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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

**WORKSHOP ON
INTER-GOVERNMENTAL
RELATIONS**

22 MAY 1995

Prof du Toit
Chairperson

Now, ladies and gentlemen, I'm not supposed to be chairing this today, (I could also leave if want you to), but Patricia de Lille seems to be not here by this time, I'm sure she'll arrive in due course. The PAC is supposed to chair this meeting this afternoon but the ANC being always ready to take control of everything, we are able and willing to do the job. I see the DP is here and the usual number of National Party representatives. Then we've got our advisors, could I heartily welcome them.

Now ladies and gentlemen this workshop today, and of course the ANC is in force here, welcome comrades, as always ready to act. I should stop politics now shouldn't I?

No, in all seriousness this workshop today is on Inter-Governmental Relations. Now this is the subject of a submission which the political parties must make, if I remember correctly, before the 6 June. Last Thursday and Friday in Brackenfell near The Cape, there was a workshop on Inter-Governmental Relations by the Commission for Provincial Government. A most interesting one, in which some specialists from overseas were talking, among them professor Johnson from India who is with us today. The aim of the workshop is to address this question of Inter-Governmental Relations. We are fortunate to have here today with us, firstly from India, Professor Albert Johnson. He is Professor of Political Science at the Madurai Kamaraj University in South India. I won't give you his date of birth because he is very old, but his fields of specialization are comparative government, international politics and political behaviour. He has extensive teaching experience as well as a lot of very excellent publications to his credit. Well, there are so many pages of publications here, (looks like ten pages of publications), and he also has some other co-curricular activities. I heard him in Brackenfell last week and really enjoyed his interaction in the South African scene.

The other speaker is an old friend of mine, Dr Johnson from Canada. He's only given me one page of a Curriculum Vitae so I can tell you that he's even older than the other Professor Johnson. He was born in Saskatchewan, in Canada and he was already educated in 1942, so before most of you were born, I must say. He especially made his mark, apart from having been very active in the civil service of Canada, as having been for seven years the president of the Canadian Broadcasting Corporation (CBC). He was three years the Director General of the Treasury Board of Canada, as well as three years he was Director General of National Welfare of the

government of Canada, two years he was the economic advisor to the prime minister of Canada on the Constitution and he has been very active really. He has spent so much of his days after retiring from government in Canada in promoting South African - Canadian relations and advising South Africans on the constitutional and provincial government development in South Africa. South Africa will never forget you Dr Johnson, I'll personally see to that. So those are our two speakers.

Now at this stage my honourable comrade Patricia de Lille has arrived and I have now introduced the aim of the workshop and she can now take the seat.

P de Lille
Chairperson

Thank you Prof du Toit. We'll now ask Prof Majola to lead us on the first topic and then just also ask our other two speakers, Prof Johnson and Johnson, if you can just take seats in front there with Prof Majola.

Prof Majola

Chairperson, ladies and gentlemen thank you very much. I have prepared a document, which everybody has hopefully got a copy of now, together with the other three Technical Advisors, and I have been requested to present the document. I think my starting point is, that we in South Africa are having for the very first time, a Constitution that is dividing government into various levels. The Constitutional Principles which are guiding us towards the new Constitution also require that we should have a government that is structured at various levels, three levels, and what we are doing now is not a rerun of what we've done before. We are doing something which is entirely new in the history of the country. Something which we have not experienced before, if I may say so. For that reason, I think that the whole process, is a process of trying to find what would be the best solutions for the country when we draw up the Constitution.

That being the case, I felt it unnecessary really to try and go too much into the philosophy of the law, but rather to take an approach that would be more practical to assist the honourable members to try and work out provisions of the Constitution that is incumbent upon them to work out. I am not going to read the document again but I'd just like to highlight a few points as it looks to us. When a government is structured in such a way that there are different levels which have got competencies and powers. You find that the possibility for duplication of services and of conflict, the possibility of waste which arises out of the fact that you employ many levels to do

the same thing, necessitates that you have to have, either in your Constitution or in your legislation, mechanisms that would try to enhance more co-ordination, more co-operation, because if it's levels of government within the same country then you cannot avoid the fact that there will be inter-dependence amongst the various levels of government. Those disputes, that inter-dependence has to be managed somehow, and that then necessitates the provision for inter-governmental relationship, the provision of mechanisms therefore.

Now we have, as I have indicated in the beginning, the Constitutional Principles which serve as some kind of a beacon that directs the Constitutional Assembly as to which way to move in the drafting of the new Constitution or the permanent Constitution. I have decided maybe just to say that the picture that is painted by the Constitutional Assembly, is namely that you have Constitutional Principle XVI, which says exactly what I've said, that the government shall be structured at three levels, which is the national, provincial and local level. All these levels are going to be given certain powers especially if you look between the national and the provincial governments, there will be exclusive powers but also concurrent powers, which means that both levels will have to exercise the same powers at some stage. This is where it is necessary to have co-ordination. This is where it is necessary to have mechanisms that will prevent or reduce conflict. I think also this is where you would like to avoid duplication and the attendant wastage of scarce resources. So the Constitutional Principles therefore creates levels but also they create concurrency of powers which creates potential for conflict and other things. In the framework we have asked the question for instance, what mechanisms should be adopted to promote co-operation and to prevent and to deal with disputes which arising from the exercise of concurrent powers by levels of government to which those powers are allocated. I think that this is a question that we need to look at and try to find an answer for when we provide mechanisms for inter-governmental relationships in the new Constitution realising that there might be duplication of services and therefore wastage. The Constitutional Principles provide in Constitutional Principle XIX that such powers can be exercised by one level on behalf of another level on an urgency basis or on a delegation basis. One area that one would like to look at is who bears the cost of exercising those powers, for instance if the national level delegates powers or asks the provincial level to act, to exercise powers on an urgency basis, there are costs that accompany that delegation, and who should bear that? You need to work out those things, you need to work

out the circumstances under which the national government can also just exercise those powers, if at all, or whether it should no longer exercise those powers while they are delegated.

You need therefore a mechanism that will work there. The question which we raised as Technical Advisors is, was what does this mean in real terms.

Then the next point that I would like to raise, is the whole question of resources. I have spoken about duplication and wastage and so on, and I have said there is scarcity of resources. While it is good for levels of government to have all these powers that they can exercise, I think also there is the question of resources, but besides that, the question of Constitutional Principle XXVI, provides that each level of government shall have an equitable share. The whole question of how you arrive at an equitable share is something that is not very clear from the Constitutional Principles and it is something that needs to be worked out so that at the end each province does get such a portion of the national revenue as to enable it to function, to render the services that is required to render.

Now one wonders whether this can be plain put in the Constitution and whether it can be adequately provided for in the Constitution, but clearly, whatever the case may be, there has to be some kind of mechanisms that have to be employed in dealing with the whole question allocation of resources, the division of the revenue between the national government and amongst provinces and also amongst the local governments. We have in the present Constitution the sections that deal with the Financial and Fiscal Commission. I think they go way towards providing mechanisms for insuring the division. In this picture we also see that while the Constitutional Principles provide that there shall be various levels of government it also provides that it protects the levels of government. In fact it says, especially between the national and the provincial government, you'll find that Constitutional Principle XXII, provides that the national government shall not encroach or should not encroach upon the geographical and functional and institutional integrity of the provinces which raises the question as to how do you ensure that the national government does not encroach upon this? I attended a workshop of The Commission on Provincial Government a few weeks ago, I think it was on 11 May, and that workshop was attended by a lot of people who work for local government in South Africa, and I was amazed by the anxiety that these people have, that the provincial governments are going to encroach upon their

own integrity and they wanted an assurance that there will be a way that will prevent provincial governments from encroaching upon their integrity. That to me just underlined the importance of inter-governmental mechanisms. So while the whole question of encroachment appears in the Constitutional Principles to be focused on the relationship between the national government and the provincial governments, I think there is also a need to look at the bigger need to look at the relationship, especially between the provincial government and the various local governments within the province, because there is a fear that the provincial governments might encroach upon the local governments. There was an overwhelming view at that workshop, that maybe the provinces should not have much say over the local government in order to try and protect them, that's not what I'm saying, I'm just reporting that. The question which also needs to be answered is, what should be understood by the phrase encroachment upon the integrity of the provinces, and one can extend it, and ask what would amount to encroachment on the autonomy of the local government?

Constitutional Principle XVIII(5) requires that the provinces, I mean when you deal with this possible encroachment or scenario that might lead to that encroachment, that the views of the provinces have to be heard and how do you ensure that the views of the provinces have to be heard? Do you use a referendum? Do you consult the legislatures? Do you consult the executive of the provinces, or do you structure your provincial government in such a way that they have a say in the national government? Those are some of the mechanisms that one can use maybe to comply with this aspect of the Constitutional Principles. I have already alluded to the whole question of local government and indicated that there is concern. It does appear as if we may have to think very seriously about the whole question of local government in the sense that the Constitutional Principles merely provide that there shall be a framework for local government contained in the Constitution, and the details will be contained in either national or provincial legislation and the danger exists that therefore there might be encroachment. Besides that, I think that there will have to be greater co-operation between the provincial governments and the local governments also there may have to be some co-operation between the local governments and even the national government.

One aspect that is kind of on the side is the whole question of, maybe should I call it self-determination, that you'll find in Constitutional Principle XXXIV, which envisages that there

might be an establishment of a territorial entity within the republic in one way or another, and the question is, if it does happen that such an entity is established it would presumably have some powers and the question would be, what would be the relationship between that and other structures existing and what mechanisms would be put in place in order to deal with that situation? I have looked at the written literature on inter-governmental relationships and my starting point also, as far as that is concerned, is that we have got a unique Constitution in South Africa. I am not dismissing what is happening in other countries, I am saying that we have an unique situation in South Africa and we are still going to draw up our own Constitution. When we look at the whole question of inter-governmental relationships, I think we have to bear the fact in mind that we have to come up also with the mechanisms that will fit our own, that will suit our own unique situation. I have tried to give briefly, the purposes of inter-governmental mechanisms; of course, you know, they are there to help co-ordination, to make the inter-dependence much more fruitful to all those involved, to sort out disputes, to prevent them and those that have arisen to try and solve them; you know, joint-policy planning and things of that nature.

The question we pose is whether these mechanisms should be in the Constitution, and I would like to say that the answer is neither yes or no, because when you look at some of the constitutions of the world that have got inter-governmental mechanisms, you do find that there are those mechanisms which are contained in the constitution and then there are additional mechanisms. The advantages and disadvantages of having everything in the Constitution are pointed out and I am of the view that when you have a new Constitution it develops; and because of that you don't want to put your everything in that because you cannot foresee the future to start with, but also, you restrict development in a way if you got to put that.

Then finally, there was a suggestion of what mechanisms, inter-governmental mechanisms that can be used. Some of those mechanisms are known in other jurisdictions, for instance the premiers conferences, you've got them in other countries for instance Australia and they deal with quite a number of matters. You have the ministerial MEC conferences, I refer there to the present Constitution as far as it deals with the present South African Police Services, but of course those can be extended to deal with other matters. Relationships don't only exist between province and national government. Of course they exist amongst provinces themselves, between

province and province. I have tried to make a very rough example of what can happen and I'm begging the members not to look at the reasonableness or otherwise of the example. I was just trying to paint a scenario that might arise that may need co-operation amongst the various MEC's, in order to sort out the problem.

