

2/4/2/1/10/19

Good transcription - but
a few corrections to
names to be made. ✓

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CONFERENCE AND LANGUAGE SERVICES		

THEME COMMITTEE	2
DATE OF MEETING	02/08/95
NUMBER OF TAPES	7
CONTENT OF ENVELOPE	
1) PRINT OUT	✓
2) NOTES	✓
3) TAPES	
4) COMPUTER DISK	✓

↳ PROVIDED NEW
DISK AS DISK WAS
NOT IN ENVELOPE

Theme Committee 2 - 2 August 1996
Tape 1

NOTES

4308:
Who is speaker?? Professor Steytler???

4335:
Court ??? presides

4411:
Speaker seizes/ceases???, s or f there ???

4499:
to our drivers???. Why

4533:
Is it Prof. Steytler???

Theme Committee 2 - 2 August 1996

Tape 1

Chairperson

You are all welcome to the first meeting of the Theme Committees and everybody's looking very well, healthy, fresh, moderated. We've got a lot of work ahead of us to do so I would prefer that we start directly with our deliberations. Just before we get to the draft formulations, we have the Core Group report which has been circulated to you. Number 1, we will have this Theme Committee today to consider mainly the draft formulation from the Senate, one on the National Assembly, and the National Executive. And 2, that the Senate report will then stand over until ANC gives a further submission. And that 3, on Monday we will then start looking at the electoral system. 4, that on the 14th of this month the traditional leaders report shall have been completed by the ad hoc committee and in a few weeks' time the first terminations report also shall have been completed, and that the Freedom Front will also like to make a further submission in this regard. Let's write it from the Core Group meeting which we had on Monday. So, today we have only one item really on our agenda. That is to discuss the draft formulation. I will be very glad if we can complete this today so that Administration can then print and prepare for submission to the Constitutional Committee on Friday this week. We need to further report to the CC Friday. Without any waste of time, I will then ask Professor Steytler to lead us through the draft formulation. Over to you.

Prof. Steytler

Thank you, Mr Chairman. We start on page 2. I think I will just then go section by section and point out any issues

that may have arisen since the last discussion and people can obviously also then comment on that. Just by way of introduction, just a few remarks on how the draft was prepared. One of the technical advisers prepared a draft. It was then circulated amongst us and we made further comments. It was then forwarded to the law advisers. A new draft was then prepared and the technical advisers then commented on it and we had discussions yesterday and effected some changes to it. There were also issues which the law advisers raised independently and I will indicate these to you and also the responses thereto. Mr Grové, the State Law Adviser, is here and he can also take questions and comment where necessary. If we then look at the first report on the National Assembly. Section 1 there is blank, which indicates that the definition of the legislative power of the National Assembly would depend on the deliberations of Theme Committee 3 on the powers of the national government as opposed to the provincial legislatures. Section 2, the parliament can sit as the National Assembly, that again depends on the Senate and the Second Chamber so we can't have much there. Section 3, the National Assembly consists of so many members; again question of numbers permitted.

Chairperson

Thank you, Professor Steytler. Mr Grové, you are most welcome and the members of the CPG also, you are most welcome to this meeting. That is phase 1, that deals with Section 1, Section 2 and Section 3. Any comments from the members? Comments and questions, discussions? Mr Rabie?

Mr Rabie

What is the question on 3? Seeing that there is a

subcommittee established by the CC, are we going to deal with the outstanding matters here in this Theme Committee and are we going to deal with those matters that we need to revisit in this Theme Committee or are we going to refer it to the subcommittee?

Chairperson Who are you asking, me?!

Mr Rabie You can try that one!

Chairperson Do we have an answer for Mr Rabie there? Mr Groenewald?

Mr Groenewald Chairperson, I think this is a contentious issue and it will probably go to the subcommittee for further deliberation. I don't know if there is any purpose whatsoever of this Theme Committee coming back to this because there are strongly divided ideas on the side of the National Assembly.

Chairperson That's how Mr Groenewald feels. I don't know whether it satisfies you. Mr Eglin?

Mr Eglin Chairperson, I think we should make our own report. If there is a subcommittee making a report direct to the CC, well then that's fine, but I don't think a report of this Theme Committee should be prejudiced one way or the other by the report of the subcommittee.

Mr Rabie OK. We are reporting now, there's contention on the size of the National Assembly. The question I am basically asking: Are we going to debate it again here? And those matters that need to be revisited? Or are we going to submit our report and leave it to the subcommittee to deal with that

and then they report to the CC.

Chairperson Dr Pahad?

Dr Pahad? Mr Chair, I think what should happen is that we should go through this report. If it is acceptable to us, we then submit it to the Constitutional Committee who will then decide what's best to do with it. We've been through this thing. We've discussed the matter. I can't see that a great deal more is going to be said by us which is going to help change our minds insofar as the issues that are contentious and I just feel that we should proceed now and let the Constitutional Committee deal with it. The Management Committee can look at it and see how best to deal with it. If they want to refer it back to the Theme Committee, that's fine. If they want to refer it to the subcommittee, that's fine. If they want to deal with it themselves, that's fine. I think that's the way we should now proceed. We should try to adopt this report insofar as it says where there's contention and everything else, and just submit it to them.

Chairperson Mr Groenewald?

Mr Groenewald Chairperson, in the supplementary report, 24.2, on page 14, all the opinions of the different political parties are set out on this issue and I suggest that, that should be with the reportage we have in front of us. We should submit comments as they are, have these tabulated, in that particular document, page 14 of 24.2

Chairperson Of course, that will be done. Thank you very much. Let's proceed. Any comment on page 1. Mr Eglin?

Mr Eglin

On the point that Mr Groenewald makes. I am assuming that... A draft framework of the Constitution comes from us, but added to that is in fact a report of the views of the various parties on these issues. It doesn't just go in this form. As an annexure to that the CC will have a copy of the parties' views on each of these issues. I'm assuming that, that would happen in any case. There's one point I've got, this question on legislative power. I think it's correct that Theme Committee 3 is looking through what I call "what powers are going to be exercised at the various levels", but I am assuming... We have talked of the National Assembly, and the whole of this theme is on the basis that this is the body which will make legislative decisions at national level. It isn't just a blank. Otherwise we will be wasting our time on it because this is the body that's going to choose the President, is going to make the laws, and I don't know why we shouldn't have in there the thing that this is in fact the legislative body at national level. How we then separate national and regional, and even local, government is a matter for Theme Committee 3. So I would not have just left it blank. I would have put something in there to indicate that this is the body which makes laws at national level.

Mr Groenewald

The question was there simply difficulties with the formulation because an earlier draft had "the legislative power at national level" or something to that effect. Clearly one can indicate it as we did indicate it with the executive powers. It said there "the powers of the executive at national level" and we were not happy with that phrasing, but it clearly indicates that there is a limited competency of the legislature and the executive and one can have drafts like that.

Dr Pahad I thought Mr Eglin was quite right. In the Interim Constitution it just says "the legislative authority of the Republic shall, subject to this Constitution, vest in parliament which shall have the power to make laws for the Republic in accordance with this Constitution". We need to say that at least because otherwise it means the National Assembly, it would seem, has no powers at all. Even if we use that formulation, it should be quite okay.

Chairperson Mr Rabie?

Mr Rabie Moreover, Chair, in our first report when we dealt with the separation of powers we reported that parliament shall be the "supreme legislative body on a national level". It was reported like that in our first report.

Chairperson Thank you. Mr Eglin?

Mr Eglin ...this draft in a sense has a degree of completeness, include a provision such as the one in the Interim Constitution, but as a footnote, say that this is subject to the further report from Theme Committee 3 in respect of any matters of detail. So that it takes into account that this is our view, but it is subject to a report from Theme Committee 3.

Chairperson Agreed on that? Thank you. OK. If no comment or questions on page 1, then page 2. Can we move to page 3? Professor Steytler?

Prof. Steytler Section 4, National Elections there, dependent on what would be discussed under the electoral system and we will

deal with that on Monday so that was left blank because we haven't discussed that. Then on Section 5, duration of the National Assembly, subsection 1, five-year term, unless it's dissolved beforehand. Then subsection 1, how is it dissolved before a five-year term? And there it said only after a vote of no confidence in the cabinet passed by the National Assembly. Footnote there. The law adviser suggested that it may be considered whether the President should have the power in his discretion to dissolve parliament before, or any time, during the five-year period. I suggested to him that it was in fact the opinion of this committee that the term would be fixed subject only to the one possibility of the dissolution of parliament after a motion of no confidence. So it has been footnoted there "the other possibility". Then the subparagraph 3, of Subsection 3, deals with the continuity after the dissolution, National Assembly continues until a new parliament has been elected and functioning. Or just functions until the day before the national election.

Chairperson

Mr Beyers

Mr Beyers

Chairman, I want to react to the footnote that there is uncertainty as to whether the State President should have the prerogative as in other democratic jurisdictions to dissolve the National Assembly at any time before the expiry of the term. I think that we have consensus that the period of four or five years was a fixed period and all parties agreed that there would be no jurisdiction to the State President to dissolve parliament before its term has been completed. So I can't remember whether... It was not contentious. It was agreed upon actually, as I remember it.

All parties agreed that there would be a fixed period and so, to my mind, there's no uncertainty. It is certain to my mind that we have agreed it will be a fixed period.

Chairperson Mr Hendrickse and then Mr Eglin.

