think what was contemplated where we were distinguishing between 1 and 4 was to say that as far as 1 was concerned there is merely a primary competence, where that's really the field of the SPRs and therefore the right to come in is limited. Under 4 we are saying this is the rights of both. So if the SPRs come in under as far as concerned their interest to the subject matter is different to their interest in 1 and the protection that is built into this constitution was that concurrent power shouldn't be exercised so as to deny the integrity which means there must be a real power residing in the region. So the choice that may have to be made and then it becomes a matter of principle is to whether there should be a return to one list subject to the qualifications you mentioned or whether one distinguishes between the areas which are of primary competence or of more equal interests.

Dr Venter:

I must point out that control over the quality and delivery of services does not refer to control by the national government. It concerns control as control. If there is no proper control there may be legislation to establish that by whom ever can do so.

Mr Cronje:

It will far more clear if a clear division of responsibility between national parliament and the SPRs are made in respect of the obligations to concurrent powers. I am concerned that in this clause 7 deprive it substantially is a strong word. How does a court judge that. The first part which says that parliament shall not exercise its powers to encroach upon the geographical....integrity. If you go to clause 128 which refers to the powers, functions and objectives of the commission, says the Commission will have the responsibility to finalise the boundaries and functions of the SPRs. This effects geographic. In e, the final delimitation of powers and functions between the national and the SPRs, effects powers and functions, or is this in respect of the new constitution? The new constitution? Thank you.

Chair: 119?

Mr Cronje: Where you have a situation where you have a rationalisation , the SPR boundaries have been drawn, you have a situation for example, the north west in terms of the delimitations commission, you have the Cape provincial administration, the Transvaal provincial administration, the SA government and the Bop government, all functioning under different sets of laws and administrations and personnel, in terms of whose law do you operate?

Dr Venter: Section 120 deals with that. The laws continue as they are the administrations continues as they are. But there is the requirement that both the national government and the relevant SPR legislature should consolidate as expeditiously as possible. Please keep in mind that this cant be anymore than a mere framework. This matter will have to be dealt with in detail probably by special legislation that has to be designed prior to the election.

Mr Shilowa: We agree with the BOP administration. We understood that there had been some form of agreement of the setting up of a structure on rationalisation that is going to look at rationalisation and how the delivery of services is going to be transferred to the new SPR and to ensure continuity. I hope we are assuming correct that there is such a structure. Secondly while the political structure would have been dissolved there would still be public servants in a particular area. The Third assumption that we have is that we have always regarded those mentioned in clause and b as administration notwithstanding any protestation by the government. We therefore find it strange that we are told that these administrations will remain. We have no problem with public servants remaining. But we dont understand how you can have a Bop administration when BOP doesnt exist at that time. How can you have a TBVC administration? We therefore dont agree with the present wording because it gives an impression of an administration based on a new SPR and a....inaudible.

If you look at B the same thing is being raised and we believe that this nothing else but the perpetuation of bantustans and the other systems such as the TPA etc. what would need to be into therefore is the aim of whatever is being done here and the wording must be changed substantially to ensure that from day one people know who is responsible for what in that area and we believe that it has to be the new administration. The question of rationalisation that can be sorted out. For workers it must be clear who is their employer. We therefore say that we need to agree is that in line with whatever structure we set up to look at rationalisation this section must allow that one that structure has completed its proposals that the process will continue based on those proposals rather than us putting it down first and changing it later.



Mr Chaskalson:

The language used talks of administrators , institutions and structures it does not talk about administrations. It contemplates that on the day this constitution comes into force the government of TBVC if reincorporated cease to exist, the provinces and the selfgoverning territories cease to exist. But all the departments which have set up previously and the people working there will be there without any employer unless the constitution or somebody deals with it. What is contemplated by (a) is that the SPR administrations will immediately take over responsibility for the departments concerned and they will become departments of the SPR administrations as long as they are in the functional areas which have been allocated under section 118 to the SPRs. Under (d) whatever was an administration of the SA government will continue to be an administration of the SA government so the departments which the SA government has established and which reports directly to the SA government structures will continue to report in the same way. Those dept which fall outside the scope of SPR competence for example the Transkei dept of defence they too will report to the national government, so existing civil servants will continue to work and they will temporarily be regarded of either the national govt or the SPR govt until rationalisation has been completed. Why does the national government not take responsibility for everybody immediately? That is a choice it was contemplated at the time of the first draft of the constitution , that the process of rationalisation might follow that course, we even then did have in mind, that for practical reasons it would be essential for the existing reporting and line systems to continue in the way they did in the past to avoid administrative disruption and chaos. So we thought it appropriately to take second tier government functions and make them report to SPRs and take national government functions and make them report to national government and treat the employees concerned as being either employees of the SPRs or of the national government until the rationalisation process has been carried out.