There are mechanisms that could be employed at the legislative level as well as at the administrative level, I have tried to give those mechanisms there. The one mechanism that we were briefed on was the whole question of the Senate. There are suggestions that you can provide a mechanism for inter-governmental co-operation if you structure your Senate in a particular way. For instance if you make it a point that your Senate is representative, truly representative of the provinces, and you allocate certain powers to this Senate, you might end up dealing with certain disputes or harmonising certain relationships between the national government and the provincial governments and that you might also deal with certain disputes that might arise. For instance the whole question of the imposition of legislation upon provinces by the national government. I think that the whole question of the imposition can be handled in a better way if your Senate is representative of the provinces because they would be there to then look at the side of the provinces and try to present the case of the provinces in legislative terms. I think that I should stop here. I would like to admit that the document that we have prepared raises more questions than it supplies answers, but of course we are trying to think about what we should have in the new Constitution and therefore matters have been placed for discussion. Thank you.

Chairperson

Thank you Prof Majola, indeed it does raise more questions than answers, maybe now in this session, we might get some answers from you. We now open for questions and clarity to Prof Majola please.

Prof Du Toit

I thank you Madame Chair, I'm so glad I must say if I may comment, that more questions were raised than answers. Because that's the way one should go about this type of stuff. Perhaps I could raise more questions.

You see I think there is some consensus developing, if my feeling is not wrong, that we will have a new type of Senate in South Africa. Really, I get the feeling that there is consensus developing on this matter. The Senate, more in the line of the German Bundersraad, in other words one that represents

provincial governments. Now, I'm starting to worry about inter-governmental relations as such, that we don't really think what we have when we talk about inter-governmental relations. We will hear about the Canadian experience later today, where they don't have a central institution for inter-governmental relations, so inter-governmental agencies are developed all over, and do a very effective job, we will hear from Canada. Now if in South Africa we will have a new Senate, suppose we will have a new Senate, basically as an instrument of linking national and provincial government and having extensive legislative functions, then when we talk about inter-governmental relations we should talk about executive inter-governmental relations perhaps, because that other part will be handled and then the real problem, or the question reduces to the classical question what is, (regarding the Senate now), what is the relation between the executive and the legislative arms regarding the Senate? For example, there is need, as you rightly point out somewhere, that your provincial governments will now have a legislative arm in this new Senate, but then decide somewhere, or talk together, on as executives on the legislative policies they want to get done, anywhere, through their provincial legislatures, perhaps in their Senate. The question is really what is the relationship between the executive arms of the provincial governments and the new Senate, and eventually their own provincial legislatures and eventually their national government executive arm? The question is, shouldn't we just talk about inter-governmental relations if we accept the Senate for the moment. Supposing it's accepted, as only executive relations, then all your things which you mentioned: mediation, doing needs assessment, joint planning of national policy, that is the function of executive inter-governmental relations. Then the next question will be, do we need a new kind of co-ordinating body, perhaps annexed to the Senate or don't we need any national co-ordination of this inter-governmental relations on executive level? I'm putting in very theoretically the questions, thank you.

Mr Tsenoli

One of the mechanisms that is used in some of the other countries to deal with a mechanism to mediate the relationship, for example between local government and central government, is what are often non-statutory organizations such as the Association of Local Authorities for example. There is no doubt that we are going to have a similar phenomenon developing in our country. That is the municipalities themselves coming together and perhaps as a result of a legitimacy which they develop, then becomes seen by central government or perhaps provincial government, as legitimate

institutions or structures, which to relate to. Now I just want to endorse what Professor Majola was saying earlier on, that we may need to look at local government, I don't think we may have to, we actually have to. The Constitution says there shall be three levels of government. We can't discuss the levels of this government without strong reference, as it were, to local government. I do agree with the results of the workshops that were saying that local government has to be spoken of in equally strong terms as you do with provincial government. What I'm asking is, do the inter-governmental relations have to be mediated necessarily by a statutory organization or could we also move in the direction that we are going to move into anyway, by also utilising non-statutory, but legitimate institutions, such as the association of municipal structures? That's one question that I'm raising.

Mr Montsitsi

Thank you Chairperson. Mr Majola has mentioned in his input that Constitutional Principle XXXIV, actually makes provision for an entity to be established and I'm not quite sure whether this entity to be established actually does become subordinate to the local or provincial government structure, but I'll be quite happy if he explained what he meant by the establishment of the entity through Principle XXXIV.

Prof Majola

Thank you Chairperson, I will take the last question. I think the Constitutional Principle clearly says that there might be, that there is a possibility, for an establishment of an entity. It says for instance in the sub-section 2 "the Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination. 3.If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new Constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions". Now, I do not know, the question you are asking, what will be the relationship between that entity if it is established, and the existing structures, is a question that I don't know, but I think that it is a political question that would have to be negotiated by the stakeholders involved. I cannot say what would be the relationship. Maybe my colleagues, the advisors can try to risk an opinion on that.

As far as the second question is concerned, I'm thankful for the input. It is also my view, if you remember what I said right towards the end, that it's very difficult for us to know what will be our needs in future, and then to provide for them adequately in the Constitution. Thereby, I meant that there are

certain things that we can provide for in the Constitution and there are other things that would then evolve and we can then either follow it up by way of legislation once it has evolved to legitimise it, or we may just adopt it that way. I don't think that there is a bar towards using non-statutory measures. The problem with using non-statutory measures might be that there may not be sufficient control because each level might use it's own and so on. But I agree with you, that would be possible. The Association of Local Authorities, I don't know whether we don't already have that. I was under the impression that I have read somewhere where you do find some names such as Association of Local Authorities somewhere.

Professor Du Toit raises very difficult questions, maybe that is why I am answering them last. The whole question of what the relationship will be if we accept the kind of Senate that we are thinking about as the Senate for the future South Africa. What would be the relationship, between that Senate and the executive, especially the executive arm of the provincial government? The other question is, if we accept the Senate as such whether the mechanisms would not be executive mechanisms? I have not given much thought on what the relationship would be between the Senate and the executive arms of the provincial governments. It's something that might need to be taken into consideration.

I could just risk an opinion at the moment, which is not a considered opinion. I was thinking that maybe if you wanted the executive arm of the provincial government not to be left on the side, you would want to consider in the composition of the delegation that represents the provinces, whether you don't want to include some of the members of the executive government to start with. It may be a complicated idea that I am proposing, it's something that one would certainly need to think about. I think it's a very important question.

The whole question of whether under those circumstances the mechanisms would not be executive, I tend to agree, that yes, because the Senate would then maybe take care of the legislative problems that might arise. One would say so, but not entirely. I think one province may pass legislation which is pernicious to a neighbouring province, what do you do then? Of course you can deal with this also at executive level through the premiers conferences and through the MEC conferences. So I tend to agree with you Professor, yes you can deal with it at executive level, and I think it is much easier that way.

Finally, the whole question of the National Co-ordinating

Committee, the necessity or otherwise of such a committee. I can say that it would depend on the needs of the country. I am not for or against it, I think that it's something that can be tried and tested. If you have mechanisms at ground level, for instance you have your MEC's, you have your ministerial and MEC's, you've got your Premiers conferences and so on, what would the National Co-ordinating Committee do? I think that it's something that might be considered in the course of time depending on the need for it arising. My own approach of course is that we should allow a great deal of development and evolution and so on. I may not have answered your questions.

Prof Johnson

I'll try to respond to the question raised by Prof du Toit, that's here in the hand-out of Prof Majola, it says that "if the Senate or second chamber in the national assembly is adequately representative of provincial governments, this may serve to enhance and harmonise co-operation and good working relationships between the national government and the provincial governments". I will go a step further and say that it need not be adequate representation but it would be equal presentation of provincial governments if the provincial governments were to see that their voice is heard there. Since from what I've heard a little earlier, and also in the workshop which I attended during this week, the idea is that the national government would be the dispenser of the finances, to the provinces as well as to the local bodies. If that were to be so, then I would say that the local bodies also should be given representation in the Senate. That is my submission. Then, instead of going by the beaten path, following the pattern of any other federation or any other unitary state which has a second chamber, I would say that from our experience in India, we find that the money that is given by the state government, to the local bodies or to certain local agencies, for the upliftment of downtrodden people, never reaches them, because there is no proper mechanism to see whether the money has been actually utilised for the purpose for which it was allocated. Now, I would submit that the Senate could be given that responsibility by forming different committees, so that they could review the performance of different bodies in tune with the money that is been made available to them. Thank you.

Mr Manie

Chairperson, I want to follow on the point that was raised by Mr Lechesa Tsenoli, and that is, it seems as if local government is not really seen as an area where the whole concept of inter-governmental relationship extends that far. Even in the way that the Interim-Constitution has addressed it, and although Professor Majola is right, previously, it is not really seen as an

area where the whole concept of inter-governmental relationship extends that far, even in the way that the Interim - Constitution has addressed it, and although Prof Majola is right previously, there did exist various Federations and Associations for local government, but with the new Transitional Councils, it appears that its status is completely unknown. People are trying to get these things done at the provincial level but there is no national attempt to bring that together; and perhaps that is one of the issues that needs to be raised at the Constitutional Affairs Portfolio Committee that it is actually its responsibility to ensure that thing is not left out. Now I'm glad that the issue was raised because the actual status its decision making power and how binding the decisions are, taken at that level, how it actually applies to local government needs to be captured somewhere, and in my view, I think it should be taken up very strongly.

The second point that I want to raise is around the whole MIN/MEC of the Ministers and MEC's. Although I agree that there is a need for it, but unless we are going to clarify the status and the powers of these meetings, then it is just going to become a talk shop. Because perhaps it's part of the process of going through this experience of a new system of government. But certainly the way things are going now, we are totally unclear about whether the decisions taken at that level can in fact be enforced on certain people. So it's an area that I would like the panel to respond to: whether in other experiences these various fora, conferences of whatever form, whether, in fact, have the power to enforce their decisions on all the people who are supposed to be part of that. The status of their decisions and also the powers afforded to them. It does say that whatever level of government cannot interfere with powers of local government, once those have been given. And it says, without having to consult local government, but in what way, what form is not quite clear. Could we have some comment on that? Could we also specifically invite Prof Johnson from Canada to talk to us, unless it is in his input, about, for example, the role of the Federation of Canadian Municipalities and whether, in fact, they play any specific role in terms of inter-government, in the topic that we are discussing now? Thanks

Prof Majola

I missed the penultimate question. Chapter something...

Mr Manie

Chapter 10 of the Interim-Constitution says the higher levels of government cannot interfere with the powers of local government once those have been devolved to that, without consulting local government. But exactly what that means and

what form does that consultation take, is not clear. And what I'm asking is some of us are arguing that we need to retain that in somewhere, but perhaps in a clearer form, in a slightly better formulation than it currently is. What one wanted to know is, as a specified manner of relating to these levels, could we have some comment on how, firstly perhaps are their views of how that could be improved or, whether in fact that formulation needs to be in the Constitution in the first place. Some of us believe so, but we would like to have other views.