Mr Hendrickse Thank you, Mr Chairperson. With regard to 5.2, the question of no confidence. You will recall we had quite a discussion on it. In other parts of the report there are also references to this question of no confidence and I want, Mr Chairperson, if it might not suit us if we left that particular clause, let it stand over until we got to the end of the report of the second part of the report, number 20, where we are dealing with the question of votes of no confidence. And then, depending on what we decide there, make everything else consequential.

Chairperson Mr Eglin.

Mr Eglin Mr Chairperson, I've got three issues. I'll just deal with the one that Mr Hendrickse raised. I'm concerned that 5.2 as it is, is a negative. "It shall only be dissolved", I think you have in Constitutions when you can be dissolved. So I think it is correct, you should have a clause somewhere under what conditions it can be dissolved, but you don't put in the Constitution what you can't do. I would think that we should look at that clause as to whether it fits in there correctly or not. That's the only point. The second one is, a phrase in 5.1 which is borrowed from the present Constitution although not exactly that "the National Assembly as constituted in terms of a general election shall continue for five years". How does that deal with the

question of the filling of vacancies during the course of the five years? Because if you say it's as constituted in terms of a general election, I would presume that it means the people who are elected at the general election. And the question is, is it correct to say this... How does this deal with by-elections and the filling of vacancies in the terms it's cast here? The last point, is a point raised by Mr Beyers, and I don't know where this comes from: "there's uncertainty as to whether the State President should have prerogatives, as in other democratic jurisdictions, to dissolve the National Assembly at any time." I haven't got all the Constitutions, but I have checked on six of them and I cannot find a Constitution where a State President or a President, other than through a vote of no confidence, or other than on the advice of his cabinet, can summarily dissolve a parliament. I actually think this is an undemocratic process, but even more so, if this Constitution is going to be adopted, the State President can be dismissed by parliament. And here one is saying that the State President can quickly get in and he can dismiss parliament. I think it is quite wrong. I know of no... You say "other democratic jurisdictions." Can we have an illustration of where a state or a president can, say, arbitrarily dismiss parliament? Namibia not, the French not, the Americans not, the Germans not and I don't know of anywhere where a President is supreme in the sense that without a vote of no confidence or without the request of the cabinet, he, on his own initiative, can just dismiss parliament. So I would think it is not a matter for dispute. Under this Constitution the State President is elected by parliament and he is responsible to parliament and I think it would be quite wrong to give him the authority to dismiss the very body to

which he has to account. And I think that's a new issue which has been raised and it isn't appropriate to this particular Constitution.

Chairperson Can we just get reaction before... Is it contentious? Right. Then I'll allow the technical advisers to answer what Mr Beyers raised, Peter raised and Mr Eglin.

Mr Rabie I also don't understand how they come to the comment of six because in our first report, page 4, block 9, we agreed "a fixed term unless dissolved as a result of no confidence." True? "May only be dissolved by the State President following a vote of no confidence." So I don't know where the uncertainty comes from there. The only thing that was not clear is that the number of years should be revisited.

Chairperson Mr Steytler or Mr Grové, any one of you.

Mr Steytler I totally agree with Mr Beyers, Mr Eglin. That was the report and, as I indicated when I spoke first, that was inserted by the law advisers and we actually discussed it yesterday and disagreed on that. But Mr Grové here will be able to say why he in fact added it in.

Mr Grové Thank you, Chairperson. I just want to deal with the other point raised by Mr Eglin in 5.1, that's the National Assembly as constituted in terms of a general election and how this provision is going to impact on the filling of vacancies and so on. There will be provisions in the Constitution dealing exactly with vacancies or the filling of vacancies and I think the two provisions must be read together so this is... I don't think one can take this literally, that the National Assembly,

as constituted in terms of a general election, shall continue for the full term, as constituted. Read together with the other provision dealing with vacancies, it becomes very clear that you must read them together to get the real intention here. The other point, Chairperson, if that is the case, we can simply remove the footnote. We didn't try to say here that there is uncertainty in the Theme Committee. I, for instance, had an uncertainty because a particular government may require a new mandate, there may be serious things that happened in the country and so on and now you have to wait for the full term to expire before you can have a new election. Or otherwise, you have to force, in a very unnatural way, a motion of no confidence in the cabinet so to enable the government to go back to the electorate, as happened in Germany a while ago. But if the committee is fixed on this recommendation, then I simply say remove the footnote.

Chairperson

Are we in favour of removing the footnote? OK.

Mr Eglin

...what two issues? I mean if you take... At the moment there shall only be... parliament will only be dissolved if there is a vote of no confidence. It would be correct to say in Germany they actually contrived a vote of no confidence in order to dissolve parliament. I don't know. The Namibian Constitution goes further and says "the President can dissolve parliament at the request of the cabinet, that it is unable to govern the country effectively." In other words, it indicates a mandate situation. So that would be a more flexible one, although I still favour the no confidence. The other one which has not been canvassed, but has cropped up frequently, should it actually only be a fixed term of

suggesting that when we come to the end of this report, Section 20, dealing with votes of no confidence, maybe we can deal with the three or four suggestions there and then make any other references to no confidence consequential.

Chairperson

OK. Can we then leave it until we come to the end of the report? We'll revisit that. Are you happy with that? OK. Thanks. Page 4.

???

Section 6 is the Speaker and the Deputy Speaker. This is pretty straightforward. How are they elected? By the National Assembly. The President of the Constitutional Court ??? presides over the election. And we've used consistently the President of the Constitutional Court as the presiding officer in officiating elections within the National Assembly and the national executive. Then, procedure. How it shall be elected? There is a schedule in the present Constitution which sets it out very clearly and one may just want to re-incorporate that procedure. The powers set out by the Constitution and the law, including the rule of the National Assembly. 5, the Speaker and Deputy Speaker ??? ??? there to hold office when he resigns or ceases to be a member of the National Assembly and can be removed by the National Assembly by a vote.

Chairperson

Comments and questions? Mr Rabie?

Mr Rabie

Perhaps I don't remember correctly, but can somebody just indicate to me when was the President of the Constitutional Court canvassed as the presiding officer? I couldn't pick it up in our documentation at all.

Chairperson Mr Mlangeni?

Mr Mlangeni Perhaps the question should be to our ??? Why do you prefer the President of the Constitutional Court and not the Chief Justice? What are the reasons.

Prof. Steytler Mr Chairman, the first question. It was what always... In the debates I don't think we had clarity on that, but it was always suggested there that there are two possibilities. The argument why to have the President of the Constitutional Court is that in all matters dealing with the Constitution, it should be the body devoted solely to this document and that is Constitutional Court as opposed to the Chief Justice which, in terms of even perhaps in the Final Constitution, will not have a constitutional duty or pronouncing on the constitutionality of any legislation. And apparently the only reason why in the present Constitution the Chief Justice is preferred, was at the time of the election where the President had to be sworn in, there was simply no President of the Constitutional Court. That came subsequently and it may have been that the desire was that the highest judicial official dealing with the Constitution should also preside over constitutional matters, but that is open to this committee.

Chairperson Mr Groenewald?

Mr Groenewald Chairperson, I think there are enormous implications for making such a decision. It practically means that we are saying that the President of the Constitutional Court is the top judge in the country, that is what we are basically saying. And I don't think we can say that. We are giving

him a status which... I don't know who is supposed to be the senior judge and really, I don't think that this Theme Committee at any state suggested that the President of the Constitutional Court should be such a person. So, my personal feeling is that we should keep it at the Chief Justice.

Chairperson Dr Pahad?

Dr Pahad I don't think this should detain us. I think what should happen is that there should be a discussion, people from Theme Committee 5 – is it Theme Committee 5? – just looking at this whole judicial thing, and then come back to it. Don't make an issue out of it. It doesn't matter who the hell is going to swear the next parliament in, but I mean if Theme Committee 5 has a proposal that would impact upon what we are doing then obviously this needs to be a discussion. So I would suggest we leave it as Chief Justice now and put the footnote that this issue should then be discussed with Theme Committee 5. And we then ask our technical experts to have a discussion with their counterparts and see what should happen.

Chairperson I agree on that. Thank you. Can we then move to page 5?
Professor Steytler?

Prof. Steytler The qualifications of the members of the National Assembly

(end of tape 1)

Theme Committee 2 - 2 August 1996
Tape 2

NOTES

391:
called/courts sits or votes???

0467:
Who is speaker???

1277:
he may be a ??? person

1501:
Who is speaker? Just to fill??? up

1996:
Who is speaker???

2651:
Who is speaker?

2977:
Who is speaker???

3136:
Who is speaker???

3480:
Who is speaker???

3734:
the ??? these are a seat???

3929:
Is it Mr Mshana???

3957:
requires vacation of ??? after ??? ???

3981:
parliament recirculation???

4660:
Who is speaker???. Is it Mr Grové?

4694:
Who is speaker???

Theme Committee 2 - 2 August 1996

Tape 2

Prof. Steytler ...those matters there, particularly 2, disqualified from being members, unrehabilitated insolvents, persons of unsound mind, convictions. There is footnoted the difficulties in trying to find out which offences may be applicable, and which not. We will only count it from 27 April and subsequent to that date or also prior to that. If you look at the next page, is when is a person regarded as being convicted and there is no appeal pending? Persons who are members of the Senate which, I think, should probably be deleted because we don't know what that means. It may be that there is uncertainty as to who the members of the Senate will be. Then, persons holding office of profit under the Republic. Then, excluding a number of persons there, the question has been raised: What about traditional leaders when they are paid by the central government? Are they holding the office of profit under the Republic? And then disqualification. The penalties if persons who are disqualified sit and vote. ??? sits or votes.

Chairperson Right, we have been dealing with pages 5 and 6 together. Section 7. Comments and questions? Discussion?