Mr Shilowa:

I've no query with the principle being raised. All I am saying is that why cant we, if we know the boundaries of the northern Transvaal why cant we begin to in terms of that committee begin to work out the mechanism where on day one that region assumes that aspect. The part I dont agree with is where Dr Venter says that the Act, treaties whatever exists are going to be used. I dont understand, unless you say that the committee which is looking into the question of repressive legislation is not going to take account, because there are certain laws which exist say in Kwandebile which are not necessarily the same as may be in Lebowa and yet when Dr venter replied to Mr Cronje he said that these various pieces of legislation will exist until they are harmonised. That is a recipe for disaster. We are saying that on day someone must assume responsibility. It has to be the SPR. We dont accept that we going have different pieces of legislation existing in one new SPR until rationalisation has taken place.

Mr Chaskalson:

Let me give you an example of casinos. There is no SA legislation which governs casinos. It has been set out and dealt with by legislation which is peculiar to the TBVC states, if SA legislation were to apply then that particular function would not be able to be carried out. There may also be functions which are being carried out differently than the regulations under which departments are functioning, the requirements of particular departments may differ from place to place and there is going to have to be a process of rationalisation and the sooner, we think, a Secretariat is set up for each of the regions with the responsibility of addressing that task so that when the new constitution comes into force there is already a great deal of preliminary work done. The new democratically elected SPR legislature will be in a position to pass laws as soon as the secretariat reports to it. But until the SPR legislature is set up there is no body with any authority to pass SPR laws and you are caught in a dilemma. You are trying to create SPRs where none exists and where there are different legal structures functioning within a given territory and different administrations functioning within a given territory and the only rational way of looking at it is either to put everything into the central government and allow it to go outwards afterwards or to vest the powers in the regions and to let them pass the laws as soon as they have ascertained what the laws are and then let the rationalisation be undertaken as we have suggested and that is really what the choice.

Prof Devenish:

What is of importance is that there has to be administrative continuity. If you look at the actual process it is a complicated process because it requires that the provinces will have to collapse the self governing and TBVC states will have to be collapsed. In their place will have to come the SPRs. What will be necessary is that before day one there will have to be a commission on rationalisation that anticipates some of these problems and in so doing makes provision for a smooth a transition as is possible then you will get administrative continuity.

Dr Venter:

We have pointed out in previous reports that a mechanism should be established as soon as possible to do preparatory work. That cannot be dealt with in this constitution because this constitution comes into effect at the time of election and we would urge Council to consider having this dealt with either in the context of the TEC or separately.

Mr Ngoepe:

With regard to Mr Shilow's point. You will find in those areas which will form SPRs there will be some people who have acquired some rights however notorious those laws may be, so people have got certain vested rights which they have acquired in terms of the laws which existed over a long period in those areas. It may cause problems to say that well we know the history of this area, it is not a good one, we don't want these laws which applied in that area to apply tomorrow, and then rub it off like you clean a blackboard. There must be a way of trying to harmonise this process and to make sure that the rights that existed there are properly taken care of before you harmonise all the

legislation that would eventually apply in that SPR. The other point in relation to section 119, you will appreciate that in order to give effective implementation to the propositions contained therein it would be necessary to have a clear understanding or a clearly defined operational area of the SPR or of the central government other wise, you will not be able to implement some of the suggestions contained in 119 which was drafted with the assumption that at one time prior to implementation of the whole process of rationalisation. These areas would be clearly defined, the COuncil would identify which areas would fall under the SPRs and central government.

Mr Rajbansi:

There are two schools of thought of whether your administrative structures of the SPR should be established before the coming into being of the SPRs or should they be established after that, but there is a need, that the process towards joint administration should commence immediately. possibly the TEC might not have the muscle to do that, there might be a need as parliament has already done, to pass legislation to create joint administrations. But we must bear one thing in mind that members of the civil service in the various provinces and in the selfgoverning states are concerned that we are not going to have a different commission for administration for each region. There's going to be only one public service. I don't think that it is envisaged that there is going to be a separation of public service according to regions because for portability, transferability and if a person has to be promoted into another region on the basis of equality that should be allowed. We should not demarcate the public service along regional lines. I want to advise against the creation of permanent executive heads of combined administrations. There is a golden rule that the executives of the SPR must be given the right to appoint their senior officials, and whatever temporary structure that builds up towards joint administration must not result in the creation of permanent appointments.