Prof Majola

Chairperson, thank you very much. The comment by Mr Manie, I think it is a question. I thought it was a comment, Well, if you don't mind can you please repeat it? I thought you were making a comment, that you feel that there has to be a tying together of what I could call the loose ends, because you say there used to be these federations and so on, but, with the advent of these transitional authorities they've kind of moved to the periphery and so on. Wasn't that what you were saying? And I tend to agree with you. I think there is a need for it. And you wanted to know amongst other things how consultations and how they can be consulted, was that your question?

Mr Manie

In fact, it's on both of those questions that I posed the MIN/MEC as well as the Local Government Associations. The question was also with regards to the status of decisions taken at those levels. Should it be catered for somewhere or should those things be in the Constitution, and are there examples elsewhere? So it was a very broad open ended question.

Prof Majola

Well, the whole question of the status of the meetings and the decisions taken in MIN/MEC's is a tricky one for the simple reason that if you know exactly what they are going to be dealing with, then I think you can say the decisions should bear particular status, they should be enforceable and so on. Some of the things they will be dealing with are really things that need to be negotiated, especially where there is concurrency of powers. You may find that there has to be a lot of negotiation and the give and take, that has to come in. which may go, in a way, contrary to existing not contrary, but we may move away from the provisions of existing legislation or the Constitution. I would venture to say that it is necessary yes, to have them, to give these meetings enforceable status, but you might scare people away from going to these meetings because Governments might not want to lose their powers that easily. They might want to make interim arrangements, they might want to make arrangements that will enable a particular problem to go away without, you know, being forced in future

to tow the line. And in my view, it's very difficult to say that they must just have the enforceable status. I think you may be able to categorise and say decisions in this area could be enforceable, but not all of them, you see. Because these, I think these meetings also play a very big mediation role, you see, you are going to limit the capacity to mediate if you are going to require that everything has to be compulsory. That every decision taken. That is my view, I don't know, Dion is here, professor Basson is here maybe he could share a view on that. And then you did point out that if they are not made compulsory they would be just talkshops. While I agree with you that the possibility exists that they may just be talkshops. I think that they will still be useful because, I don't think that it, I don't think that it's only where there is a force of law that you can achieve certain objectives. You can achieve certain objectives where people are free to take decisions knowing that it is entirely upon them to do that. I don't think that it will be entirely useless you know to have them even if the status of their decisions is not enforceable by law. I think the question that came from the last speaker was actually trying to invite professor Johnson from Canada to try and come up with a situation in Canada.

Prof. Du Toit

Madame Chair on the order of the meeting, could I address you. I'm afraid that we are running bit behind time at the moment, perhaps we could hear the inputs of the other two experts and then have another discussion at that stage.

Chairperson

Thank you professor Du Toit I was just going to ask members to hold their questions after we've listened to the next presentation. I think Mr Manie who requested Dr. Johnson to say something on this issue. Maybe should just allow him to answer and then move onto the next presentation. You are covered in your presentation. Thank You. So we'll move to the next presentation, inter-governmental mechanism in Canada, Dr Johnson.

Dr Johnson

Thank you Madame Chairperson, honorary members, I want first of all to thank you for the great privilege of having been invited to appear before you. I also apologise for my voice, I seem to have contracted laryngitis especially for the purpose, but maybe I resonate more as a consequence. I was very flattered by Professor Du Toit's introduction. I had only one balancing factor so that you'll all know where I'm coming from. I spent as many as, not more years in provincial government than I did in national government, And I have been involve for many years in the very kinds of inter-governmental relations that you are talking about. My purpose is to try and say

something about the fact of Canada's reliance on national, provincial conferences, federal, provincial conferences as we call them, and some of the factors that lead us to rely upon them. I will not be talking about local government. In Canada local government, partly because I did not prepare myself to, point of fact, in Canada local government falls under the exclusive jurisdiction of the provinces and the national government. When it does make forays into fields like housing, for example, through a central mortgage corporation, when it makes forays into fields of municipal, local government, it does so with great care and usually resulting in a lot of beating over the head from the provincial government. So I won't be talking about local government, we can talk to one another in question period.

Well, first of all some facts. You have in front of you in pink a copy, a little bit piece of paper to which I will refer as I go along. First of all, in facts, just bear facts. During the past 5 years over 90 meetings of Ministers or Directors General, we call them Deputy Ministers, were held each year, around 90, and this is only a fraction of the inter-changes that take place between officials at various levels, say, between the level of Chief Director and onto the service deliverers in the field. Virtually all functions of government are involved in the exchange or inter-changes that take place, between officials ranging as you will see if you look at Annex 2, alphabetically, ranging from Agriculture through to Transport. I don't know that there are many functions of government that you couldn't find on this list, I won't go over it because you have it front of you, unless you want me to speak to it. You'll see it ranges from Agriculture to Environment to Health to Finance even to Housing, Justice and the rest, Transport. It's significant, when you look at the numbers, that the greatest frequency of meetings is to found first on constitutional issues, secondly on those functions of government where conditional programme grants are paid to the provinces by the national government, and I refer to the conditional grants in the field of Health and Human Resources and Social Services, and the third category in terms of frequency has to do with those functions where national and provincial jurisdiction or competencies are unclear. I'll explain to you in a moment why they could be unclear, such as the Environment, and the fourth factor where jurisdiction is shared and Justice and Solicitor General meetings here are an example of that. So, I'll come back to the reasons we have such an extensive use of national, provincial conferences as I go.

The question of a structure of such conferences was raised. I think it's difficult in Canada to speak about a structure of

national, provincial conferences, since they are not created by the Constitution in the first place. There is no reference to them and more than that they are held more or less informally. That doesn't really extend to meetings of the Prime-Minister and the Premiers, they call themselves the conference of First Ministers. They are held in great, should I say "Pomp", great ceremony. They occupy centre stage. They are televised all across the nation, except for the in-camera meetings where they really make their judgements, I won't say decisions yet, but for the most part they are informal. The structure, of course, is the most important conferences, the conference of First Ministers they are held in frequently once a year, once every eighteen months, except during periodic reviews on the Constitution. And I must say to you that if you were Canadians you would know that we have had a steady diet of constitutional conferences, the reasons for which will become apparent I hope in a moment. Then you have the next level down the conferences of DG's, or deputy ministers as we call them. Which clearly are merely committees to the ministerial committee's, I should have said before that, before DG's. They are conferences of ministers. In virtually all fields, and then there are conferences of DG's which are merely committees of the ministers and there is a wide range of other conferences. If you want to look at annex 1, you get some idea as to the kinds of structures or kinds of conferences, that are held at the top. By the way I got this list from our cabinet office, the Federal provincial relations secretary of the cabinet office just recently. You see at the top something called formal structures. In fact these are just meetings of ministers, but they have tried to, I think, to give some emphasises to their importance and to their status by calling them councils. Another reason for doing it is, if you have a council instead of a national provincial meeting, you don't have to have the National Minister in the chair. In Canada that would be regarded as a joke. Ministers of the environment, energy ministers, forestry ministers, transportation and high-way safety ministers, committee of ministers on internal trade. Among the more informal ministerial meetings you'll see that in the last nine months, we've had meetings on finance, transportation, seniors, (that's guys like me), labour market, agriculture, sports, recreation; and in the next six months they will be meeting on agriculture again, housing, health and aboriginal affairs. At the DG level, deputy minister level, you'll see again, lists of the numbers of conferences that have been held, and that will be held over the next six months. Over the next six months there are nine to be held. So you can see the frequency, the breadth and the frequency of the meetings that are held in Canada.

What gives coherence to this profusion of meetings? Well that's a good question. I think one thing that gives some coherence to certain of the conferences, is the imperatives, that prevail. I will direct your attention now, to, but we might want to return to the charts of the end of this paper, which deal with the fiscal arrangements, between the national government and the provinces. I will come to that. The imperatives of inter-governmental conferences on fiscal arrangements lay in the fact, that in Canada, unlike your Interim-Constitution, our whole Constitution is based on the concept of dividing responsibilities, competencies, dividing revenue fields, occupying revenue fields, as opposed to sharing. And this makes a huge difference in the way in which we function, and I will be referring to this difference between our Constitutions as I go. But frankly, back to the coherence question. The coherence that is found, really arises through the presence in the prime minister's office and the presence in most Premiers offices, (almost all of them), of an inter-governmental affairs secretariat, or sometimes called a department. Almost always they report to the Premier. And the purpose of course, is to keep the Premier and in the national government's case the prime-minister, aware of what's going on, and whenever you have public servants (of which I was for many, many years), whenever you have public servants who are put there to co-ordinate something, and they build a bureaucracy, and then they start advising. That's if there is a coherence in the federal provincial conferences, the national provincial conferences, I think it would arise from those mechanisms.

Let me shift to then some of the factors I think have contributed to Canada's reliance on national, provincial conferences. The first one I have almost made reference to, namely the character of our Constitution. As far as the competencies are concerned, they are divided into two water-tight compartments. National responsibilities or functions, and provincial and any straying by the national government. This was done in 1867, when the inter-dependency that we talk about so easily now, was not readily apparent. Not only that we had four provinces coming together and ultimately stretched over 5000km. But it seemed possible then to think of these water-tight compartments, and any straying by the national government in the provincial jurisdiction, was seen to be unseemly, and they could only be justified in extreme circumstances, such for example as an emergency. Talking about not the way the Constitution reads, I'm talking about the way it's functioning.

Over time however, it came to be recognised that there are national aspects to provincial competencies, and there are provincial aspects to national competencies. Almost always this is the case. But in Canada we had no constitutionally accepted vehicle to enable the national government to legislate on national aspects of provincial fields. You have section 126 in your Interim-Constitution, we have no such thing, and it was the courts, in interpreting the Constitution, that did decide that the national government, while it might not legislate on areas of provincial jurisdiction, could spend in those areas. And so we have had in order to achieve national social services, in order to achieve universal medi-care, and health care across the country, in order to achieve social services across the country, we have had the national government offering to provincial governments, conditional grants in these fields providing that they would, (national bearers 50% of the cost say); providing that the provinces respect the principles or the norms and standards that are established in the national legislation, in the conditional grants legislation. And it was through this judgement of the court and the use by the national government of spending power, that we built this fabric of social security and health measures, which now I think it's fair to say, about virtually all Canadian's, except for Quebec nationalists, represent for us one of our bonds of unity. For me with my biased background, (it's the Canadian Broadcasting Corporation), plus these bonds that are established, by what? By a value system we share, because that is what health insurance, that's what social security that's what they are all about.

Having said that, Quebec in particular, followed by certain other provinces, has never been able to reconcile itself to the creation of this national creation by the courts, of this national spending power. Their view, (of course, I think you will know), that the autonomy required for Quebec, (the national autonomy at the Nationalists would put it), calls for not a national power to intervene into provincial jurisdiction, but for greater autonomy for the province.