??? Two quick questions. The question of "sentenced to more than 12 months". Is there any particular reason for that 12 months, or is it just an arbitrary number of months? I assume that the five-year period is in terms of the life or a term of parliament. Is that the connection for five years? Why are those two figures used: five years and 12 months, in 7(c)? If he has been sentenced to more than 12 months'

imprisonment without the option of a fine, why not six months or 24 months? And then the other one is, in terms of the footnote: that a person, after a period of five years, may become eligible again.

Chairperson Professor Steytler?

Prof. Steytler Well, clearly it is an arbitrary... whether it's twelve months of ten months. I think it is more a tradition coming from the old legislation about trying to set a time limit and the five years is again arbitrary, but trying to set a time when a person can again be requalified to do so and not impose a blanket permanent ban on it. I think it probably comes from the present Constitution. Perhaps Mr Grové could enlighten us.

Mr Grové Chairperson, yes, the twelve months comes from the Interim Constitution, but there was no need to include the five-year period here because the Interim Constitution – I am speaking of the Interim Constitution – can only endure for a maximum period of five years, so that was the reason why it was excluded in the Interim Constitution. But if you go back to the older constitutions, it's always been the case that this is not a disqualification for life. It expires after a period of x number of years, but at this stage I can say that the five years is simply an... It is not a fixed recommendation, but I think the principle here is what the committee should decide is whether a disqualification shall endure for life or not. And, if not, to perhaps determine a period when the disqualification lapses.

Chairperson The matter is open for discussion. You want to determine

that now? The question of five years. Mr Mlangeni?

Mr Mlangeni

The period of five years sounds reasonable. It is inhuman to bar a person from holding a public office for the rest of his life simply because he was sentenced to a term of imprisonment which lasted more than 12 months without the option of a fine. It sounds human to me, I don't know how you feel about it, and reasonable that even the child abusers who go about raping women and children, they could be rehabilitated. A sentence of two years imprisonment for committing a serious crime, while in prison he becomes rehabilitated somehow or other. You may be a ??? person, somebody who could be useful to society, the community in future, in spite of your previous offence you committed. But I think to say we ban that person from becoming a Member of Parliament for the rest of his life, is inhuman. Five years to me is reasonable. Five years after his release, he could stand, or she could stand for public office. To me five years is very reasonable. Thank you.

Chairperson

Some more comments? Mr Hendrickse?

Mr Hendrickse

Yes. I think it's fair, we don't have a problem with the principle. I think maybe the question of time factor could be discussed again at the next stage. I think the principle itself that, that person must not be disqualified for life is acceptable to us.

Chairperson

So we leave the question of that time for later discussion. OK. You all agree with that?

???

Just to ??? up. I don't know whether we did answer the

question of Mr Rabie, when he said when these questions come back to us, do we have time to discuss them again? Was that question answered?

Chairperson Yes, it was answered.

??? What was the answer?

Chairperson The answer was that it was answered! (much laughter) I won't try to explain that. Let's discuss these issues that we've answered today and then we approve of this report. We send it over to the Constitutional Committee. And then the Constitutional Committee, out of its deliberation, will then give direction which matters should be referred to the Theme Committee and which matters will be referred to the Subcommittee on these issue. So that was the answer.

Mr Rabie I think that there is no principle objection to what is stipulated here. We mustn't let the list grow longer with regard to matters that we must still discuss, and that must be revisited because we must complete our job at some stage or the other because by the end of October the Draft Constitution must be published for public comment. So we have now a Final Draft before us, more or less, so let us not refer things to be discussed again. Otherwise we won't get done with the job.

Chairperson Mr Eglin?

Mr Eglin One technical point. Just Clause 7 (c) the last words "such person has received a pardon". I know that word is used in the Interim Constitution. Is pardon the same as an amnesty

or general amnesty which is given to prisoners? I don't know what the word "pardon" means in the legal sense. It is not a word which is generally used in terms of amnesty being given to prisoners because it's the President's birthday or it's five years for the Republic and things like that. So I just want... Is the word "pardon" the appropriate word in that particular sense? The other one is more important and that is, right at the beginning of 7.1 "only South African citizens qualify to vote in elections of the National Assembly". Now, we don't state what that is. I presume that this assumes that elsewhere in the Constitution there is going to be a provision for the franchise because I don't think that can really be left to the legislature to decide what the qualifications are. I can only accept this on the assumption that we also agree with the clause that there is going to be in the Constitution which will set out what the qualifications are.

Chairperson

Any comment on that from the...

???

Chairperson, I think, I am not sure, but I think there is a report from Theme Committee 1 on this issue that will be discussed on Friday in the CC.

Chairperson

OK. Thank you. Professor Steytler?

Prof. Steytler

Yes. Just on the question of pardon. Pardon can have the narrow meaning, simply meaning a person is serving and then gets a pardon after being convicted, whilst amnesty suggests sometimes one before the prosecution has taken place. One tries not to be too... probably should try and get a word which covers both instances, if that is necessary

rather than pardon or amnesty because amnesties are particularly an issue at the moment, it may not be an issue in the future, so to try and get a more encompassing word.

Dr Pahad

You see the amnesty thing will be different in the sense that if you get an amnesty you will not be charged, so the question of being charged and sentenced would not arise. But the problem of the pardon would arise if, as Mr Eglin is saying, you were sentenced to a long term in prison and for some reason or other they decide to pardon you, the question is then that whatever years we subsequently decide would then come into operation because you would have been previously convicted for 12 months or longer. So the disqualification period would certainly enter into the picture at that point, so we can't put it as you have now put it. So it needs to just revise that because quite clearly once you say that... Let's say the figure is five years for argument's sake, then that person would still have to wait for five years following his or her release from prison before they can become eligible to be members of the National Assembly because they have been convicted previously for 12 months or longer. To take into cognisance, we just need to change that.

Chairperson

OK. Maybe just a last question. Mr Eglin?

Mr Eglin

Yes. I wonder whether this committee can state an intention... Is it the intention that... Let's assume a person is convicted and sent to prison. If that prison sentence is then reduced, I take it that the 12 months wouldn't apply, it would be a lesser period. And when can the person re-apply to become a registered voter. Would they have to

vote for a period or, as it stands at the moment, they would be disqualified, once they have been sentenced. So what is our intention that if a person is sentenced, that person is struck off the voter's roll and that person therefore cannot be a Member of Parliament? At what stage can that person be re-instated? At the end of that sentence? Or some period after the end of that sentence?

Chairperson Professor Steytler?

Prof. Steytler Mr Chairman, I think the first thing one would do is to separate the eligibility as voters as opposed to that of a Member of Parliament. It may well be that prisoners have now had the vote and therefore being an eligible voter plus further qualifications, which means that the penalty is only pertaining to MPs. The question of imprisonment.

Chairperson OK. Thank you. We can pass that one. Are there questions on Section 7? ???

??? Mr Chairperson, 7.2 (b)(v). I just want to know what that word means: "in excess of their salaries". Because the way I understand it now, if he is once a Member of Parliament he receives a certain amount of money in excess of what he is earning. Let's suppose now as a member you are earning R1 500 and as a committee member they give you an allowance of, let's say R200. Then you will be earning R1 700, in excess of your normal salary. Now, I just want to know if that is meant in that way. Or some of these people may be having outside interests where they are earning at least something in excess of what they are earning.

Chairperson Professor Steytler? Mr Grové?

Mr Grové This provision comes from the Interim Constitution and I am not sure whether I understand it, but I would say that it is permissible for a Member of Parliament to receive remuneration which does not exceed his salary as a Member of Parliament. So he can, in fact, receive additional remuneration as a member of a statutory body, but that remuneration is not permitted to exceed what he gets as a Member of Parliament. But I'm uncertain what exactly the idea here is, but it comes from the Interim Constitution.

Chairperson Mr ???

??? I think if we look at the first part, Section 1 and Section 2: Ministers, Deputy Ministers, you can understand what the intention is. I think the wording in that thing is distorted. In order to be a member of a parliamentary standing committee, you have to be a Member of Parliament. Now they are saying you won't be disqualified if you serve on a parliamentary committee, from being a Member of Parliament. So, I think what needs to be corrected there... It means that you cannot receive an additional remuneration from the State. I think that is the idea. Then exceptions are made for certain categories of people like Ministers, Deputy Ministers and people serving on statutory bodies. You might want to look at using the wording: receive an additional remuneration not in excess of their parliamentary salary.

??? ...equal to the; not "excess", but "equal". It should be "equal the amount of salary".

Mr Eglin

Mr Chairperson, Mr Hendrickse has raised an issue which has concerned us also. We never understood the original Constitution although we were proposing. This thing hinges on the amount of remuneration you can receive. In other words, you can receive your salary, plus 99%, for those serving on a statutory body, as long as your second salary does not exceed your first. Now, we think that is entirely arbitrary. We actually think it is wrong for Members of Parliament who are legislators, receiving salaries as legislators, also to be serving on the executive, in terms of statutory bodies etc. etc. other than if they are performing cabinet functions. And I don't know where this came from, but the issue should not be that the salary is pegged to something less than you get as an MP. But should you as an MP, paid as an MP, serve on other statutory bodies and also be paid on those statutory bodies? We actually think it is wrong as a concept. Other than the natural one of serving on the executive, which is the cabinet and its functions. So we think that this should be revisited especially as even the law adviser doesn't quite understand it.