Mrs Jajula.:

I cannot see that the administrations in these regions will remain as they are with the executive of the SPR existing at the same time.

Dr Venter:

It must be clear that on day one all the existing administrations will be replaced by newly elected governments. In an SPR where there is provincial government and a part of a TBVC states and the existing government will not exist anymore they will be replaced by the newly elected government. What remains are the civil servants in terms of the legislation existing still the previous day until everything is rationalised.

Mr Gordhan:

**I want to suggest that we postpone discussion on 119 unless we see this discussion as part of a continuum that begins when the TEC is established and ends way after the election**

of an SPR and national government we are not going to be able to deal with this in a piecemeal way. The technical committee has suggested in its eighth report that the TEC should consider establishing secretariats for each of the SPR. The TEC draft Bill that we have makes reference to a subcouncil on local and regional government and that structure is empowered to look into restructuring and rationalisation, coordination etc. Furthermore on a previous occasion we had requested of the technical committee that they prepare a scenario that describes this continuum, that describes both what happens to the political and administrative structures prior to the election and what happens to the administrative structures post that election. I think we should suspend debate on this until we have that before in order that we can see the total continuum and then begin to make contributions in respect of each element of that continuum. Looking at this section on its own at this point in time is going to cause more confusions and unnecessary debate. Perhaps the technical committee when next they see us will have that scenario and we will then be able to put in the TEC phase and this phase together and look at it as a totality.

**Chair:**

The guideline will also come with a diagram I suppose so that people will be able to understand. There's a proposal from Mr Gordhan. Any seconders? Seconded alright.

**Prof Repinga:**

I support the proposal. Here we are dealing with structures that have existed over a long time that have ideological connections and we are also dealing with persons who have allegiance to specific political leaders. The scenario as it is proposed here seems to portray a perception that there are no political problems you are dealing with a neutral issue, especially because reference in H no reference to time frames is made, which is a problem, from now until the elections the people who are attached to administrations will pay allegiance to their old political masters. So there is problem I have a problem with the logic that is used to portray the scenario. The logic for the administrative structures is different to the logic that should be used for rationalisation and the logic is different in terms of functions so that if the technical committee could use a different logic to try and address the three issues. The question of control of functions, reallocation and rationalisation is a problem. The possibility of the tec subcouncil, the commission and provisional secretary to address the coordination must be addressed now. with regard to joint administration and the central government we have a problem. the proposal of a joint administration implies that in a particular region you only have the national government and

the selfgoverning territory and the TBVC administration, working jointly, what about the extraparliamentary structures, what about accountability to who will these people be accountable to.

Mrs Mangope:

The technical committee has by its own admission has said they have been put together as constitutional experts and not as public administrators. in order to help the debate move forward on 119 we would have to suggest to them that they look into pulling in administrators either as a subcouncil or something to advise on these matters. While we shooing away the administrations of BOP etc no resolution will be found unless this section has been looked at by public administrators.

Mr Botha:

I think that there are problems with some of these clauses for example to simply say that you are going to inherit the institutions is not enough. The employees that are employed by various government under given conditions, you cant simply say that the SPR is going to inherit all of that. **You need a specialised team to deal with this in addition to the subcouncil.**

Chair:

**The planning committee will also give consideration to the proposal of Mrs Mangope.**

Mr Shilowa:

You cant take public administrators and ask them to say this is how we are going to rationalise you. I agree we need people who are experience in people who have experience in public admin in the same way that we are using constitutional experts.

Mr Chaskalson:

Just for that particular task, there is a difference for providing a legal framework to capture a situation at a particular moment in time and the actual precise detail of the rationalisation. What we have tried to make clear in these provisions, you will see that all the questions about different regulations and different conditions of services, rationalisation is going to have to be addressed. What we are suggesting is that it is going to have to be addressed by appropriate governmental authorities after they have been elected. the new SPRs and the new national governments and they do it with the commission on regions and the precise detail of how the rationalisation should take place will be carried out under the direction of that team of experts who will be the commission on regions and that the preparatory work should be done by the secretariats beforehand but they cannot take the decisions because they are not an elected body and they dont know whether the decisions they take are going to be the decisions that the new SPR and national government want. So before you get into the stage of getting experts to advise you on detail you should think about when you want that advice also what you want in a constitution because you dont make those very detailed provisions as to which particular department or

aspects of a department are going to be taken over when and by whom. That doesn't go into a constitution. You may need some advice as to whether the framework which has been put out by us is a framework which would be satisfactory for holding the framework together until the newly expected governments can take the decisions, pass the laws and do what is necessary and whether there is going to be any hiatus. We don't think there is but if you wish to consult public administration experts, I'm sure that will be helpful. But you can't expect in a constitution to provide a detailed type of allocation of powers and functions, that may be contemplated by such a group.