The question is how you get here from there. That's what government is all about. What was wanted was more power - take it from parliament, give it to the legislative assembly of Quebec. But if you do that, either the other provinces have got to say 'hey wait a minute, I want to come along on this train too' or the alternative, you say to Quebec, 'well if you want these additional powers in the national assembly of your province, remember that your members of parliament, and Senators, are not going to be able to vote on measures that

will not apply in Quebec'. Well, they didn't want that. So we have had (a) series of conferences on the extent on which we could increase provincial autonomy while at the same time maintaining what (inaudible) of nationhood are essential to our country.

I say again, if we had had a well defined and carefully prescribed, or circumscribed, (as the case may be), 126 in our Constitution, I think that we would have avoided a great many of the travails through which we have gone in federal, national, provincial relations. Well, that's one reason we have used a lot of national/provincial conferences, because we were discussing the Constitution so much, and because the amending formula which we now have provides that the Constitution may be amended by action of the prime ministers and the premiers.

The second factor that has caused us to rely on these conferences, I think, lies in the very conditional programme grants that I was talking about. On the one hand, if you establish conditional grant programmes, you create the circumstances under which harmonisation is called for. The whole idea of a 'Shared Costs Programme', (as we call them in Canada), is something like framework legislation, is to have the national establish certain principles that will be observed by the provinces and to have the provinces operate the programmes. So harmonisation of policy and practice, harmonisation of policy programme and delivery of services, is a necessary function to be performed. In the Canadian experience we just see it as normal, but the unfortunate fact is also, (by the way the Canadians are great for confessing their sins and their weaknesses), that Quebec, and followed by certain other provinces, constantly regarded the use of the spending power as politically illegitimate. They didn't challenge it in the courts but they regarded it as politically illegitimate. So the imperative of the national/provincial conference is centred not only on the question of harmonising, it's centred also on disputes concerning the legitimacy of the spending power.

I come back to another aspect of the Constitution, and that is dividing revenue fields as between the national government and the provinces. Another factor in the use of, may I say federal provincial relations. Once again, the difference between our respective Constitutions. In Canada the provinces and the national government have full access to all tax fields, except that the provinces may not impose customs duties. As a consequence of that, what happens when you have this situation, and it prevails today, you face the question of 'what on earth are you going to do about the unequal per-capita tax

yields as between the rich provinces and the poor provinces? You have gotta do something about that. We didn't do anything about it until we had gone through a depression and a war, (World War II), but we finally developed an equalisation formula that essentially guarantees to all provinces, roughly the national average per-capita yield from provincial taxes at national provincial rates, through a combination of what the province raises itself, and an equalisation payment that takes it up to the per-capita national average, approximately.

What did you have to get there? I was privileged to be involved in the development of the equalisation formula. We had meeting after meeting after meeting in these very early stages of the development of federal provincial relations in Canada, with officials, (so that the ministries could always disown them), in the negotiation of a Equalisation Act. The consequence of the type of Constitution we have, we don't share taxes as envisaged in section 155 of your Interim-Constitution, we divide them up.

We have other problems as well. How do you prevent a tax jungle as we used to call it? We had meetings and finally we arrived at a system of tax collection agreements under which the provinces agreed that they would for the most part, enter into tax collection agreements, under which the national would collect the taxes, providing the provincial tax laws, (tax base), corresponded with the national law. So we worked toward something that is explicitly provided for in your Constitution. We had meetings, also we still have meetings over tax sharing, because what you people are saying 'we are going to share the taxes; we are going to have a Financial and Fiscal Commission that is going to have to advise on this. It's going to be a very public kind of advice'. In Canada, the tax shares are established by the unilateral actions, or minorly harmonised actions, of ten provincial governments... Well, if you are going to try and harmonise those tax laws, you have to have a vehicle for doing so and we have used federal provincial conferences for achieving this.

I can hardly refrain from expressing the view again, as I have read your Constitution and heard something of your discussions about that, that the sharing approach, sharing of revenue, rather than dividing the rights to tax, (with the benefit of the Financial and Fiscal Commission), probably would give rise to *yas jusputatious* (?) dealings between your MEC's for finance and the national minister of finance in our system. But that's a personal view. At another workshop recently where another Canadian, Ron Watts was there, if Ron Watts were talking here

(he is a professor of Federal Provincial Relations at Queens University), he would be saying the exact opposite to what I've just said.

Another factor I think is this one, still talking about how and why you use national provincial conferences. The closer you get to the services delivery level and to the analysis that flows from the very delivery of services, the policy deficiencies that you discover, the policy concerns that emerge, the closer that you get to the delivery services level, the more frequent the national provincial and inter-provincial contacts become. The reason is very simple. Everybody involved is devoted to the same end. You get a bunch of social workers together and they are not going to be arguing over national and provincial jurisdiction, they are going to be worrying about getting the social services to the people. The same thing applies in health. So that the character of the meetings changes. I think that first of all, they are very very much more informal, they may be person to person, but secondly, the orientation changes. You abstract yourself the closer you get to your concern for programmes and for people and for the delivery of services to people, the more devoid the discussions are of jurisdiction, because unfortunately governments do worry about jurisdiction.

I have deliberately talked about the factors that have influenced us in Canada. I may have sounded as if I didn't really place in a high position, the need for harmonisation. If that made it self-evident, I think it is self-evident no matter what kind of two-tier system of government you establish. It may be more prevalent in our system, the divided responsibility system, I believe it is, than in your shared responsibility approach in the Interim-Constitution, but I emphasize that harmonisation is an essential function at the executive level.

Now, I'm coming to the centre. I left it to the last. In Canada, we do not have a Senate that reflects the interests of the provinces. We have a Senate. It has representatives from the provinces, but it is appointed by the prime minister. The long and short of Canada's Senate, is that it is by-and-large a patronage body. So it is not really looked on being a factor in national legislation, at least certainly not a provincial representation factor. The consequence of this is that, never mind the executive level harmonisation of which you were speaking earlier, even at the legislative level, and the Appropriation Act level, there is no body that speaks for provincial interest. If you don't have that, and if you don't have a Senate that is clearly regarded as being a representative

of provincial interests, then you don't have anything in national government systems that assures something that is fundamental (I said at the beginning), ensures that the national government looks at the provincial and local aspects of legislation, just as through section 126 you have a vehicle by which the national aspects of provincial legislation can be looked at. So the place of the Senate, (I'm really repeating what others have said and what all the literature will say), is extremely important, to the extent that you don't have one, in our experience, you then turn to what? You turn to national/provincial relations, federal/provincial conferences, where you fight out the differences between you in respect of these several aspects.

I conclude with a word about the status of the conferences. I have no hesitation whatever in saying their status is one of influence, it is not one of power. It's a status of influence for the simple reason that it does not exist as a constitutional body, a constitutionally authorised body. It's status is influenced because the public of Canada recognises, (and I think they recognised this in a relatively recent referendum on constitutional matters), it was not chosen democratically. The national/provincial conference is not chosen by the people. My wife, who is one of these right hand side brain people, (you know, show her a financial statement and she will go and play the piano), says to me, 'listen, I voted for the national government and I voted for the provincial government, but who are these guys we are watching on television, all these ministers sitting around saying they should be making decisions?' So the status is that of influence. They may try to make decisions but in the final analysis they must each go back to his or her own parliament or legislative assembly and seek the authority of the caucus and seek the authority of the whole legislative body.

Sen Bhabha

I am glad to know that my adherence to a particular system is not merely ideological, it has some political implication as you have just confirmed. I just want to ask you a question regarding the status of these inter-governmental forums. If a Senate is created whereby the composition the Senate would not only be more representative of the provinces, or would be representative of the provinces, but if a Bill touches a particular competence and the executive member of the provinces personally comes to the Senate, would that not then negate, or remove the need, for having inter-governmental forums? Would that not serve the purpose of inter-governmental forums?

Dr Johnson

I find it difficult to visualise a legislative body dealing with essentially administrative matters (and I'm making the same distinction that someone else made earlier on), between the legislative function and the administrative or executive function. About the legislative function, I haven't any doubt that if, in my mind, though I personally prefer an elected Senate, but to be practical about it, if you were going to (words lost at change of tape) clearly the services delivery level, to repeat myself, you have got to harmonise your efforts in order to help the citizen and I am not all sure that legislators are in the best position to do that. I am not afraid of executive harmonisation if you can remove the disputatious part of inter governmental meetings that arises from a lack of agreement over when the national may move, with respect to provincial aspects and visa versa, if you have a senate that achieves that, then it seems to me the cast and the character of the inter governmental meetings changes, which, to me, is the really important part of it.

Mr Andrew

Yes, thank you. Professor, just on something you touched on. I would like to, the issue of fiscal equalisations or the transfer and relating to national average tax yields and that sort of thing. What mechanisms or what processes do you have so that you don't eliminate incentive to provinces to either be efficient in tax collection or any other, the factors if in fact in the end it is going to be completely equalised.

Mr Carrim

I just want to ask how does the special status that Quebec claims impact on the practice of inter governmental relations, because I think Quebec has more powers than other provinces or are they or is that not true? I noticed that you refer in your document to provincial and territorial structures? How do these territorial structures differ from the provincial and in what way are they drawn into inter governmental relations?

Mr Gordhan

My question is at a more general level. It is what one might call a macro question. It is intriguing that as one studies more and more federations, there is this interesting contradiction between; on the one hand, the political demand, as you have also recognised, for more power at a provincial level, and a greater stand off between the national government and the provincial government on the one hand; and on the other hand these elaborate mechanisms to actually get inter governmental co-operation on the other hand.

Now, what is this a symptom of in your view? Is it a symptom of the fact that in fact ordinary people throughout the country, whichever province they come from, actually want delivery and

they want to lead a decent life? But, the political elites and political parties are the ones who actually want this notion of provincial powers and provincial autonomy and a fragmentation of or political fragmentation of a country? and in that context, what advise would you give to us in South Africa? Should we also practice this what amounts to almost nonsensical exercise of political divisions being entrenched in constitutions in a very harsh and divisive way on the one hand, and on the other hand them going to an elaborate exercise of developing inter governmental relations, either in the constitution or by legislation, or by voluntary mechanisms. What from the Canadian experience can you teach us in that regard?

Mr Cronje

Ja, maybe just to add to that one. I am sure that, you know, when those people got together in 1967 part of the reason why they wanted autonomy is because they thought they were somehow different to each other and then they drew some constitution which was based on that ideology only to discover that it is in discordance with the practicalities on the ground.

Now, given that we have now got provincial legislators and they, there is nothing yet said about where they shall meet. I am not talking about senators who come from the province now to the national. But, it seems to me from what I experience on the ground, that it is the provincial legislators who never get a national overview. In other words that they are not really so, (the problems are not really so) different. That those are the people that somehow will promote the centrifugal forces. The splitting apart. The competition, you know, we are different type of thing. Now, shouldn't one perhaps then also look at provincial legislators at some point coming to the centre to get more of a national perspective to find that they are not so different.

Dr Johnson

Thank you, Madam Chair. The first question had to do with fiscal equalisation and how Canada avoids removing the incentive, removing from the province is an incentive to advance in a particular way. In their own particular way.