Dr Ranchod

I think the situation that exists at the present time is that it is possible for a Member of Parliament to be appointed to a commission or theoretically also to the National Housing Board, boards of that nature, where members are remunerated. I do know of a case in Natal where a member of the Legislative Assembly is also a member of the Housing Board and he is entitled at the present time to remuneration for the additional functions that he is performing. Whether we want to exclude or penalise Members of Parliament who take on additional duties, is something that I think we ought

to debate and I can't recall us really applying our minds to this question.

???

Chairperson, I'm sorry, I speak under correction, but I think in the previous Constitution you had a much limited section because I think there was a short piece regarding the Conservative Party where a Member of Parliament was a Justice of the Peace and was disqualified by the courts or was taken to court, saying that as a Justice of the Peace he was receiving a salary from the State, no matter how small the amount was. That disqualified him from serving as a Member of Parliament. So this might just come up afterwards to try and be a catch all phrase. I think we need to revisit it though or look at the wording of it.

Chairperson

Could you then ask the technical advisers and the Steytler advisers to look into that. Mr Grové?

Mr Grové

Chairperson, yes, perhaps I can read you the wording in the Interim Constitution. It's very similar to the one we have here, but I think it goes further than simply technically refining what we have here. It's a matter of principle. Whether a Member of Parliament should receive extra remuneration when he serves on a board, on a statutory board. So perhaps we can footnote this for further discussion in the CC, but I would suggest that we remove the words here of "committees of the National Assembly" because it doesn't make any sense. But then the principle itself, leave it to the CC to discuss it further.

Chairperson

Right. Let's move to page 7, Sections 8, 9 and 10. Up to page 8.

Prof. Steytler Section 8 is then when a member of the National Assembly, the ??? these are a seat ??? eligible to be a member, I think there is some difficulty with that word "eligible" or being disqualified, resigning as a member or becoming a member of provincial legislature or local government. Filling of vacancies: that will be dealt with under the electoral system. Then the oath and affirmation of members: the aim of including the actual oath in the text in the past has been just been placed in a schedule and sort of the philosophy that is emerging in drafting is that to say what you are doing in the text itself rather than hiding things at the back. So the idea was to place all these actual oaths in the text. Those were sections 8, 9 and 10.

Chairperson OK. Any questions or discussion, questions 8, 9, and 10?
Mr Mshana???

Mr Mushwana Mr Chairman, on the footnote, Section 43 (d) which requires vacation of ??? after ??? ???. So this will come into the Constitution or should we leave it for parliament recirculation???

Chairperson You're dealing with footnote 22?

Mr Mushwana 15(b).

Chairperson OK, 15(b). Alright. Is it a matter of legislation or should it be in the Constitution? Mr Eglin?

Mr Eglin Chairperson, I mean, on the face of it I would say that it's a matter of legislation, but I don't know whether you can have legislation which would disqualify a member if there is

a matter of legislation, but I don't know whether you can have legislation which would disqualify a member if there is not a provision for that disqualification in the Constitution. If you said: These are the grounds of vacation of seat, I don't know whether ordinary legislation could add to those grounds, so I don't know whether that would work.

Chairperson Professor Steytler?

Prof. Steytler I would agree with Mr Eglin because otherwise you can legislate and disqualify a large number of people within parliament. If you spell out the disqualifications it means that, that must give certainty about when a member will be disqualified and when not and not be the vagrancies of parliament itself. So I think because it is such a serious matter to disqualify someone from parliament, that it should be regulated within the Constitution itself.

Chairperson OK. Any other further question or deliberation on this. If none, let's move to Section 11.

Mr Eglin ... "fifteen consecutive days' absence" – I take it that means 15 sitting days of parliament? I mean, I presume it means that. If parliament adjourns, it must be 15 days in which parliament would ordinarily sit and I take it, does that include... Well, we won't have a Constitutional Assembly then, so we can forget about that.

Chairperson OK. Thank you. Dr Pahad?

Dr Pahad I don't want to delay the meeting, but I'm not convinced that it's of such fundamental significance. I don't fully agree

I am asking myself: What is it that you want in the Constitution? Because you can put everything in the Constitution if you so wish. The question about whether or not somebody is absent for 15 or 20 or 30 or 40 or 50 days, consecutive days of the sitting of parliament, before he or she may lose her seat, isn't, I think, a matter for the Constitution. Because it might change. Today you might decide it's 15 and sometime or the other the needs or functions of parliament could certainly alter, you might be giving parliamentarians other kinds of work to do and you might want to alter the thing, which means you don't have to come and alter the Constitution every time you want to do that. So I am not convinced in my own mind that the question about this is so vital that it needs to find a place in the Constitution, and whether it is not better to leave that to negotiations between the parties themselves in parliament as to what they think may be the best possible period. The principle is there, that if somebody is absent for a long time, then they should obviously not continue to be members of parliament, because they are not coming to work. But, the days, in my view, shouldn't be put into a Constitution. I am not saying it shouldn't be there, but I am asking whether you want things like this in the Constitution because there are a helluva lot of other matters which are relating to parliament and which lead to the way parliament works which you could equally argue should be in the Constitution, so I wanted to make the point that I am not yet convinced that this particular item should be in the Constitution, rather than left to rules and regulations of parliament or legislation. Parties themselves may change and new parties may come in and the correlation of the balance of forces in parliament itself may alter. And I think

new parties may come in and the correlation of the balance of forces in parliament itself may alter. And I think it is a matter really for parliament rather than the Constitution.

Chairperson Any comment?

Prof. Steytler Perhaps just to say that if the function of the Constitution is to determine how people get to parliament then it is equally important to say how they get out of parliament and clearly, one can say the numbers of days of sitting may change, and that may be regulated, say, in the standing orders of parliament. But that avenue of dismissal, if it's an avenue of dismissal, I think it is as important as any of the other elements or ways in which a person loses his or her seat. So, I disagree there, Mr Pahad, it goes to the very function of the Constitution. How to constitute the National Assembly and how your term then may be terminated.

Mr Grové??? Chairperson, is it possible way out here not to recognise the principle in the Constitution, but leave the days for parliament to decide?

??? Would it possibly assist to refer to fifteen days unauthorised absence? And your parliamentary rules then determine what is...

Mr Olifant Chair, I wonder, maybe, if you look at 8(a) at the top. I mean it says there "a member of the National Assembly shall vacate his or her seat upon ceasing to be able to be a member". Now that says a lot actually. Then one could be fined whatever you want to through regulations, rules or whatever, outside of the Constitution. Because in essence

to get rid of a member. That's what I would suggest.

Mr Eglin

This is a matter which the law advises must go into... I would initially prefer that this be left to parliament, but equally, if the Constitution says you shall be able to be a Member of Parliament, I don't think parliament can then on its own decide on which conditions you can cease to be a member and therefore there's got to be some provision on what basis do you cease to be a member? I agree, 15 days here is relatively arbitrary, but equally, I think to leave that to parliament and individual cases to decide which...

(end of tape 2)

Theme Committee2 - 2 August 1995
Tape 3

NOTES

1262:
??? 22. The ??? of the National Assembly

1834:
??? ??? fair and free.

2374:
???

2499:
Who is speaker??? Paranjoe???

2560:
and three such periods???

3036:
Who is speaker???

3203:
Who is speaker???

4730
??? discretion, Sir,

4742:
back to ??? for

4802:
??? only when its

Mr Eglin

...in individual cases decide which should be expelled or not, is equally arbitrary. In other words, I think if you take each case and then say we are going to pass a different regulation for different members. There has to be something in the Constitution which permits parliament or permits legislation to deal with this matter, but I am not comfortable with having 15 days pegged in this particular Constitution, but that there should be provision for the expulsion of members who don't attend or who are delict in their duties, should be included in the Constitution.

Dr Pahad

That's precisely the problem. I presume that if an MP misbehaves, then the Deputy Speaker expels them and they don't listen and they continue to do the thing, there would presumably be other provisions in terms of the rules and regulations of parliament to enable parliament to take some kind of action against that recalcitrant member. What I am saying is that I have no objection to saying this in principle, but the problem is that there are a whole lot of other things which are not covered here and, with due respect for Professor Steytler, I agree that it is important. I am not yet convinced that it's that fundamental. It's not correct to say, in my view, that if in the Constitution you define how somebody can become a Member of Parliament, you therefore have to take into account all other factors in your Constitution which would then disqualify such a person from remaining a Member of Parliament. I am saying that there are other issues which could arise. What I am saying is that it is not a fundamental issue. It may well be worth

considering leaving this. I don't even have a problem if we want to put the principle, but there are other reasons why somebody can be removed from parliament other than not attending parliament for any number of consecutive days. Now, do you then want to cover in the Constitution all of those other things? This is what... This is the only reason I am asking because then the details become a problem. I am just saying take this into consideration because it's not the only reason why you can be kicked out of parliament. You can be kicked out of parliament if you misbehave very badly, or if you mislead parliament deliberately. So I think that's possible. But let's not continue...

Chairperson

Mr Rabie?

Mr Rabie

I don't want to go against Dr Pahad, but I believe it should be in the Constitution. We've got a very amicable arrangement at the present moment. It is stipulated like this in the Interim Constitution. If you need more than 15 days absence, you ask leave of parliament and a proposal is made accordingly in parliament for you to have that amount of leave. Because there are some members that are supposedly sick now, as we are sitting here, but they are doing other work on the outside, but they are on sick leave. And you must have some stipulation.

(interjections)

No, no, no, they didn't ask permission from parliament; he just submitted his sick leave.

Chairperson

I am interested to know who they are.

(laughter)

OK. Do we want to take this matter further? I don't think...