Chair: I think we will revisit that debate and leave it to the Planning Committee.

Adjourn for tea.

Chair: We are going to close 120

Mr Rajbansi: I take it that the provisions of chapter three will be applicable to the continuity of existing legislation in case that one or two legislations may be in conflict with the provisions of the fundamental human rights

Chair: Section 122?

Prof Repinga: We have proposed that this issue be part of 119 and those proposed structures to look at rationalisation also look at the question of laws.

**Dr Venter: As far as we understand there's nothing for us to do at this stage regarding section 119. We haven't had any specific instructions regarding this matter.**

**Chair: It's been referred to the planning committee. Section 121? 121 (1)**

**Mr Cronje: In view of the fact that we refer the issue of taxation to the planning committee I will not repeat the point I made.**

Dr Rajah: We talk about an equitable share of the revenue is it an equitable share of the revenue excluding taxation or the money raised through local taxation?

Dr Venter: Subsection 1 of 121 says of revenue collected nationally. As I understand it the possibility of SPRs raising their own taxes is not covered here but it may be that the capacity of an SPR to raise these things may be taken into account.

end of tape

Dr Rajah: ... when the national government is distributing the taxes will it take into account the taxes that the SPR has raised when it shares into the national government or will it exclude the revenue that the SPR has raised.

Mr Moseneke: Conceptually, national revenue would come out of revenue laws that have been passed nationally and these would cover the entire country. At the same time the SPRs would have a concurrent power to raise revenue within their own borders. Therefore there are two sources and if you look at an equitable share of revenue you will look at all the criteria including how much a particular SPR is able to raise. The PWV might have a higher capacity than north western and you would have to have regard to that in your formal allocation.

Dr Venter: Subsection 2 which provides the criteria for the recommendations for the financial and fiscal commission includes inter alia economic disparities between the SPRs and those disparities will also be reflected in their capacity to raise their own taxes.

Chair: 121 (2)? 121 (3)?

Mr ???PAC: If you look at 121(1) it says that an SPR shall be entitled to an equitable share of revenue collected nationally and in 121 (3) says that an SPR revenue fund shall be entitled in every SPR which shall be ..all revenue owing to the SPR. These SPR revenue fund, will it also take that money that is collected nationally into the same fund or will it be in a separate fund?

Dr Venter: There will be a revenue fund for an SPR into which all funds available to it will be put into it. Revenues raised by it as well as other monies, allocations made by the national government.

Mr Rajbansi: The current position is that subject to the approval of the legislature if you want to transfer from one expenditure to another from within the SPR normally in cases like this for example in education, if money is allocated for education according to a norm and lets say theres heavy rain and you did not build schools and you have got surplus money than you be able to transfer them subject to the approval of the national treasury.

Mr Botha: If there will be that revenue fund established for the collection of all funds accruing to the SPR does that mean that the SPR, I am not sure what is the legal status of this fund that is created and what cognitions by the SPR is relation to this, why is it created and what ties the SPR and the centre to the fund?

Dr Venter: This takes us back to section 118 (1a) which makes one of the exclusive powers the appropriation of SPR revenue and monies for finance and services for the SPR. Its exclusive, but again subject to

subsection 3 if it is necessary for those things mentioned in subsection 3 that would be the constitutional foundation for the allocation from national revenue to an SPR with strings attached. But it will have to fall within those criteria. the purpose of an SPR revenue is to have a place where the money is held for the SPR and those monies ,must be allocated in terms of 118 (a) from the specific fund It would not make sense to have an SPR legislature appropriate funds from a revenue fund not under its control.

Mr Cronje: The SPR will be able to fulfil its functions in schools and roads and hospitals etc thats what it means.

Chair: 121 (4)? 121 (5)

Mr Wessels: I am comfortable with the fact that to raise loans you will need the consents and advise of the fiscal commission but I would like to believe that it appropriate to add the reserve bank here because raising loans for capital expenditure lays more in the domain of the reserve bank whose task it is to see that the currency is not eroded etc.

Prof Devenish: One should look at Chapter 11 which we havent completed yet which deal with finance in general so that section 121 would ultimately have to be read in conjunction with chapter 11 and it will be necessary for us to get advise from experts in the field of finance.