A short answer is, there is an incentive built in. In the first place the equalisation formula brings the provinces, all provinces up toward the national average. Now, I will have to get a little bit technical here. What we used in the formula was the national average provincial tax rate weighted of course, but a national average provincial tax rate and we apply that to the provincial tax base, e.g., retail sales for the sales tax, for general sales tax and say that will yield so much per capita. That national average rate will yield so much per capita. How

much will it yield national average? You apply it there and you get a difference and the national government makes up for the difference.

That means, however, that the provinces that are above national average or above whatever national norm is set, enjoy a higher standard, a higher level of per capita revenues because they are above national average. That is reason number one.

Reason number two. The provinces all have the power to impose higher tax rates. To put it in terms of the Interim-Constitution, it is almost like saying the provinces have a constitutional right to pose surcharges. So that once again you have the power to do different things. Now, I came from a province where we started, universal hospital care and then there was a medical care, we were a poor province. We were well below the national average at that time, still are but close to it and we simply just raised the taxes and the people were prepared to pay the taxes for a universal medical hospital care, but we had complete freedom to do that. It helped, of course, enormously later on by the equalisation formula is that special status for Quebec ...

Chairperson

Just a second, Dr Johnson.

Prof Davis

On a point of clarification. Could I ask a point of clarification on that. When you talk about the national provincial average. Is that how was that calculated? Is that a combination of the national tax rate and the provincial or just the ...

Dr Johnson

Just the provincial. You see, what we were trying to do was to develop a formula, to put it very bluntly, that was political proof ...

Dr Johnson

So we said we are not going to make any judgments in this formula. We will make no judgment about what is the right level of provincial taxation. We said we will simply take the facts of life as we find them. What is the national average provincial tax rate. Now, I am not going to get into the formulas. I have probably forgotten them any way, but ...

Prof Davis

Right.

Dr Johnson

And we applied it to the tax base. Just again it is factual and we exempted, there were no revenues exempted. That has posed some problems by the way during the oil boom and so on, but I won't get into detail. So, that the only thing that in the, one can do is, if one wants to tamper with the equalisation

formula which now, by the way, has almost the purpose of the equalisation formula has now been enshrined in the constitution.

The only way you could tamper with it would be to say it has become too expensive and we have to lower the national norm and that has happened in Canada because of our fiscal problems. But, for any politician to say I am going to take this revenue out and this revenue out, you know perfectly well it is happening. You can penalise one province or penalise another province depending on which taxes you include and which you exclude.

Prof Davis But, the point being, once you have worked out this national provincial average, as I understand what you were saying then, that per capita for the provinces as it were should give you X. If the province is getting in Y, does it get the difference between X minus Y.

Dr Johnson Yes.

Dr Johnson You are talking about the higher income provinces?

Prof Davis Yes.

Dr Johnson It is not equalisation to the top.

Prof Davis No, I appreciate that.

Dr Johnson The province of Quebec. No, the province of Quebec does not enjoy more legislative powers than the other provinces. The nationalists have argued that they shall have special status. But, for reasons that I mentioned a moment ago that simply wouldn't work. Was not acceptable. What we do have and we have all this national provincial conferences that I talked about, what we do, what does exist, however, is the use by the national government of the power of administrative delegation, i.e. we delegate to the province of Quebec the administration of aspects of immigration less for example, so that there is a kind of de facto asymmetry if you will, that arises from out of this power of administrative delegation.

The question of the territories. I knew as soon as I got these tables that I have to explain the territory scheme. Canada's population, I think 75% of Canada's population lives within 500, 750, 750 to a 1000km of the US border. 30 million, 28, 29 million people spread across like that. Far, way north the provinces extend quite far north. North of that right up to the

arctic circle are that, you find the territories. The territories are very sparsely populated.

But, many years ago, I can tell you when it was in the 1960 when I first moved to Ottawa, a movement, the national government decided that the people of the territories would be granted the right to have a legislative assembly. That can be done by statute, because parliament controls the territories, give to the territories the right to have a legislative assembly and the right to have a government; the right to receive money from the national government, but they do not enjoy provincial status, i.e. they do not have any constitutional status.

But, because we are going through what can I say, going through these motions, but because we have these structures and providing for by law as opposed to the constitution, the territories are included in national provincial conferences. If you have ever been up there you will understand why the population is so small. It is cold.

Provincial power - let me see now. The question had to with whether South Africa should accept competitiveness. I think these elaborate mechanisms to which you referred do have something to do with the political elites, yes sure, and they have something to do with bureaucratic elites as well, sure. But, it is and I respond with another sure, it is, the people want the delivery of services. They are not interested in which government provides the services.

My own judgment is that well, you have heard me say again, I will say it very quickly. I think that in any two tier system of government, federal government whatever, must have vehicles through which the national aspects of provincial matters are expressed and the provincial aspects of national matter are expressed through one vehicle or another. And you maintain, you keep the ground, the grass roots in mind and really through the political process, through the constituency system. That is how it happens in Canada. It is not just the provincial governments that are close to the people. It is when on a constituency basis you are close to the people. You are going to have to get their votes and if you don't pay attention to them, you pay the price. That is the kind of competitiveness that we have. It becomes a political competition to listen to the people as opposed to not listen to them.

Now, I may have misunderstood the question. So, I beg your pardon. Provincial legislators and whether or not they have, they, how do they get a national view. Well, I was talking to

Senator Lamani and she told me something that I didn't know and I find enormously interesting, namely the fact that the Senate refers legislation to the provincial assemblies. I have never heard of that happening and I must say I said that I find that very ingenious. I can take the other point of view very easily, from having sat around the provincial legislature for a long time, that one of the, one of the beauties of the two tier system is that the provincial legislatures do exist to reflect a local and provincial point of view, and they are close to the people and they do deliver services. I will speak of the Canadian situation. They deliver services much more effectively than if the national government try to delegate districts.

So, in a certain sense, I think, it is a good thing that the provincial legislators represent their provincial constituency or constituencies. But, it certainly is true that they remain provincially oriented or if you want, parochial, how is that? And it would take some special vehicle such as the one the Senator mentioned to overcome that. I think those were the questions that were asked to me, Madam Chair.

Prof Johnson

Madam Chairperson, members of the committee, my learned colleagues, I must at the outset thank you for giving this great opportunity to be with you today. Well, I don't think I will be very technical in my presentation and I shall stick to the way in which, you know, the things have developed in my country for the past 44 years. We gave ourselves a constitution which came into operation in January 1950. So, now it is a little bit over 44 years that we have had this constitution.

Though, most of you will be aware of the great diversity which characterises India with over 1 600 languages and dialects spoken all over and many ethnic groups and also the caste system and all that and also the unique problems which we faced at the time of our independence in 1947.

The constitution makers took it upon themselves to draft a very detailed constitution. So, we have now the lengthiest constitution in the world which goes on increasing day by day, so, with the number of amendments which have been added during the past 44 years which is near about 100. At the rate in which this tendency goes, I don't know when the Constitution will end up in the beginning of the next century.

Similar to the British model we inherited, we adapted for ourselves the British parliament pattern of government and our

constitution does not say that India is a federation, though it qualifies to be one because of its size and diversity. So, the word union only is used. I think the only intention was not to grant a federation for the country. But, in 1950 and 1956 the administrative units in India were grouped under four categories. In 1954, to be precise, a gentleman fasted unto death and actually died, because he wanted the creation of a particular state on linguistic grounds. So, our first prime minister (J) Nehru who was dead against this idea of fragmenting India on linguistic lines, saying that this will ultimately end with the destruction of the whole country, was totally against this idea, but then he was compelled to agree to the granting of linguistic re-organisation of states.

So, in 1956 the entire territory of India was organised, re-organised on linguistic lines and today we have 25 states and seven union territories. Excepting for one state, Kashmir, no other state has its own Constitution. So, what should be the constitutional structure, framework for the states is prescribed in the Constitution itself. It is more or less a replica of the national government. At the national level we have a nominal executive called the president, at the state level we have a governor and then at the national we have the prime minister. At the state level we have the chief minister and the position, powers and the responsibilities of the national as well as the state legislatures are more or less similar.

Then our constitution does not say anything about the local government institutions, both rural as well as urban. This has been left to the total responsibility of the states concerned. So, the states, taking into account that their own position, they can enact legislation and create whatever bodies they want to create.

So, so far as the organisation or structuring of local bodies are concerned, there is no uniformity in India. Some states have a single tier administration of local bodies, some have two, some have three and some have four and my state, one of the southern states, it has a three tiered structure so far as the local government is concerned.

So, their organisation, their powers, their modes of revenue, all these, are determined by the state legislation. So, what the constitution concerns itself, is only with the state governments and the professor has pointed out his paper, we have two sections in the constitution which deal extensively with inter governmental relations and they are broadly divided into two categories. The one is administrative relations and the other is

legislative relations. I will also add one more that is the judicial relations.

Now, so far as administrative relations are concerned, I shall make mention of the state executive. The normal executor is the governor who is nothing but a nominee of the national government and he, to use the technical term of the constitution, he serves during the pleasure of the president. That means he is not functionary and who is totally integrated with the state mechanism, but he is at the beck and call of the national government.

Until 1967, until then, the congress party was, Indian National Congress, was having control over the national government as well as almost in all the state governments. Then, the position of the governor was nothing but a puppet in the hands of the local chief minister. But, since 1967, one by one different states began to have different political parties as their ruling parties. So, now in more than 12 states there are different political parties in power and the report I saw last night on the TV is right, then I think the Indian Congress is heading for destruction during the next two elections which are due in 1996.

So, so long as the congress had absolute control over the entire country, inter governmental relations between the national government and the provincial governments was not an issue at all, because for one reason, that is, the national parties in India are totally centralised parties, unlike the American parties. Indian political parties are absolutely centralised, especially the Indian National Congress.

So, all decisions, whether pertaining to the national level or the state level or to the regional level, all decisions are taken only at the top most level, whether it is deciding the candidature of a particular individual or for any other practical solutions.

So, in the course of the past, I would say 30 years or so, the congress party has lost its grip over the regions and this has led to the emergence of a number of regional parties which clamour for autonomy or more powers, because they speak for the regions and they point out that the Indian National Congress is more concerned about parliament and not concerned about the state at all. They say here we are. We are to speak for you. So, certainly the people of the (inaudible) ... and more and more regional parties are being in power and this has put a further strain on the federal state relations.

Now, the governors position today because, under the change of circumstances, that he has become rather active. I think in the sense that there are certain provisions, obnoxious provisions in the constitution which, I think, you should very carefully avoid in framing your Constitution, that the national government in India has an absolute control over the state governments, even under normal circumstances.

We can understand it if provisions are made in that direction during an emergency, during a national emergency that is, of course, permissible whereas even under normal circumstances, the national government can have an absolute control, it can even go to the extent of deciding the destiny of a state government, irrespective of that state government enjoying the (inaudible) ... as it has happened for over a hundred times in India. No state has escaped this. All the states at one time or another have experienced this, that is the national government, without assigning any reason whatsoever, could dismiss a state government and get away with that.

So, this is a non justiciable provision in the constitution. What the constitution says is that if the president is satisfied or a report from the governor or otherwise, that the constitutional machinery in a state is not in a position to function according to the constitution, then he can dismiss the government of the state concerned.

So, herein there are two provisions. One is a report from the governor. That means the governor is required to submit periodic reports to the national government about the way in which the state government is functioning. Second is all other way that is there are also other channels through which the national government collects information regarding the functioning of the state government.