- Dr Pahad What we have agreed, Mr Rabie, is that we have accepted the principle, but not the precise figure. So we have accepted the principle, not 15 days or 100 days or 20 days. I think that's the general agreement.
- Chairperson Professor Steytler?
- Prof. Steytler Will the formulation then read "the unauthorised absence from parliament as determined" and the length then determined by the rules of parliament?
- Chairperson Is it OK? OK, then, fine. Can we then move to Sections 11 and 12.
- Prof. Steytler Chairman, this is the convening of the National Assembly. First then the issue after ten days after National Assembly. There again we would then correct that "the President of the Constitutional Court" to read "Chief Justice" and then footnote that. Then secondly, "the State President..." page 9 "...may at any time summons the National Assembly for an extraordinary meeting for the conduct of urgent business." Then the seat of the National Assembly is a footnote, where it shall take place and then the possibilities of taking it elsewhere. And then the quorum, continuing on page 9, we have reached no consensus on that.
- Chairperson Mr Hendrickse. Ms Sethema?
- Ms Sethema The other issue that we would like to raise is on 11.1 ??? 22. The ??? of the National Assembly of federal election shall take place ten days after the election at a time and on which its... I think, given the previous situation that we

come from, we must agree that it was quite clear that, that period when the election was not declared free and fair, and I think what we need to say is that it should be ten days after the election has been declared free and fair so that we maybe have those ten days... for we are saying the Chief Justice, or whoever, can actually call National Assembly to sit and then we are quite certain that we are talking about a period after the election has been declared free and fair so that we don't get caught up in the kind of rush-rush that we have.

Chairperson Any suggestions? That parliament be called ten days after the results of the elections have been declared free and fair?
Mr Grové

Mr Grové That will be on the assumption that there is going to be a provision in the Constitution requiring some body to declare it free and fair. I am not sure what the position is, otherwise I don't think it is on. It's based on an assumption now that some commission or body is going to say that the election was free and fair.

Mr Sethema I think it is an assumption right now, but it is a fair assumption, I think. We can't just agree that we will have elections and then the new parliament takes over without that thing. It's in case we have such a situation, then that's what we will be required to have.

Chairperson Mr Mlangeni?

Mr Mlangeni I think Ms Sethema is correct, Mr Chairman. Somebody is going to condemn the elections. It's either going to be the

electoral commission or some independent body and obviously after the election, they're allowed to be given by that body, and in that context that body who then challenges that the elections have not been fair and free, and so on and so forth. And I think what Estelle/Ms Stella??? saying is that parliament can then be convened after that body has given us a result and pronounced that elections were fair and free. I agree with what she is putting forward.

Chairperson An assumption?

Mr Mlangeni No, that somebody will say: These are the results and it is that body which is going to say these are the results, these are going every sentrum. ??? ??? fair and free.

Chairperson Mr Olifant and then Mr Hendrickse.

Mr Olifant Chairperson, I just want to know whether we could get some assistance from the technical advisers. Two persons have now spoken about the whole question of the assumption that the elections should be declared first before we can actually have a parliament sitting. Isn't there any way that we could then bring in this provision for that declaration to support this devolution here in 11.1? Maybe they could get the assistance of... be clarified on that.

Mr Hendrickse The point that has been made is a very valid point and maybe we should just footnote it and say that, depending on the electoral system, this might have to be changed to read "ten days after certification of the results". A second thing that we might also need to look at is that the

Constitution at the moment says that members of parliament continue to be members up until the eve of the election. If you have that situation you might need to have the same provision there, that members remain members until the elections have been declared free and fair because if elections are not declared free and fair, you then have to call another election which would then mean that the existing parliament would have to continue so as to avoid a vacuum.

Chairperson

Thank you. Mr Eglin?

Mr Eglin

Chairperson, there are two things. One is whether you should make provision for declaring free and fair. One of ours wasn't declared in that sense. Declaration of free and fair is done by international agencies since that's their view of it. All that the IEC does is... This is the result. So there it is. I think the concept that the ten days should be after the result of the election, and not after the holding of the election is a valid one because you might take considerable time to elect. Oddly enough, the Interim Constitution is not all that clear because there it says 10 days after an election of the Assembly and it doesn't mean to say election for the Assembly, it says the election of the Assembly which I think is the day on which it is elected because we actually only became Members of Parliament on the day that we were declared elected not on the day the election took place. But I would think that really it should read "the first sitting of the National Assembly after a general election" – I don't know why we say "general" election – an election, shall take place ten days after the declaration of the result of such election. That's what it is about. It is ten days after

it has been... Whether it is declared in terms of what law, free and fair or not, it is ten days after the declaration of the result of such an election.

Chairperson Do we agree with Mr Eglin's proposal? OK. Fine, thank you very much, they will sort out. OK.

??? ...in terms of one ceases to be a Member of Parliament. Is it the eve of the election or the eve of the declaration of the result?

Mr Eglin Parliament might have to be convened even during that period.

Chairperson Can you speak louder, Mr Eglin? Speak into a mike.

Mr Eglin Chairperson, I think it's a technical one, but there always has to be a parliament and therefore existing Members of Parliament continue to be Members of Parliament until new members take over because technically in that intervening period you might need to have some parliamentary decision. So you continue to be a member until the next set of members takes over.

Chairperson ???

??? I don't have any difficulty with 11.1, but I think one must appreciate that the executive still really drives the process and it would be really very desirable if the National Assembly could in fact determine the time and duration of its sittings and ??? periods. I think it's a goal that we ought to work towards, but the de facto situation is that, that is

determined by the executive. We don't sit if there is no legislation or no business which really... We still don't have a clear division of powers as envisaged in our Constitution, but I have no difficulty that we have this and we ought to move very rapidly to the situation where members know at the commencement of the year exactly when we sit and when we are in recess.

Chairperson OK. That closes the discussion on the matter.

Prof. Steytler I think the point that Mr Hendrickse raised, has that been resolved? Because then we have to look again at Section 5.3 which talks about the day before the polling of the next National Assembly and whether we should extend that now to say until the duration of the election.

Chairperson Could you repeat that, Professor Steytler? Yes, Dr Pahad?

Dr Pahad He is quite right. You then have to change that. That's how it's changed, as I understood it, in terms of the Interim Constitution. And therefore I don't think Mr Eglin was 100% correct. You then have to change that on the basis of what Mr Hendrickse has said. If we accept that in the event of something going wrong with the elections, then the previous parliament could continue to sit until next elections. Then 5.3 has to be altered. And you would then have to make constitutional... I think you need to make a provision in the Constitution for that to happen as well as for the executive to continue to function as opposed to... Because, you see the President is not a member of the National Assembly, but members of cabinet are members of the National Assembly. Presumably if you are not a member

of the National Assembly, you cannot be a member of the cabinet and therefore... I am not asking that we discuss the matter now, I am just asking if between Professor Steytler and Mr Grové they can look at this and just find a formula that will take this issue into account.

Chairperson OK. Thank you. We'll now move to page 9. We have dealt with the quorum. Any issues to be raised as far as the quorum is concerned. Yes, Mr Hendrickse?

Mr Hendrickse A quorum query: Can the Speaker call a sitting of parliament during the recess? You are saying that the President may at any time summon the National Assembly. May the Speaker also do so at the moment?

??? I think this is... Normally it's a convention that at the request of the executive, the Speaker will summon the National Assembly. This is the point I made earlier that in fact the National Assembly does not, on its own, determine the sittings of parliament. It does say "in conjunction with the executive".

Mr Eglin Mr Chairperson, we must get it very clear – and with all my respect for the Deputy Speaker – it is parliament that decides on its sessions. Clearly it has to take into account the workload, but specially if parliament is operating now. We are doing work which is not dependent upon the executive. We've got standing committees and all kinds of things which function. All that this says is that the National Assembly may determine that and they must then take all these other factors into account, but in addition, it says "the State President may summon the National Executive to

an extraordinary sitting for the conduct of urgent business. The State President is not the person who decides on the ordinary sittings, but this allows him to convene a special sitting of parliament to deal with urgent business." And so we've got to separate those two.

???

My main question, Sir, is that the National Assembly determines its hours of business. They decide we are now going into a two-month recess. Can the Speaker on his or her own self determine in those two months that parliament needs to come together for urgent business?

Mr Eglin

I don't know, Deputy Speaker. But I can tell you normally what happens. The House would adjourn and would have a resolution which says that it adjourns until such-and-such a time unless the Speaker in his authority deems it necessary to convene the House at an earlier time. So the House confers that authority on the Speaker to act on an interim basis.

Chairperson

OK. Thank you. The quorum. Anything to raise? Section 12. Mr Eglin.

Mr Eglin

(mike off) Does the blank indicate that there have been no submissions on whether there should be a quorum at all? Or just on the question of the numbers? This is up for dispute or discussion with the CC.

Chairperson

OK. Let's leave it for further discussion with the CC. Can we leave it at that? Sections 13 and 14, which takes us up to page 11.

Prof. Steytler The decision is then that there was agreement on majority of votes cast by members present. Then the presiding officer in the National Assembly does the casting vote. Then 14, the right of the President to sit and speak in the National Assembly but may not vote, that stating that he would not be a member of the National Assembly.

Chairperson Any discussion on Sections 13 and 14? No questions raised, no discussion. Sections 15 and 16?

Prof. Steytler Mr Chairman, the general autonomy. It just reads that "the National Assembly shall determine its internal arrangements and make rules and orders in connection therewith" and then secondly, "salaries, allowances are being paid, provided by national law". What should be erased here is footnote 31, that there should be provision for the establishment of standing committees or parliamentary committees and secondly, what are the powers of the standing committees, including the right to call witnesses and evidence and that one may want to include in that section, specific mention of the standing committees plus what their powers are.