Mr Botha: Dont we want to specify in respect of loans we require certain condition conditions for borrowing. Because that is the position presently. In respect of certain loans we need the approval of the reserve bank.

Chair: 121 (6)?

Mr Wessel: The wording in 6 is strong especially one stipulates that the SPR government shall be competent to levy such taxes and surcharges as may be recommended by the fiscal commission and approved by the national assembly. One will have to refer this debate until one hands the benefit of chapter 11.

Chair: Subsection 7?

Mr Tsane: How will the criterion be created to determine that an SPR is now detrimentally effecting the national economy in the manner that they are asking for taxes? bearing in mind that when a government wishes to raise taxes normally it is a unilateral decision, how will it be determined that the SPR is taxing its own people detrimentally?

Chair: All these matters related to the taxes have been sent to the Planning Committee. It will come back to the Council. Subsection 8? Clause 122? 122(1)?Agreed. 122(2) Agreed? Clause 123? 124? 124(1)? 124(2)?124 (3)



Mr Rajbansi:

A query on 2, somewhere in this draft there is a procedure given to this Commission to play a role in respect of SPR Commission. Is this provision not in conflict with that provision.

Mr Cronje:

If I understand it the provision for the commission to play a role is in respect of chapter 5. The limitation on time between the adoption of this constitution and the elections to be held in terms of this constitution, the preparation of the final constitution is going to be limited. The TC has pointed out that a political decision has to be made in respect of SPR constitutions, so I want to qualify what I say against this that as the provision is in gear the procedure which I favour is not accommodated so I believe we need to make a decision, and that there should be no inhibition between now and the election for political parties within the boundaries of a proposed SPR to get together and if they can reach agreement for that constitution to be adopted by an elected SPR after coming into position, secondly that clearly such constitution will have to comply with the constitutional principles and abide by the bill of fundamental rights, if we have to wait for the constitution to be negotiated in Chapter 5 it means there will be no constitution for the transitional period.

Dr Venter:

There is indeed nothing in this draft that prevents that, as a matter of fact it cannot be dealt with in this constitution because it comes into effect at the time of the election. It is a matter that lies within the ambit of the policies of the existing governments in the various parts of the country which will eventually be included within a specific SPR whether such a process is possible and it will also have to be done within the framework whatever else is developed for instance the framework of the TEC and the electoral legislation. So it should not be dealt with here.

Prof Devenish:

Its going to be the function of the elected representatives of the SPRs to draw up a constitution. That doesn't preclude interested groups from doing preparatory work, but those interested groups by themselves won't be able to enact such a constitution. And that constitution will have to be compatible with the constitution devised by the CMB and the constitutional principles.

Mr Cronje:

Why is it necessary that if the constitutional provisions of an SPR complies with the constitutional principles and a bill of rights, that it should draw up the constitution in consultation with the commission, why should that constitution be ratified by the CMB? Why can't they as a legislature adopt it.

Mr Moseneke:

The very same reason that you need for testing the national constitution made by the C < B against the constitutional principles you have to subject constitutions for SPRs to certain processes so that for the same reason it can determine certainty and have these a (inaudible) The proposal is that CMB will have to accord that approval and to say

that it accords with the principles. To ensure that constitutions are consistent with the national constitution.

Mr Rajah: I understood that even the final constitution requires the certification of the constitutional court so couldn't this constitution also be certified by the constitutional court rather than making it the property of the CMB.

Mr Moseneke: Sub 6 on page 43 makes provision for that eventuality.

Mr Chaskalson: The problem that is implicit in this discussion which needs to be addressed is what happens if there is a conflict between an SPR constitution and the national constitution. It is this issue which calls for discussion. A hypothetical example, assume that an SPR constitution claims certain powers which were different to the powers that the national constitution finally decides should be allocated to the SPRs, you will have a conflict, what will happen. Assume that there were differences on citizenship, assume that the SPR constitution defines citizenship in a particular fashion and dealt with the franchise in a way that is contrary to the national constitution, what do you do with that. So the idea that the SPR constitution should be compatible with the national constitution is to ensure that there wouldn't be such conflicts and to avoid that sort of dispute.

Prof Devenish: The constitution that we are discussing at present makes provision for SPRs, but besides that there is no provision for an interim SPR constitution that the constitution derived by the SPR after the election will have to be compatible with the national constitution and they then will be permanent constitution.