Now, this is a provision, you know, which the opposition parties are demanding to be scrapped from the constitution because it cuts at the very root of the democratic parties in our country. So, I will request you to bear in mind that when you draft your final constitution, see to it that the national government does not have any overarching influence over the state government so far as the retention of the government or the dismissal of government is concerned and then so far as the legislative powers are concerned. There are three lists, exhaustive lists, in our Constitution. One is called the state list. The others are central and the third one is the concurrent and all of those (inaudible) ... powers, you know, which do not find a place in anyone of these three lists, are called the

residual of powers.

The residual of powers have been assigned to the centre, so even under normal circumstances, the centre has an enormous amount of legislative powers and a very significant factor here is that the state legislator is elected by the people. The state legislator by the constitution is required to enact for the state concerned on the subjects which are included in the state list.

Okay, now after the state legislator has passed that legislation, the next stage is, it goes to the governor. The governor assents to that and then it goes to the president. After the president has assented to that, the Bill becomes law. That is the procedure. But here, if on a particular Bill the national government doesn't have any agreement. It can direct the governor to reserve that Bill for the consideration of the president. So, the Bill after it has been passed through the state legislator will be reserved by the governor for the consideration of the president.

The president can do one of two things. One, he can straight away direct the state legislator to modify the Bill or he can refer the Bill to the advisory opinion of the supreme court. In fact that happened on four occasions in Indian constitutional history. A very, a very damaging Bill was enacted by a communistic government. The first communist government which was found in one of the southern states. Most of the population was against that, because that Bill was meant to cut at the very root of educational freedom.

So, since there was so much hue and cry against that Bill, the president referred the Bill to the advisory opinion of the supreme court and the supreme court opined that certain provisions should be removed and the same information was passed on to the state legislature and after the state legislature took appropriate action accrued to the directive the Bill was assented to by the president.

But, apart from this exceptional circumstance, even under normal circumstances, any Bill which is not to the liking of the union government, could be dispensed with through the instrumentality of the governor, that happens. But, here, let me be a little more technical here. Let us say that the Bill has been reserved by the governor from the consideration of the president and the president examines that and then he will require the state legislator to reconsider the Bill within a period of six months.

Let us say the state legislature reconsiders the Bill within six months and as for the directives of the president makes appropriate governments and resubmits the Bill through the governor to the president. What happens next? The constitution is absolutely silent. That means the president has an absolute veto over state legislation, which power he enjoys enjoy over national legislation. So, this is a point of controversy so far as the states are concerned. And then even the subjects which are eventually in the state list, are not sacrosanct.

We have in our national parliament two houses. The council of states is the upper house and the house for the people is the lower house. But please do not be misled by the term council of states. It does not represent the states. It is only the name. Now, if the council of states passes a resolution that the union parliament should enact a law on a subject mentioned in the state list, the parliament can proceed in that direction. You may not get the concurrence of the state concerned, or if two or more states request the union parliament to enact a law on a state subject the parliament can do so and that law would be applicable only to those states who required such a legislation.

Whereas and the government in the Act 1935 it has provided that in such a (.....) If, at a later date, one of the signatory states does not want that legislation, it can repeal it, but the present constitution does not provide that provision. So, once the parliament enacts that law, that remains in the Statute book.

Supposing there is controversy within the union parliament and the state legislator or in law enacted on a concurrent subject. What would happen. In that case, well, the union law would prevail not the state law. In spite of it being assented to by the president that the state law would not provide, only the union law. So, even under normal circumstances legislative powers are more in favour of the national government than at the disposal of the state government.

Then coming towards the way in which the financial resources are shared within the union and the state. There is no permanent yardstick by which that is being done, because our constitution says that periodically, that is once in five years, parliament may appoint a finance commission and a finance commission would go into the question of centre state financial position. Look at the volume of intake by way of revenue on the part of the states as centre and also take into account the

per capita income in each state and then according to a formula, it would advise parliament as to how funds ought to be allocated between, among different states.

Now, here the report of the finance commission which is to be submitted to parliament need not be approved by parliament. Parliament is free either to accept the report in toto or to reject it in toto. But, so far it has not done so and funds are relegated only according to the formula which is a (...) by the finance commission and the money that is allocated by means of this arrangement, is a tax revenue.

You see we have three ways in which to raise taxes. There are certain items of taxation which are of elastic nature, which go on increasing, for example, income tax. Income tax can be levied only by the union parliament and not by the state legislatures. That is something which belongs exclusively to the union government. Customs and excise duties, Corporation tax, wealth tax and then surcharge on income tax, all these elastic sources of revenue are at the total complete disposal of the union government.

Other local items of taxation are given to the states. Then what about the local bodies? Local bodies cannot decide on what items they should tax and how much they should tax. The items of taxation at the local level and also the quantum of taxes that they should collect will be decided by the state legislature by law, according to that they collect the money.

But, then they can only collect the money, (...) cannot appropriate that money. The money that is collected by the local bodies is to be remitted to the district treasury and the state government will decide how much each municipality or (...) should receive. So, that is how, that system works at that particular level.

Now, this particular issue of disparity in sharing the revenue has been one of contention between different states for quite some time, and in fact, from 1964 onwards a number of state governments have voiced a concern, in fact every finance commission has received the submissions from different states for including corporation tax as a tax that should be divided between the states and the centre.

Sorry, what is this corporation tax? Corporation tax is nothing but tax on the income of companies and since, you know, it is, it goes on increasing. The share of the union government goes on increasing and the states want a share of that, but the

union government doesn't want to share it because the constitutional assembly is very specific as to what items of taxation are to be shared within the union and the states. Only those taxes are shared. The other taxes exclusively belong to the union government.

So, there is a great disparity in the source of income of the states as well as the national government. Now, apart from taxes there are these grants. There are three types of grants available in our country. Statutory grants, discretionary grants and capital grants.

Now statutory grants about which provision is found in the constitution. Grant (....) So, the parliament can decide the quantum of grant that is to be made available to a particular state and this is usually then on the recommendation of the finance commission. Then what is a discretionary grant? A discretionary grant is a weapon in the hands of the union government, because we have an institution called the Planning Commission.

Our first prime minister wanted to have, wanted to transform India into a socialistic society. So, he thought that the best way to do that is with the help of a planning mechanism. So, he created a planning commission, which today is a supra national body. There is no legal provision for it and there is no constitutional provision also for the creation of a Planning Commission. But, it has become very important and very powerful and it is the planning commission which decides as to how much the particular states should receive for implementing certain plans. And then the money that is required for the implementation of a particular plan by a particular state is given by the union government by way of discretionary grants and now of centre the union government is also making use of another insignificant provision in the constitution. The provision which says miscellaneous provisions regarding tax sharing. That is being used for giving block grants to the states, saying that it is in the national interest, even though the government need not follow that particular pattern so that is the position there. And then if this is the position, then what is the manner in which the interest of the states can be protected?

Well, for the first point, the interest for the states cannot be protected in the union parliament because the upper house does not give equal presentation to the states. With that the upper house is elected by the legislative assemblies of the states and then there is no equality of representation.

Representation is based on population of different states.

So, more populous states can have the final say in most matters, whereas the least populous states will be left in the lurch. That is unfortunate the position there and then there is a provision in the constitution for the creation of an inter state council for resolving any disputes between states. There is a clear provision for that, but until date such a council has not been created.

Whereas periodically there are meetings which are held in the (....). There may be education ministers meetings or the finance ministers meetings which are, of course there is no provision in the constitution for calling such meetings. It is decided at the whim and fancy of the national government. So, the educational ministers of all the states assemble there and then according to the agenda, that is prepared and finalised by national government, the meeting takes place.

Then what about the court here? In case there is a dispute between states or a state and the national government. Well, the courts come under the jurisdiction of the supreme court. If there is a dispute between two states or between one state and several other states, or between one state and the national government, then, it can be directly referred to the supreme court. But, if individuals are involved that cannot be taken to the supreme court. So, this comes under the supreme court and, of course, in many cases have gone to the supreme court for final adjudication.

Then, what about the position of the local bodies? local government institutions? I believe that in certain operations like the United States there is provision for direct federal assistance to local bodies. But, as in India such a thing does not exist. That is why I earlier said that there must be provision made in the constitution for direct financial assistance to local bodies and also a mechanism to see that the assistance that is made available is made use of for the purpose for which it has been made available. Otherwise you know, it becomes (....). This is from an Indian experience and I do not know how many of you are aware of that, probably gentlemen of Indian origin may be interested to know there is no less than 14 demands currently in India for greater autonomy or separate statehood or even total freedom, mostly in the northern belt and also one or two in a southern belt and if you go into the, into the merits of each one of these you ...

Autonomy or separate statehood, or even total freedom, mostly

in the northern belt, and also one or two in the southern belt, and if you go into the merits of each one of these, you find finance is the root cause because the money that has been appended, has not reached the grass roots level. God knows where it has gone.

So, it is meant to uplift the some tribal people in the interior of the jungle. They are there as they were hundreds of years back. But, or if you look at the books, millions of rupees have been made available. God knows where it went.

So, that means the government has not been responsive. So now they are on a warpath. I will give you one example. It is a part of the state of J... Kashmir, it is called Ley(?). Now, the people in that area are all Buddhist. Now, they say, we do not want to get the (...) whether Hindu majority (...) and they do not want to be controlled by the Muslim majority. Give us an independent status. The demand has been there for the past 40 years. They do not get their due share, either it is schools or hospitals or other services, because money doesn't reach. So, that is part of discrimination. So, they want more attention to be paid.

So, about 40 years back, a gentleman started an agitation. He went on paralysing the district administration. He would call one hundred hours total strike. So, nothing can work there. Why, because he wanted a separate state to be parted for his community and ultimately the government, you know, was forced to come to terms with him and an autonomous district was created for the particular community. Pleaded with him not to ask for more. Supposing such a demands originate in different parts of the country, where would the country end?

So, if the constitution is a little more pragmatic in its terms, then these featured trends, these feature developments, also could be taken care of and then an adequate mechanism to be employed because, and we do not know how far right I will be in my observation regarding South Africa, but I can with confidence say that (inaudible) ... in my country, for example, during the first I would say ten years, from 1947 up to 1957 or the early 1960's, the congress was considered to be the senior because it was in the forefront of the liberation struggle. We have got the freedom from the British.

So, all the leaders were accepted without any question. But, then now today, after 44 years of freedom we have a new generation. Freedom struggle is only in the history books for them. They never experienced this. They do not know what

struggle went on the century and all that.

So, now, you know, they have new demands, new aspirations. So, if there is no provision for them, then they will demand it. Somebody said earlier that it is the politicians, you know, who articulate. Well, if it is a valid democracy, then people would articulate. Fortunately or unfortunately we don't have a direct democracy. Only the politicians can articulate on behalf of the people.

Well, if you take it as the articulation on behalf of the people without the people then it is articulation of political parties. Whatever it may be. They represent, they say that they represent the people and say well this is what the people want. So, my submission is that when a contribution is made for a country as he has very rightly observed, it is something which is there permanently, so long as the country lasts, the Constitution should also last. But then as far as practicable taking into account the diversity in the country, the possibilities which could arise, the problems which could arise within the next ten or fifteen years and make certain safety valves.