Chairperson Questions? Discussions?

Prof. Steytler I think one can just refer that again to block 18, the third, to the establishment of committees.

Mr Pahad Can I ask, if we said that the National Assembly shall determine its internal arrangements and make rules and orders in connection therewith, why then do you need to put in the Constitution that you can have committees and

you'll have the powers to call witnesses and evidence. Why is that not part of parliamentary regulations as it is now? I mean, what worries me all the time is that we seem to make a selection of one thing. I mean, in the way select committees that should function, there are difference of opinion amongst parties anyway, but there is agreement that you need to empower these if you want to empower the legislature vis-à-vis the executive. Why is calling witnesses more important than something else? It just concerns me that we make some selection, whereas if we leave it as it is, and don't put anything, then the National Assembly from time to time will decide what really is important for them and how they wish to function and not have to go and change Constitution in order to empower themselves vis-à-vis the executive. I am just worried that the Constitution has too many things. We might just be creating more problems in the end. So, it's not a question that it shouldn't be there, that is not what I am arguing. I am just asking whether we need to put all of these things in there. If we just say the National Assembly shall determine the internal arrangements then it can do as it thinks best in terms of how it should function.

Chairperson

Professor Steytler?

Prof. Steytler

Mr Chair, that's totally correct in terms of how it should function, but the question is whether it has particular powers, and I don't think it can be established in just rules of order because those rules really pertain to members. What one is really looking for is powers to outside parliament and those may have to be written into a law, or preferably the Constitution.

Dr Pahad

I am asking: Why Constitution? Everything has to be written in a law in a sense. We won't put everything in a Constitution. What I was asking was whether it should be in the Constitution then the whole question of having powers of subpoena and everything else have to be put in the Constitution, which may have other implications in terms of the judiciary and everything. What I was asking was whether you need to put it in the Constitution? I am not disputing that some of us who are MPs may well want that power, but whether it should actually be in the Constitution... My own feeling is that it need not be in the Constitution. The reason I am raising this, Mr Chairman, is that we do not want to get in a situation in which we have to continuously start amending this Constitution over small things. That would bring the Constitution into some dispute, in my view, if there is a continuous basis in which you have to keep on amending your Constitution, because you put so many things in there and the National Assembly wants to do something else. And they come back and they negotiate and change the Constitution. That's what's worrying me. And if you leave it at the National Assembly, it can make its rules and regulations in terms of how best it thinks it should function as a body.

Chairperson

Mr Grové?

Mr Grové

The question of the establishment of committees and the powers and so on. I think it is adequately covered in the wording in 15.1 read with 16.3 and, in any case, parliament remains sovereign to pass any law not inconsistent with the Constitution so it will be in the power of parliament to make the law on the subpoena of witnesses, cross examination,

whatever.

Chairperson What do you suggest? Do you suggest that we remove the footnote?

Mr Grové The query, Chairperson, that can be removed, but the footnote still... The outstanding issue there is whether there should be a constitutional duty on the establishment of committees so that's a different matter.

Chairperson Professor Steytler?

Prof. Steytler Mr Chairman, if the powers of the committees on parliament are limited to 16.3 which talks about privileges and immunities... Now privileges are privileges, if you talk about law of evidence, it is a privilege against self-incrimination, immunities, it's protecting you from actions against you, it doesn't provide for powers. And one may just want to add there: "other powers, privileges and immunities will so be described by national law."

Chairperson Agreed on what Professor Steytler is saying? And then remove the query there. OK. Can we then move to Sections 17, 18, 19 and 20.

Prof. Steytler Obviously not much is going on there. They all deal now with how the legislation will be passed and that depends on the definition of parliament, what is Parliament? National Assembly alone or something else along with it? There is no clarity on that. It's been left blank there.

Chairperson Any questions, discussions on those issues? None? Alright.

Page 13, Sections 21 and 22. Up to page 14. Professor Steytler?

Prof. Steytler The assent of bills, bill passing by parliament, then assented to and signed by the President. Then there is the power of the President to withhold his assent, it goes back to parliament and/or it is referred to the Constitutional Court for a ruling on constitutionality. Then a proviso in Subsection 3 there that the bill before its referred to the Constitutional Court must first be sent to parliament for consideration. And then 4, assented and signed by the President, it becomes an act of parliament on his promulgation. And the last one is just the safekeeping of the acts of parliament and here the thought was the Constitutional Court at the moment is Appellate Division. If the constitutionality of acts of parliament is going to be decided by the Constitutional Court, it seems to make sense that it should be the guardian of these acts.

Chairperson Professor Ranchod and then Mr Hendrickse.

Prof. Ranchod Mr Chairperson, I would like to ask Professor Steytler whether 21.1 the President has to satisfy himself that the bill has been passed in accordance with the Constitution because the later provisions seem to point in the opposite direction, that he does not in fact have to satisfy himself.

Chairperson Can I take another question while Professor Steytler is thinking about that? Mr Hendrickse?

Mr Hendrickse I think this ??? discretion, Sir, in terms of Section 3. Normally it may be referred back to ??? for reconsideration

only on the ground that it is inconsistent or that it has not been passed in accordance with the Constitution. Who has to determine that? If the President is of the opinion that he does not need the Constitution reconsidered, he refers it back? Or does it have to be checked or approved by somebody else? And then further, I mean, it goes on and it says at the end there that "a bill may be referred to the Constitutional Court for ??? only when its a constitutionality only after the bill has been reconsidered and again passed by parliament, without correcting the defect." Now, I mean, who determines that it has a defect? And how must it determine that?

Chairperson

Professor Steytler?

Prof. Steytler

The power here to refer a piece of legislation back to the parliament first in terms of procedure how it was enacted, and then also on the content, first comes from the Interim Constitution. Then, clearly if he had the power, I don't know whether we want to spell out whether it should be a duty to check each time...

(end of tape 3)

Theme Committee2 - 2 August 1995
Tape 4

NOTES

0870:
from Professor ???

0954:
Who is speaker? Is it Dr Ranchod?

1972:
Who is speaker? Is it Mr Grové???

2266:
Who is speaker? Is it Prof. Steytler?

2469:
Who is speaker? Is it Mr Hendrickse?

2616:
Who is speaker???

2960:
Who is speaker???

3343:
matters of ???

3353:
I thought that ??? agreement

3532:
Who is speaker???

3893:
Who is speaker???

3998:
creating or ??? these are

4001:
Who is speaker???

4849:
which ??? years

Theme Committee 2 - 2 August 1995

Tape 4

Prof. Steytler ...whether it should be a duty to check each time whether it's been a constitutionality. Maybe it's something that one should want to raise here, particularly with national checks and balances. Here clearly the defects - the second question raised - must be the defect in the mind of the State President at that time because the defect can only really be cleared by the Constitutional Court and by no one else. Or one could say correctly that the objection as opposed to a defect, which means it has been established already.

Chairperson Mr Grové

Mr Grové Mr Chairperson, perhaps I may add here that this provision is cast in objective terms because if you say "in the opinion of the State President" you exclude the courts. So if there is a dispute on whether the President was competent to refer back to parliament or to the Constitutional Court, then that matter can be taken up in the courts. So it's, as I say, the whole provision is cast in objective terms and we can say "in the opinion of the President", but then you are going to exclude the courts from pronouncing on any dispute about this matter. This is a matter of principle so if the committee can give us guidance there we can make it "in the opinion", that is true. But as it stands here, it is objective and it does not exclude the courts. If you make it subjective, then you exclude the courts.

Chairperson Mr Hendrickse?

Mr Hendrickse Is the whole idea not there that in the President's opinion he finds fault with the bill, he then refers it back to parliament, if parliament then has not addressed this problem that the President sees in it, then it goes to court. What you are saying now is that parliament could decide, rather than dealing with the matter again, to go to court and say that the President's objections are invalid?

Mr Grové Not only parliament. It can be any interested party. A political party in parliament, for instance, can take it to court. But if the ideas to make it subjective... I am saying that again, we can change it. There's no problem with that.

Chairperson Professor Steytler?

Prof. Steytler This is now a very serious issue that Mr Grové is raising because if this package here is in fact giving parties in parliament the right to refer bills back, then it maybe must be spelt out quite directly. If this, what type of standing is here? Because the one way, if you put it subjectively, it says: Yes, the President may refer a matter back to parliament if, in his opinion, it is not constitutional and then parliament must reconsider it and then only after that it's referred to the Constitutional Court. Because the other way round would mean parliament says: Well, this is not constitutional and we are not going to reconsider it, then the President refers it to a court and the court says: Yes, it's unconstitutional. Then it goes back to the parliament. And then it circumvents the whole procedure.

Mr Pahad From Professor ????. What is wrong with this as it stands now? What is objectionable? I mean, it makes no sense to

me. I am not a lawyer, so it might be some deep legal or constitutional problem, but as it stands now it seems to me to make sufficient sense. So I would like to know.

Dr Ranchod

Let's look at a hypothetical situation where the cabinet processes legislation which comes to parliament. The cabinet approves legislation. It has a desire to achieve that particular objective. The matter comes before parliament, but then maybe one could argue non-compliance with the Constitution, there is a will in parliament to have that particular bill approved. It is approved. Should we go through the entire process where the President then approves the legislation and leave it to an individual or to a political party to then challenge the validity of the Act or should we at this stage, where the President has to approve or assent to the bill, should he in fact satisfy himself that the bill complies with the Constitution? There are very rare cases, but one can envisage that sort of situation arising and all I'm asking is, what is the meaning of all this? Does the President simply assent to a bill once it is passed by parliament or must he actually apply his mind to whether the constitutional provisions have been complied with.