Mr Botha: The debate this morning demonstrated the difficulty of drafting first regional constitutions before a national constitution. The questions of concurrency and exclusive powers would arise when it comes to the drafting of those SPR constitutions and it will create all sorts of problems because there will be conflictual areas of responsibility between the SPR and the national constitution and for this reason we don't envisage a situation where you would adopt SPR constitutions before a national constitution was drafted and adopted, because the only way you can test the compatibility of the national constitution with the national constitution is after that adoption of that constitution. We oppose any attempt to push for the adoption of the SPR constitution before the national constitution.

Mr Cronje: I am confused by Prof Devenish's response. Clause 5 says an SPR constitution adopted prior to the adoption of a new constitution in terms of chapter 5. So it seems to me that there can be a constitution for the transitional period. 7 says an SPR constitution which is not in force prior to the new constitutional text which means that there can be one that will be in force. I can see no difficulty if an SPR draws up

a constitution and if there is a conflict between the SPR constitution and the final constitution than obviously the SPR constitution must be amended to conform to the national constitution. How will the legislature operate without a constitution.

Dr Venter:

It may be useful to refer to the next provision section 125 because there is some interaction there. What is contemplated in 124 is that an SPR legislature that wishes to develop its own constitution can do so, subsection 5 submit that constitution for the approval by the Constitutional assembly and its implementation even before a final constitution has been adopted. In 121 the part of a final constitutional text dealing with SPRs is dealt with here. The constitutional assembly is required to give priority attention to that matter. It is therefore possible that there can be a parallel process of constitution making regarding SPRs. This requires coordination. But if it can't be synchronised the possibility arises from this design that an SPR constitution can be developed by an SPR legislature and approved by the constitutional assembly and can be implemented before the national constitution is adopted finally and when the final constitutional text is adopted it may approve that there are inconsistencies and it will have to be changed and be subject to the national constitution.

Mr Chaskalson:

Want to respond to Mr Cronjes question of how can an SPR legislature function without a constitution. The answer is that the provisions of Chapter 9 provide all the legal structures which are necessary for proper functioning of an SPR. It provides for the legislatures, the executive and everything that one would expect to find in an SPR constitution if one were to be brought into existence. It also sets out the powers and matters such as that. There will be no legal difficulty concerning the functioning of an SPR concerning the constitution for the transition. It's really a political question as to whether SPRs should have their own constitutions which may reflect somewhat different institutions to the ones provided for in chapter 9. That's why we characterise it as a political question calling for decision.

Mr Shilowa:

What confuses me is that we are told on the one hand that there is no constitution, the CMB has not yet adopted a constitution, and I assume that there is no new constitution adopted by the CMB for two reasons, because they are still negotiating and drafting or because when it is finished they are not able to reach certain decisions and they still trying to find consensus. How are they going to be able to approve another constitution and say that it is in line with what they are discussing. Test it against what. If you haven't finalised a constitution how can you bring in a constitution of the region if you can't test it against a final constitution. That is a problem. And to say that you will then come to it and amend the constitution, it doesn't make sense.

Dr Venter:

This design is what was developed earlier in the debates what we call the possible equilibrium and it's not that complicated. If an SPR legislature should choose to draft its own constitution, it will submit

it to the constitutional assembly to test against its own intentions regarding constitution making, it may be that the constitutional assembly at that stage may have completed and passed a chapter in the final constitutional text regarding the SPR dispensation. But even if things change after having approved an SPR constitution and it has been implemented and its working and the CMB a month later approves a final constitutional text the whole of the affected SPR constitution which has been approved already must again be tested the final constitutional text. So its a matter of coordination.

Prof Devenish: If both the constitutions being developed are in agreement with the constitutional principles than at least in theory there shouldnt be a conflict between the two. The constitutional principles are of great importance.

Dr Rajah: There are certain sections of the clauses here that do not gel. The first par 1 says that the SPR will adopt a constitution by two thirds majority than we say in 6 an SPR constitution adopted may be referred to the constitutional court by the chairman of the CMB for an opinion form the court. Surely in the first par that provision that the constitution will be adapted must conform to the principles enshrined in clause 1 rather than make it a clause of dispute that somebody else in the CMB may raise the issue. If I take clause 2 and 4, the wording of the clauses, it says the SPR may make arrangements am not sure what arrangements have to be made, the drafting of the constitution , than you go to 4 and you say now we have to develop a constitution.

Chair: The technical committee has indicated that we need to take a political decision on this matter.Lets leave this debate for a while.