So, that, you know, you can to a great extent, reduce the pressure. So, as and we do not have a national police force. Each state has got its own police force. But, then in case of emergency, the national government could send in the central reserve police, even without states permission, and this is being resented to by the states. How can the centre send its militia into our territory without our asking for it? So, there is (a) bone of contention there. Then we have two types of civil service. One is the explosive state civil service. The other is the All India Service. For All India Service, that is for the highest civil service recruitment is by the Union Public Services Commission, whereas for the state, each state has got its own service commission which it approves recruits personnel through the merit scheme.

But, then these All India civil servants, they serve not only in Delhi where the national government is situated, but in also in all the states. Even at the district level you will find the All India civil servants and it is charged with ensuring uniformity in administration throughout the country.

So, this is the way in which, you know, the Indian constitution has been operating for the past 40 years, which has given birth to a number of demands and also two major commissions appointed by state governments to (look) into the question of inter government relations which ultimately led in 1984 to the

(state), the central government appointed a commission to go into the question of centre state relations and advise the national government as to how best the states could be given more freedom and all that.

It made certain strong recommendations but till date, even for 11 years after the submission of the report, the government has not acted on that. I don't know when they are going to do that. But then if the tendency goes on like this, I think, there will be more room for separate tendencies to development in the greater part of the country. Because we should be very, very careful about one thing, that is the narrow nationalism would destroy a nation.

One political organisation developed around the, in the city of Bombay (all of you must have heard of that) it is called Shimsana(?) You know what they did as soon as they came on the scene. They said this state is for the people who were born here, not for outsiders, get out. And immediately in one of the surrounding states that was repeated by another organisation.

Now, this is gradually gaining ground and now that we have the linguistic organisational states, what happens is that there are 15 languages which are approved as the official languages in the Indian Constitution. So, each state can have its own language. So, I come from a state where the official language is Tamil. The government may require everybody to learn Tamil to Tamil to write in Tamil. All official correspondence, that means everything should be in Tamil.

So, when an All India Service officer from Delhi to take a job here in the state, then first of all he should learn the local language. Certainly he can fit in. So, that kind of tendency is gradually developing in the country and, I think, that is something, you know, should be avoided with all the precaution. Thank you.

Mr Cronje

Would it be a correct interpretation to say that in India with how many different languages do you say 1 600 odd that at, that discrimination against minorities really take effect in small places rather than at the national level.

Prof Johnson

Well, all the 1 600 and odd languages are not very prominent. The government has identified through the census report, only 15 languages which are spoken by 100 000 or more people, so they are not even given their official status. But, then the regional variations are more in the north east of India which is

inhabited by tribes, mostly a tribal area, where more than 90% of the population are Christians and thanks to American Baptist missionary work.

So, in the rest of India the problem of minorities is on the basis of caste. Caste is something, you know, which you are not familiar. Thank God for that, you know, you are and if you are born in India you are not born into a country, but you are born into a particular caste depending on who your parents are. It must be forward caste, the backward caste and then there is scheduled caste and the scheduled tribes. This is the official categorisation and in each category there are hundreds. If it is a backward caste there are thousands.

So, the most unnerving situation was with regard to the scheduled caste and scheduled tribe were called the untouchables. So, even the proximity of an untouchable would pollute. If, supposing I was born in a high caste and if a low caste man, suppose he comes close to me, and if his shadow were to fall on me, that will pollute me. That was the conception and I will give you another example to better understand to what extent this is practised.

The father of the Indian Constitution, Dr Ambedkar(?), he was born in Ambur(?). He was born in a family of cobblers. With very great difficulty he had his school education and then there were all the states in India were all ruled by kings. So, the king in the area where he lived came to notice the outstanding quality of this young boy. So, he gave maximum for his further education and he even sent him abroad. So, Ambedkar(?) went to Yale. He got a doctorate in economics. Then he went to the London School of Economics, there he collected another doctorate and he became a constitutional law expert.

But, then, when he returned to India he was assigned a good job by the king. So, he was given a room. He would sit here but then his peer, who used to carry files from one room to another, he happened to be a person who was born in a high caste. So, he would not enter the room. So, he would throw the file right through the door onto the table of the office. That has been narrated in the diary of Dr Ambedkar. So, that was the 1920's. But, even today that this is an enigma. Now, no amount of legislation would be able to remove that.

Government has made the Constitution very clear. Seats in the legislative assemblies, seats in the national parliament, a certain proportion, are to be reserved for scheduled caste and scheduled tribes. That is there and also government jobs are

to be reserved for them. It is on this where hundreds of people died recently in the north of India because they did not want those privileges to be taken off from their ranks and given to them.

But, I think it will take another hundred years for people to get over this, because India practically is a rural country. More than 80% of the population lives in the villages. So, you are tied to the family. You are tied to your tradition. So, an individual's parents would not like him to marry a girl whom they do not know. Most of the marriages are arranged marriages. They go where the hearts go and then well, you, if you break that thing you are out of society. So long as the traditional stronghold is there on the individual likes and dislikes. Well, discrimination would also, but then if it comes to the attentions of the government, very serious action is taken. There is no doubt about that.

Mr Andrew I apologise if I missed it earlier on. Does India in its Constitution have a Bill of Rights?

Prof Johnson Yes it does.

Mr Andrew And how does that impact on some of the things you have talked about including the language element, not just the caste elements? I mean just in a broader sense.

Prof Johnson Yes we have it. In part three of the constitution an exhaustive list which is called fundamental rights, which prohibits discrimination on grounds of sex or place of birth or caste or religion or language. That is very clear there and any violation of that provision is punishable by the court of law and then every provincial government has also created a cell not only at the provincial capital, but also at every district headquarters to deal with offenses which relate to the abuse of this discrimination.

Supposing it comes to know that in a village different vessels were given for the consumption of tea by the scheduled caste people, then action can be taken, very serious action can be taken by the village. So, that is the only way in which, you know, these people can be given protection. But, then the entire list of fundamental rights would become inoperative when the country comes under the emergency regulations.

If a national emergency were to be declared, then this would become inoperative and originally the right to property was a fundamental right. But, when Mrs Gandhi was in power, she

wanted to nationalise the banks and also abolish the privy process that was being paid to the kings and princes. So, the right to property was deleted from the fundamental rights and now it is a non justiciable right.

So, parliament can do that also. On this score there has been a running controversy between the supreme court and the union parliament as to who is superior, because you cannot go by the British pattern of parliamentary sovereignty. We cannot go by the American standard of there, the constitution is what the supreme court says. We cannot go by that also. So, we are to follow a middle path.

So, now the position is that, that there are seven basic principles which cannot be amended by the regular amending procedure. That is the obduracy of the supreme court and one of the basic principles of the constitution is, the form of government, the parliamentary system and also judicial review. That is the position today. So, the, I think the, hats off, I would say, to the supreme court of India. On a number of occasions I remember one it was reported in the press an elderly poor lady on a post card she wrote a letter to the chief justice of India asking for some redress of a particular grievance. You know, the chief justice took it as a writ petition and looked at the case and they ordered her justice. That something saluted I should say.

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Through you, Chairperson. I just want to know, Prof Johnson mentioned what he called 14 demands for autonomy and he said finance is the root. One of the key issues. What are the other reasons? Would you mind, what are some of the key or main reasons for demanding or asking for autonomy?

Prof Johnson

Well, everything starts from finance. That is why I said it is one of the key issues. The other is, you know the social, political and economic discrimination. It begins from that. So, for example, a particular tribe, doesn't get the benefits which it should get for the past 10 or 15 years. Then the demands of that particular tribes are articulated by an organisation which includes not really the financial backwardness of that particular tribe but then related to that, the other consequential developments to which that particular tribe was subjected.

So, there comes you know, discrimination because if you don't get money, you don't get any appropriate funds. No schools. No hospitals. No other public service, because we don't have the social security system in our country. Yes, a limited social security system is available to the government

employees only, not for all the people.

So, only through the allowances that has come through the government can certain very backward tribes survive and develop. So, the development is calculated in terms of how much intake that communities had so far as finances are concerned. If that fails then all other things fail. So, they think that we are being exploited. We are totally denied our due share and that is how the argument goes.

Dr Johnson

Thank you, Madam Chair. I would like to say how much I enjoyed what you say (Prof Johnson). On the question of finances, could I add a little footnote to it. We talk generally speaking, and when in constitutional law, constitutional discussions, about the division of competencies, is about the division of revenues.

We don't talk about power over allocation of funds and having been in the finance department for a long long time, I find this rather curious, because it would be entirely possible, it would be entirely possible for a national government to tie so much of the funds that it gives to provinces through conditional grants, it would be possible to tie so much of the funds that it gives to a province that say through the German system through framework and detailed framework legislation. It could tie so much of the funds that go through to the provinces through a very broad, section 126, it could tie so much of the money that the provinces would virtually have no power left to allocate funds and it is, this is what lies at the root I think of a very important generalisation you made that applies in a different measure in my country and that is for as I can talk about bonds of unity and the way in which I did, it would also be possible for me to argue the Quebec que case that national unity or the adherence to a nation depends on more autonomy for the province which is what you are saying.

Prof Johnson

That is right.

Dr Johnson

And if the ratio issues are so fundamental and we see (...) then you face and this is exactly what we are facing in Canada. One group that is saying more autonomy and then the fear of Quebec separation will disappear and another group (...) talking about the bonds of nation that are almost the reverse and it is one of the paradoxes of two tier government.

Prof Johnson

In addition to what Prof has said just now and because if you can accede to the demand of a particular group other greater autonomy or for a greater share in the gross proceed then, you

know, nothing prevents other groups from coming forth with a fresh set of demands at a later date and there will be no end that thing and so the best way to get through this kind of development feature, feature development is that to think very seriously as to what would be the repercussions if proper financial arrangements are not made for apportioning revenue between the national government and the provinces, because, you know, they should not think that they are being left out.

I will give you an example. One state in Kala(?) one state in south in India called Kala(?) which I would say, it contributes number, one, so far as foreign exchange is concerned, because most of the Kilians(?) are working in the Gulf areas. So, their remittances come in dollars and the dinars and the what not. That runs into millions and millions of rupees a month, millions of dollars a month.

Second, they also have cash crop exports, spices, pepper, caramel, all these things and also fish products. So, that particular state is the number one foreign exchange earner and five years back the government, non-congress government, which was also in power in that particular state said, since we are contributing so much to the national income and since we are getting only a pittance by grants or resource allocation, we are not satisfied with our position.

So, we should also be given their share of the proceeds which comes into India because of our efforts. But that is a far fetched demand. That is why the government, you know, did not take cognisance of that. If that were to come up, then if you think of what are the items of taxation, which should be brought into the devisable pool. All elastic sources cannot be put in there, because the responsibility of the national government would be more, whereas in turn with the future exigencies of time and changes of circumstances, certainly more responsibilities may be given to the provinces and the subordinate local bodies.

So, to be responsible and responsive to the popular needs then appropriate provision should be made at the time of the Constitutional framing itself.