Chairperson

Mr Rabie? Then Dr Pahad, Mr Eglin and Mr Groenewald.

Mr Rabie

It has happened during, before the recess, the legislation came from the cabinet, which was then subsequently changed by the select committee and sometimes it had to go back to the cabinet. What is indicated here in my interpretation thereof is that once parliament has passed a bill, the President must make sure that in his mind, before he signs the bill, that it meets with the regulations of the

Constitution as such. He's got legal advisers in his office, he will say: no, no, no here's something that I'm doubtful about, please go and reconsider this in view of this, that and that clause, and parliament says no they are quite happy with it as it was passed. Then the President can refer it to the Constitutional Court, if needs be. He may not of necessity send it to the Constitutional Court. But it's just a safeguard, a check on whether the executive authority will ignore parliament.

Dr Pahad

...by what Mr Rabie said. Additionally, you see, the question of whether an individual or a party or any other institution goes to the Constitutional Court to test the validity or otherwise of legislation is that they can only do it with an Act of parliament, they cannot do it with a bill. This refers to a bill before it actually becomes an Act. So I think we need to just distinguish between the two.

Chairperson

Mr Eglin?

Mr Eglin

Mr Chairperson, I don't think this impinges on the rights of parliament or individuals to challenge legislation. I think this is really the prerogative of the President in terms of whether he gives assent or not and I think it has to be something that's in his mind. I don't agree that it is the court. The court is a different process. What worries me, the way this is drafted, is it runs in paragraph 2, two concepts into one. One is: "he or she is referable back to parliament for reconsideration or to the Constitutional Court for a ruling on constitutionality." And then later on you get a next paragraph which deals with these two concepts also in one paragraph. I would have thought it would be better to say

that he could refer it back to parliament for reconsideration "only on the ground that it is inconsistent with or has not been passed in accordance with the Constitution". Because that is the first one. Then the second one is that he can further withhold assent if a bill referred to the Constitutional Court has been referred to the Constitutional Court only after the bill has been reconsidered and passed by parliament without defect. What this doesn't say is who refers it to the Constitutional Court because it says: "referrable back to parliament for reconsideration or to the Constitutional Court for its constitutionality." I take it that it is the State President who can do that. But he can only do it after it has been to parliament the first time and parliament has not reacted. So I would suggest that just in drafting, the first one is you refer it back and secondly, if parliament has not attended to it, you can then refer it to the Constitutional Court. So it's merely a question of tidiness in drafting rather than objecting to the procedures.

Mr Grové

From a drafting point of view, I fully agree with Mr Eglin. This is definitely an improvement, as suggested.

Chairperson

I'll take the last question on this issue. Mr Groenewald. Professor Steytler.

Prof. Steytler

This mentality is that it's a power vested only in the President and his opinion first goes to parliament and if he is still unhappy and it has been re-passed, then referred to the Constitutional Court. So it's not an objective criteria that we have here, this may be referred... It's a personal one and it doesn't open... Because the other... This is what I mentioned earlier. There are possibilities in other

constitutions where you can so-called abstract a view before it finally becomes legislation referable to a bill duly passed by parliament, but not yet becoming an Act to the Constitutional Court. Clearly, this is not the intention at this stage. It is the intention, but only in terms of the President.

- Chairperson OK. Mr Hendrickse, you still want to make a follow up?
- Mr Hendrickse Do we need to specify a time limit within which the President has to censor a bill?
- Dr Pahad Let the Constitutional Court decide...
- Mr Hendrickse No, no I'm not talking of bills there might be a problem with. Just an ordinary bill. Does the President have the option of sitting on it for 12 months?
- Prof. Steytler??? Mr Chairman, I think we raised this issue earlier on and the question was: Is there any point, unless you give him or her the power to refer it, the point of assenting? Because it's the old type ideas of the queen or the king signing the bill and it becoming law. Because there is no veto, there is no power vested in this assent unless it's now linked to the particular power of signing or referring it back to parliament and to the Constitutional Court. In terms of assent, whether there should be a limitation? One can only say: Well, it should be within a reasonable time. Because otherwise it can defeat an act by simply sitting on it and exercising indirectly a veto power which the President hasn't got directly. So one wouldn't want to give it sort of a date or time or period but one would call it unconstitutional if in fact the President indirectly affects a veto by simply not

assenting and that may be the answer to when does it cross the line and become a veto as opposed to simply being a person assenting to a bill.

Mr Hendrickse??? Mr Chairperson, the thing is that you do not want to give the President the veto. Therefore you must have a requirement that he must, and if doesn't within time, then the bill automatically becomes... or something to that effect. This is as opposed to bills which he has referred back to parliament or to the Constitutional Court. But once a bill has been agreed to by parliament, there is no objection, the President must sign it.

Prof. Steytler??? Mr Chairman, I think the language "shall be assented and is signed by the State President" so there is no may be or anything there, it is "shall" within the clause, in 21.1. And the question is then interpreting when he is actually not complying with this duty, to do so.

??? I would suggest, Mr Chairman, that we can be specific and say all these must be assented to by the President within three months, period of three months. We give him three months in which to assent?

Chairperson Mr Eglin?

Mr Eglin ...be used elsewhere, but I think they should be used and forthwith be assented to.

Mr Rabie Forthwith doesn't mean a thing.

Mr Eglin No, forthwith does mean in fact that you cannot drag your

heels. In terms of the law, it would mean something, but it also doesn't set a date in terms of... It may well be that they want a law passed, they want to wait for three months. I mean, I would think that the word "forthwith" means that there can be no dilatoriness on the part of the State President in exercising this particular power.

Chairperson

Do we want to include that in our draft?

Dr Pahad

I mean, I can see that the reason Mr Eglin is right is that if you give the State President powers in terms of whether or not something is in accordance with the Constitution, you have to also give that person some time to consider whether the thing is in accordance with the Constitution. And "forthwith", I think, takes care of it. Secondly, if there is any President, doesn't matter who he is or who she is, who is going to violate parliament's right to pass legislation other than as it is stipulated in the Constitution, that would create a constitutional crisis in this country. I mean, really, because that would mean then that parliament would have to pass a motion of no confidence in the President so he or she won't be President for long in my view. So I would rather go along with what Mr Eglin is saying.

Chairperson

Alright, agreed on that? Fine.

Mr Rabie

Chairperson, I need your terminology here...

Prof. Steytler

It appears in a number of Acts, when you ask a plea in court, you shall "forthwith" do so. You can't think too long about your answer.

???

It's a minor point. In practice the process of assent involves the minister responsible who will prepare his party's submission to the President, so just bear that in mind. It's not sent directly to parliament for the President to append his signature. The documentation has to also bear the signature of the minister concerned.

Chairperson

Thank you, ladies and gentlemen. That brings us to the end of the National Assembly. We will break for tea at quarter past 11. I want us to start immediately with the National Executive. Page 15, Sections 1 and 2. Professor Steytler?

Prof. Steytler

The first question is, Section 1, the executive power (at national level) is vested in the national government consisting of the State President and the cabinet. That issue that we just spoke earlier on about the legislative power of the National Assembly at national level, one is just trying to get the correct formulation there to indicate that there is executive power at different levels and this is not the inclusive or exclusive power, all executive power doesn't rest in the national government.

Chairperson

Questions and discussion? You're happy? Mr Rabie.

Mr Rabie

15.1, the executive powers shall be vested in the government consisting of the State President and the cabinet. What happens about the deputies?

Prof. Steytler

The cabinet is defined as the State President, plus the deputies, plus...

Chairperson

Dr Pahad?

Dr Pahad

You see, it's just that you footnote all these new words. Is the distinction with the head of state and the head of government still valid? You've already made clear in your previous report that the IFP is the one that wants the difference. It's no longer a query, I think, for the other parties. We shouldn't keep on putting issues as if they are still matters of ???. As far as the Theme Committee is concerned, it may still arise later. I thought that ??? agreement that, that should be so. So, if one should put down that the IFP wants to prefer a split in the office, then you should leave it at that and not put an additional query because it then directs attention and I think that's wrong. You've given it status that it doesn't deserve.

Chairperson

Professor Steytler.

Prof. Steytler

Just on that issue, Mr Chairman, actually in the draft that was prepared by the technical advisers we simply said that the State President is the head of the executive and then it came later with the draft by the law advisers to add in again "head of state, head of government" because if in fact there is no consequence in the rest of the document, making this distinction being head of state and head of government any sense and it may well be that one simply refers to the President as head of the executive and that's where the query came in. It was more from the discussion we had with the law advisers as opposed to the IFP.

Chairperson

OK. Point made.

???

Mr Chairman, then the question is then so we just reply "the State President is the head of the executive and

commander in chief of the" ...

Dr Pahad What's wrong with the "State President is the head of state and the head of government and the commander in chief of the national defence force". What's wrong with it?

Prof. Steytler ...it's a footnote.

Dr Pahad Why does it need to be a footnote?

Prof. Steytler ...head of state, head of government...

Dr Pahad Because there are a whole set of functions that the head of state performs, so in the end, if the CC decides to remove that, that should be fine. I am just saying that I don't think we should create problems for people where none exist. If somebody else in the CC wants to raise it, then fine, but I thought there was general agreement here previously that we would approach it just to say "head of state, head of government, commander in chief of the national defence force" and leave it at that. Don't create problems where none exist.