Mr Gordhan: **A point of information this matter has already been referred to the Planning Committee and is still under consideration, so we might want to hold on until a recommendation can come through**

Mr Eglin: Lets presume that theres an SPR constitution drawn up in terms of 5 the one concern would be that when the new constitution comes in to effect it would be swept away and the requirement that you could draw up a new SPR constitution if you wish. The alternative would be having endorsed by the CMB by two thirds, it would remain in effect afterwards accept to the extent that it may be in conflict with the final draft. It would give people a sense of security but only to the extent where it may be in conflict with the final draft it would require to be adjusted or amended . For the rest it would stay that way.

Chair: 124 (4)? 124 (5)? 6?

Dr Rajah: Is this a contextual error: It says an SPR constitution adopted by the SPR legislature.. goes to the last line as to whether such constitution IF adopted , first par says IT IS adopted so how could you have the

word in the last line IF

Chair: Noted the technical committee would look at that. Anything on 7?

Mr ??? The last IF adopted refers to the CMB

Chair: Nothing under 7? Clause 125? , 125 (1)? 125(2), 125(3) and 125 (4)? 125 (5)? 126?

Mr Cronje: What is the meaning of 126? if there is an SPR constitution why cant they hold an election why must they petition the CMB to hold an election?

Dr Venter: This deals with different possibilities. It may be that an SPR legislature could for political reasons could not function properly and a new election should be called. maybe that an SPR constitution is adapted calling for a different configuration of the legislature but the reason why the CMB should be involved is that this concerns the composition of the CMB indirectly due to the fact that the senate is composed according to the results of an SPR election.

Mr Cronje: The national constitution provides for the number of senators to be nominated for each SPR irrespective of what the constitution of the SPR is. I don't understand the relationship between the need to petition the CMB to hold an election when the national constitution provides you will submit the names or you will send 10 people to the senate.

Dr Venter: It concerns the composition of the senate in other words permission granted to the SPR legislature to have a new election would be given on the basis of the knowledge that the people sitting on a senate may change because of the new elections.

Mr Chaskalson: There may be other reasons as well. It may be that constitutional assembly would think it appropriate that SPR elections should be held at different times to national elections and that under the new constitution there should be a particular time for all SPRs to hold their elections and a time when the national government should hold its elections I think that possibility was raised yesterday by Dr de Villiers if that were to happen the timing for the election of an SPR government would be of importance to the national government and it would be undesirable to have the elections until the national constitution has been finalised and the dates for the holding of SPR elections has been decided. So there may be a number of possibilities that could give rise to possible conflicts with national constitution and until that has been resolved its best that they work in tandem.

Mr Van Rensburg: We have now discussed the powers and functions of SPRs at length and there has been jubilation even in the media about the federal content of this new constitution. there remains a simple question on which we want clarification from the technical Committee. The powers, functions and boundaries as finally determined by this constitution will be binding for the duration of this constitution. What legal assurance do we have that SPRs with these functions and powers with their boundaries will continue to exist after the provisional period has expired. There's no assurance in the constitution. We believe the SPRs will be left entirely to the mercy of the newly elected government and the CMB.

End of tape

Mr Botha: We believe that the constitutional principle on SPRs deals with this issue adequately and all those guarantees are incorporated into those principles and I don't think there is a need for further guarantees, if we accept that principles are binding

Chair: 127? agreed. Clause 128? Agreed?

Mr Cronje: I must express concern to the enormous responsibilities granted to this commission. If one looks at what is being demanded of this commission, the responsibility of the rationalisation of administrations in 9 regions, to finalise the boundaries of regions in terms of the same criteria which the present commission is dealing with, To finalise constitution of regions, to finalise the delimitation of powers and functions of SPRs, the deal with the fiscal arrangements between the central and SPRs, the powers and functions of local government, the rationalisation of the laws that exist in the various administrations, and then to mediate in disputes between the SPRs and the central government. This is far too much power in the hands of one commission.

Dr Venter: Sub section 2 makes it clear that the commission does not have the power to finalise anything it makes recommendation, but it is true to say that this commission will be extremely important, will have to deal with sensitive matters and will have not only the things that Mr Cronje has mentioned to do but also those referred to in subsection 1. That is the reason why the proposal is that the commission should be a full time commission and that it can also appoint committees to assist it that it will have its own staff. The question that one should address is what the alternative could be. if you don't have a commission it will have to be dealt with by existing structures such as the CMB. there's also the possibility of establishing more than one commission, but that is a matter than the Council can deal with politically.

Mr Botha: We have the same kind of concern as Mr Cronje. We are opposed to the commission but the size or volume of work given to this commission is too much. There may be a need to consider more than

one commission. perhaps the committee could suggest to us to what the other mechanisms could be We should refer it back to the TC for other suggestions.