Mr Gordhan

I actually want to address the theme that both Prof Johnson's have been addressing in the last few minutes, but also ask for them to give us advise on the basis of what they have just said.

I think South Africa is very similar to both the countries in one

sense and that is the diversity of population, language on the one hand and socio-economic factors on the other hand and also the economic development of the different parts of this country is like both your countries as well.

But, as you both correctly point out, you need a balance between sustaining a nation and indeed building nationhood on the one hand and allowing for, in a sense, sufficient control at a local level on the other hand. But both of you are also, I think, indicating the importance of pragmatism/flexibility the lack of rigidity et cetera. What are the implications of these lessons for the manner in which both national and provincial powers are entrenched in the constitution and what are the implications for the inter governmental relations on the basis of the experiences in both your countries?

Mr Cronje

Ja, I thought that Dr Johnson slightly misunderstood the Prof Johnson, because when I read correctly when the professor used the example of the small Buddhist minority, he was pleading that national government should in fact have control over the way that national funds reach on the ground, because in that occasion the Muslim, no the Buddhist minority felt that they were not treated fairly and they blamed the central government when in fact it was the, let us say the Muslim majority inside there. So, I thought there was a slight misunderstanding.

Your second example you did use the province as the base, but it would just seem to me that, that there was some sort of a plea for control over how central government funding is spent at the provincial level, because that is where minorities can be really appear as minorities visa viz a majority in the province and it is from those majorities that the quest for further fragmentation will in fact take place.

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Can I just, it is a small one, to ... in other words we are talking here, if I heard correctly of is it necessary to arrange what one may call assured revenues to whatever the target is. If it is local government, for example, in a case where this is about local government development or if it is about education, if the institution that deal with that, you have a mechanism to ensure that, that actually happens and assured arrangements that, that actually happens. Is this what we are talking about?

Prof Johnson

An answer for his question first. There is nothing wrong in making provision in the Constitution regarding the sharing of powers between the national government and the provincial governments, provided the, care is taken not to put any

conditions as to how the national over provincial governments are to exercise their powers, because there are a number of ambiguous provisions in our constitution under which the national government takes a shelter, saying that it is in the national interest. It is a very ambiguous term. What is in the national interest or what is in the public interest.

So, taking shelter behind these, you know, the national government applies certain yardsticks to control the state governments, in spite of very clear provision in the Constitution and so I would say, my submission would be that only on the extreme circumstances should the national government have the power of having any say in provincial matters, when matters actually go out of control under normal circumstances, whatever may be, the party that is in power at the national level or the provincial level, the national government should not interfere in the working of the provincial government, because whether your provincial government works according to the constitution or not is for the courts to decide not for an executive. So, I think the we are to be rather clear about it.

I think regarding your question Sir, I think, I failed in explaining on one particular segment. That is I said, we have in India 25 states and seven union territories. The union territories are small administrative units, administrative units which do not enjoy the status of a full state. They are only lieutenant governor, who is a little less in status than a fully fleshed governor. Okay, but then they get more funds. They have special grants in aid which comes from the national government directly to them. For certain administrative reasons they are there like that.

Now, the area I mentioned there Ladarce(?) with its capital Ley(?) The people in Ladarce(?), who are mostly Buddhist, they demand union territory status, so that they would get all the members directly from the national government. So, that is, that is what they want. I am trying, would you mind repeating your question.

Dr Johnson

The observation made above, what the two of us were saying towards the end of the presentation. I was essentially trying to describe the Canadian situation frankly. You see, on the one hand a person like me says the bonds of nationhood, as I see them, are absolutely fundamental to nationhood in my country. I have to take recognition, however, of the fact that there is a group in Quebec, a linguistic group, a racial group, which is convinced by its leaders, rightly or wrongly, that the tighter the federation gets or threatens to get, the more they would have,

the more likely they would be to secede and if all comes through to, to over simplify, it comes through the allocation of funds. That is why we have had such a terrible row continuously about the national government's power to spend, which I supported in the constitutional debates.

But, on the other hand, to be realistic about it and factual about it, the other side of the coin is that if we push that too far, if we tried to push that further, for example in today's climate, if we tried to push that further or push it very far so that the latitude of the government of Quebec to allocate funds according to its priorities and based on its sense of its own distinctiveness then they say we will secede and that is to me the ultimate paradox of federalism or two tier government. That is all I was trying to say.

Dr Johnson.

We now ask Prof Davis just to give us an overview of today's workshop.

Prof Davis

Madam Chair, I will be five minutes. We have run over time. We have just, I mean, in a way the workshop was initially convened to deal with inter governmental mechanisms and to supplement the framework which have been prepared by Prof Majola, but which effectively, in fairness, you know, has been workshopped amongst the various advisors because that is going to be amongst the submissions that we will have to consider.

But, it is quite clear that you can't look at inter-governmental relations on its own in a sense that is exactly what this seminar has revealed and maybe I can just make one or two fundamental points and then leave it at that.

But Prof Johnson's point with regard to the long term nature of the constitution, I think, is a terribly important point. In other words that you don't draft a constitution on the basis of the political reality of now saying well one political party is going to win the next election and therefore we need to safeguard ourselves against that. But, I think, bearing that in mind, it is a dreadfully important point, when you consider the long term nature of the final constitution of South Africa.

I think the second point that comes out with regard to this workshop is not about inter governmental relations, although it is indirectly and perhaps even directly related thereto, which is the question of fiscal relations and I noticed I got a memorandum from Mr Andrew on behalf of the Core Group that there is a request to have a workshop on fiscal relations

and I would suggest that after this particular workshop, hopefully members will realise just how desperately important that is. But both our experts, Johnson have in fact told us and are absolutely right just how important tax powers actually are and I think we should bear that in mind.

What relates out of that, of course, is a formal mechanism. One of the formal mechanisms for inter-governmental relations which, of course, is how you equalise what form of equalisation does one want? What form of mechanism does one want in relation to tax powers and, of course, that does in fact impact directly upon our topic now of inter-governmental mechanisms? Might I just make one point about this which is, and I don't know how true it is, but I understand from at least three different provincial legislatures or provincial MP's or whatever MEP's (MPL's) they tell me, in three different provinces, that the fiscal and financial commission was not in fact consulted in relation to the various allocations of the budget.

Prof Davis

Now, I don't know whether that is true because I haven't had a chance to talk to either Minister Liebenberg or Deputy Minister Erwin or indeed the FFC. But, indeed if it, that is true then it is a remarkable, it is a remarkable phenomenon and I think we need to ask ourselves whether this is the appropriate body or whether we want something else or nothing at all in relation to that and in fact it reveals the question to what extent are formal bodies really the order of the day as opposed to informal, which is something which we have been asked to consider with regard to this issue. That is do we want to write things into our constitution or do we want to have informal structures which grow over time and perhaps at a later point can be formulated into the constitution with regard to inter state co-ordination?

The next point which I want to make and which is really needs the final one, which is the question that I think one is to draw an distinction, I think Prof Majola did that. I think Prof du Toit mentioned that and I think it emanates out of both our expert's views, which is the distinction in legislative and executive co-ordination.

Now, to give you that one example. There was a lot of discussion earlier on Dr Johnson mentioned in inadequacies of the Canadian Senate and Prof Majola spoke at some length also about the senate and rightly so, because I think with regard to the senate, there is no question about it that it could play an enormously important role in the question of legislative co-

ordination, of course, I leave the question open as to whether it can perform that role in so far as executive is concerned, because as I took Dr Johnson to say and I mean I would agree with that, that it will be difficult to see that body dealing with executive matters in the same way as it could legislative oversight and I think it is important to take these two considerations into account and therefore if the senate is the correct body with regard to the legislature, it is not for me to second guess Prof du Toit's view as to whether in fact all of you are now coming together with a cosy relationship as to whether the senate is indeed the body and not only that's obviously for the parties to debate, not me.

But, clearly, if that is so, then in fact we need to talk at some length in this theme committee and together the theme committee too about the senate in regard to that issue and then turn our attention to the second component. That is the executive and in relation to the executive, the question executive co-ordination, the question is do we want a formal structure or not. I was interested by Dr, sorry, Prof Johnson's point that there was a interstate council proposed in our constitution, that I knew, was that it didn't operate and the question therefore, I mean, which we could perhaps debate, just chat informally about this and why not?

But, obviously, the question is do we want that form of formal structure or do we want and I find very fascinating the descriptions of Dr Johnson with regard to the Canadian model, namely the way in which the informal structures have operated and I would hope that members will take that into account when we actually look at our submissions with regard to that as a superior model.

The final point, perhaps I would like to just make in relation to executive structure, it applies to legislative as well, I suppose, in relation to both, is the question of the ultimate, the ultimate sanction, the ultimate arbiter. Suggestion has been made by, in relation to India and in relation to Canada with regard to the role of the supreme court and obviously, as we know, the constitutional court in South Africa does have that role.

The real issue, I suppose, I want to ask is this if you do away with any kind of informal structure, formal structures. If you say we will go the informal route but the final residual power will relate to the constitutional court with regard to executive. We will go the formal route with regard to the senate or a similar body for, in relation to legislative co-ordination, but at the end of the day we will also leave it to the constitutional

court.

The question, I suppose, is this, do we want all these issues to finally land up in the court or is there some other body or some other informal or formal mechanism which can play a mediating role, rather than just to leave to us lawyers to make a lot of money whilst the, whilst the debate these matters in the Constitutional Court and that issue therefore, I think, becomes an important final consideration.

Now, I deliberately tried to focus in this brief summary on matters relating to inter governmental mechanisms, because as I understand, that is the block that has to be dealt with. But, I want to make the point in thanking both our experts very much for helping all of us re-focus our ideas, is that clearly this issue relates to two fundamental points. One, the body of work that we have just about completed, namely national and provincial competency and I don't want to get into that, but I think there has been much that we heard today which is relevant thereto and the body of work that we are going to come to which is taxed passed and just one final thought on that, perhaps which we can focus our attention on, is not only the question of the body which maybe deals with equalisation, but what powers we want to give to provinces in relation to taxation because, as we now know, under our present constitution 155 et al, that provinces have actually limited powers of taxation and, of course, what we need to ponder is whether that is appropriate for South Africa where more than 90% of the taxation is collected centrally and where in fact we are enormously depended on those forms of tax for our tax collections, particularly indirect taxation, VAT which administratively it does not seem to me, could be collected in five or six different way by different provinces.

But, that, of course, is something which I leave. It is a provocative comment for you to think about so that we can debate that in two weeks time when we do in fact, I see Mr Andrew looking at me wryly, when we debate these particular issues and ...

Prof Davis

Well, if you have solved it, it is very good because we haven't on the tax commission, but you might have been able to. But, having said that, both of the issues which I do think flow out of that and I just, Madam Chair, that it is very useful to have actually had this workshop to debate these matters. Thank you.

Chairperson

Thank you Prof Davis. We have come to the end of our

workshop and may I on behalf of the Constitutional Committee members here express our sincere thanks to Dr Johnson, Prof Johnson, Prof Majola, Prof Basson, Prof Davis it is a really, we really appreciate your input. Thank you very much.

Please note: due to time constraints, this document has not been fully edited.2