Chair: Could we agree that we mandate the technical committee to look at other mechanisms of dealing with this. Agreed. 3? a,b,c,d e,f,g,h,i,j,k?

Mr Cronje: In respect of the finalisation of the number and boundaries of the SPRs is it the intention that the whole exercise that is currently being undertaken by the commission on boundaries is to be repeated. One gets that impression if looks at the bottom of the page the same criteria is being suggested in doing this work as the present commission is. We talked when we discussed the commission there should be soft boundaries because there may be a need for adjustments, but this seems to be full review to finalise not only the boundaries but even the number of SPRs and what practical effect will this have on the efforts being made on the rationalisation process to be started in the transitional period.

Mr Moseneke: We have introduced exactly the same criteria as was used by the delimitations committee, we have added constitutional principles which would imply a certain format of government and the provisions of this constitution as a criteria. the implications are obvious, the results would be the last departure from whatever may be divided upon now. But that is something that you can only infer and not one that can be written into a constitution. Because if we use the same criteria and you apply the principles, your results should be in substance, by and large the same.

Mr Cronje: If that is so why put it in. It does not only refer to the powers. In terms of what is written here the possibility exists that the whole apartheid could be overturned because not only will they look at the borders they will also look at the numbers and we must bear in mind that we have all accepted that the process of rationalisation could be undone by the possibility of a relook at the whole process.

Mr Chaskalson: One of the possibilities that did occur to us was, take the case of the recommendation concerning the Eastern Cape region, there has been a difference as to whether there should be one or two regions. if one were assume that the recommendation of one region were to be adopted, it would still be open to the CMB on the light of the recommendations of the commission taken after more detailed investigation to decide it would be more appropriate to have two regions. The question of number was kept open with that in mind. Our understanding of the recommendation was that these were in a sense provisional recommendations and it was contemplated that there may have to be changes. But it is a question of principle and if the view of the Council were to be that the numbers must be rigid and there could

only be soft boundaries as it were once could write in such a provision. Conversely if the view of the council were to be that the CA should be free to consider the final regional dispensation in the light of recommendations than the provision in its form now would stand, That's why we suggest that this should be seen as a political issue rather than a technical issue.

Prof Repinga: We need to revisit this matter in the light of the proposal that we adopted yesterday on the question of the delimitation of regions where we have mandated the chairpersons and the technical support team and.. We will have to come back to this issue.

Chair: Any comments on 3? No. On 29, (1, 2,3,4,5,6)?

Mr? Ciskei: Im worried by the expression penalties prescribed by law What does it mean?

Dr Venter: That will be determined by that law made for that purpose. There is a general covering text usually a general covering approach in legislation regarding unspecified offenses for penalties of this nature.

Mr ?? Ciskei: Ive never seen it all embracing in all legislation.

Mr Moseneke: The court will have the discretion to impose the penalties but I dont know if you want to clutter the constitution with actual penalties. It can be provided by law. Its a normal way of creating an offence and it flows from this that provisions will have to be made in some other more generalised act that will cover the provision such as the present.

Chair : 130? Agreed. 131?

Mr Cronje: I did not see anywhere the period of appointment of a commission. But 131 (2) does say that the period of appointment does refer to time, do you leave that open to the state president?

Dr Venter: The activities of this commission will clearly be related to the life of this constitution, but its life may be prolonged if it hasnt done everything it supposed to do by the time the new text is adopted.

Dr Olivier: Section 129 (1) covers it.

Mr Cronje: Does that not follow that once the constitution has been replaced by a new constitution all the members automatically are no longer members of the commission. But what this clause says is that any person will cease to be a member by reason of ... time may be reappointed. That's different to saying at the end of the period.



Dr Olivier: We will look into it.

Chair: 132?,(1,2,3,4) ? Agreed? 133?

Mr Rajbansi: In view of the fact that this commission is going to perform an important task and the very fact that the state president acting on the advise of his executive is going to appoint this commission, I suggest that the technical committee give serious consideration that if any member has to be appointed to these committees by the commission there must be some mechanism where the approval of such an appointment should go the president.

Chair: 134? No problem? 134(1,2)? No comment

Dr Venter: In response to Mr Rajbansi. Section 133 (1) refers to the appointment of committees from among the membership of the commission. The question that Mr rajbansi asked may apply to section 134.

Chair: 135? 136?137? Agreed. Chapters 10, 11, 12?Nothing on that

Dr Venter: We will attempt to complete the draft during the course of next week...

Meeting ends.