Chairperson Mr Beyers?

Mr Beyers Mr Chairman, I do not agree with that attitude. The fact is that there is contention as far as this is concerned on the part of the IFP and I think the report is right as it stand here. It will be simply a lie to say that there is no contention and I think we must draw the attention of the Constitutional Committee to that fact and not ignore it. If we want to ignore the inputs and the submissions of the IFP, then we

must say so. The point is that we valid them and they are valid although they are not here and the mere fact is it is contentious and we should not handle it another way.

Dr Pahad

Chair, I think Mr Beyers is quite out of order. Footnote 3 is very clear, if you read footnote 3, that the IFP prefers a split. It is clear there. All of our reports consistently have made clear what the IFP's positions are with respect to all of the issues. And there is a general agreement amongst all of us that whilst they are not here, their positions must be made known to the Constitutional Committee. It's agreed. The reason was, this particular thing, this distinction, whether it was necessary to query that because it had not arisen previously, what had arisen previously was the IFP's view of splitting the two functions and it is there in footnote 3.

???

Mr Chairman, could we just drop that question there, whether the distinction is a valid one because I think we have resolved that and there is consensus on that point so there is no need to pose that question.

Chairperson

We remove that query. Agreed?

Prof. Steytler

Mr Chairman, there was one comment that one of the technical advisers suggested is that the prerogative powers which... It wasn't clear whether it has been totally prerogative powers or the head of state has disappeared and it cannot be revived in any way unless one keeps with the notion of head of state whether that carries with it something like "of the prerogative powers". Then all power is then in terms of the provisions of the Constitution and

you can't stop creating or ??? these are the old prerogatives.

??? What prerogatives???

Prof. Steytler It was the pardons and so forth which, I think, spelt out in detail that is the other prerogatives which a head of state usually... which you haven't listed, may have been, you know, identified and used.

Chairperson Mr Emlin?

Mr Emlin Are we satisfied with the use of the words "head of government" as an appropriate phrase? Is the word "government" defined anywhere else in the Constitution? As I understand it to mean, it is the head of state which means he is a sort of titular head of state with all the prerogatives and he is also the head of the executive. I don't mind "the government", but "the government" is a generic phrase, it isn't defined in the Constitution and I think it would be more appropriate as "head of the executive". Unless there is a specific meaning of "government" in this Constitution, I think the word should be "executive" and not government.

Chairperson Can we then, because some of the people want to take a smoke. They're hungry and thirsty. Can we break for 15 minutes and come back? Thank you.

(break)

Mr Hendrickse Mr Chairperson?

Chairperson Yes, Mr Hendrickse?

Mr Hendrickse

May I beg you indulgence, Sir. On page 13, the whole question of assent to bills, we've looked at it again now and some of us have been discussing it and I think the whole question there has a much deeper significance when it comes to the question of assenting and the President being able to refer bills to the Constitutional Court because he deems it to be unconstitutional. The converse then also becomes true that the President has deemed every other bill which he hasn't sent to the Constitutional Courts to be constitutional. It is really the function of the Constitutional Court to determine whether a bill is constitutional or not. Rather than re-opening the whole debate, I would ask that we put a footnote in asking the CC to have another look at this question.

Chairperson

Any objection to that? OK. Fine. The technical advisers will consider that. Professor Steytler has got to leave at 1 o'clock. He's got a problem with other appointments and I think Mr Eglin is also leaving at half past twelve, he has already said that to me. I don't say you mustn't talk, but let us try and see whether we can finish at 1. If we don't finish, we will carry on in the afternoon, but we'll have a problem because Professor Steytler won't be here. But let's try whether we can finish at one. When we left we were still dealing with Sections 1 and 2. I think we have finished that, if there are no questions to be raised. We next go to page 16, Section 3. You can take both Sections, Professor Steytler, Section 3 and Section 4 on page 17.

Prof. Steytler

Section 3 is the election of the State President. Obviously there with president of the Constitutional Court as presiding over it, needs then again to be swopped around. There's

not anything controversial there. Subsection 4, filling of the vacancy. And then the function of office. Where there is assumption of the State President elect, how quickly should that occur? And the affirmation or oath, again President or Chief Justice and in the text the oath or affirmation.

Chairperson Some comments? Discussion on Sections 3 and 4. None? Then Sections 5 and 6 up to page 19, Professor Steytler. Take it up to page 20 because it ends up there.

Prof. Steytler Section 5 term of office. The term of office is the first sort of bridging provision, when the new President starts and when the old one ends. Then 5.2 is a contentious issue, "no person holds the office as State President for..." and then delete... "for terms of office exceeding a combined period" of so many years. That whole issue whether it should be any limitation, the length of limitation, when it's linked to terms, the difficulty of linking it to terms, can be very short terms if there are motions of no confidence, so that is clearly something for the Constitutional Committee. But just delete those two words "more than two".

Chairperson Delete "more than two"? And then how will the sentence read?

Prof. Steytler "No person may hold office as State President for terms of office exceeding a combined period ..."

Mr Eglin May I just ask? Let's presume one says eleven years and the guillotine then falls. There is no motion of no confidence in the President, but eleven years is up and there isn't going to be a general election, what happens, should he just

vacate his office automatically then? So you would actually vacate it in mid-term if the calendar said that's eleven years?

Prof. Steytler

The situation would be if there is no way that the parliament can be dissolved before a term ends, you could have said two terms, which ??? years because built in is the possibility of dissolution of parliament before five years. It means that... It's the difficulty of linking it either to terms because you can actually have two dissolutions of parliament...

(end of tape 4)

Theme Committee2 - 2 August 1995
Tape 5

NOTES

0185:

Who is speaker? Is it Mr Grové???

0902:

mike gone dead - tape blank from 0902 until 1330.

2026 and 2239:

Who is speaker???. Is it Grové???

3027:

Who is speaker? Mr Hendrickse???

3031:

in that ??? as it stands there

3501:

Who is speaker? Mr Manyane???

4833:

Inkosi who???

4843:

(mike not on) will be ??? for all governments

Theme Committee 2 - 2 August 1995

Tape 5

Prof. Steytler ...There are two dissolutions of parliament within two years and therefore limit a President to two years if you link it to terms.

Mr Eglin ...the terms. I am now raising the problem of the time. Let's say you say that it's an office of nine years, the day of the nine years may be half way through the life of the parliament. Does a president just walk out of office on that particular day and is there then provision for the election of a new president?

Mr Grové??? Chairperson, the position would be the same where the President resigns during mid-term or dies or whatever. Then there is provision in Section 3 for the election of a new president by the National Assembly. It simply says that the "National Assembly shall at its first sitting after a national election and thereafter as and when it becomes necessary to fill a vacancy during the term for which the person was elected", so it is adequately covered.

Chairperson OK, Mr Eglin?

Mr Eglin ...will say that a combined period of eleven years means that at some period, some day, he is just automatically going to cease to have an office. It should really read that "and on the expiry of that time would automatically vacate his office and a new election take place." Is that what is meant by it?

Chairperson

Dr Pahad?

Dr Pahad

I take Mr Eglin's point, but it raises all sorts of funny issues because the President is elected by the National Assembly and I think what needs to be done is this whole question of years and terms needs to be put in the way that it still needs a lot more debate and definition. That is from the ANC side. As you know, we had said previously that we had not yet come to a clear position with regard to whether or not there should be a limitation placed on how many years or how many terms a person may serve as President. So I would rather that we put it in a way that it remains a very open thing. Because the very moment you put "years" here and the footnote you put "terms" then you've quite rightly made a distinction between the two because there is a distinction between the two, but it looks like we might be more in agreement with years and less in agreement with terms. If we could just ask. I think we should debate it because Mr Eglin's point is quite right. The second point with footnote 12. You see, if it says "in order to so continue until the State President's term normally expires only when his or her successor assumes office", you've got to add the qualification "unless there is a motion of no confidence in the President" because you can't have a notion of no confidence in the President and then the President says: well, I am staying in office until my successor is elected twenty days from the time that I was... because the other provision makes provision for twenty days or whatever it is. Or, I resign, but I am sticking around. I mean it is just that I am just asking that the footnote perhaps should be a little bit more clear.

Chairperson OK. Any further comment on the issue? Alright, the advisers will look into your comments. Professor Steytler.

Prof. Steytler Powers and functions... (microphone gone dead - tape blank)

Chairperson Questions and comments on the powers and functions?

Mr Eglin May we just ask whether there is any significant departure from those referred to in the Interim Constitution or are these similar?

Prof. Steytler The shopping list comes basically from the Interim Constitution and there is nothing new to it.

Chairperson Mr Groenewald and then Mr Hendrickse.

Mr Groenewald Chairperson, 6.2, page 18. "All powers and functions shall be discharged by the State President in consultation with the other members of the cabinet." Is it necessary to have "other members"? Why not just "in consultation with the cabinet"?

Prof. Steytler Chairman, it depends on the definition of cabinet. The cabinet is defined under Section 12, "the cabinet consists of the State President, Deputy State President and other members." It's a question of trying to get consistency of terminology. If you talk about cabinet it means that... I can see that there is already a distinction there because its the other members - the other members, not the other ministers of the cabinet - that therefore includes Deputy State President and ministers.

Chairperson Mr Hendrickse?

Mr Hendrickse ...in terms of my earlier points with regard to the motions of no confidence, does that 3(b) also stand over until we have dealt with that question? And then also the same applies to 3(d), refer the bill back to parliament or to the Constitutional Court. Will that also be revisited in terms of what the CC decides?

Chairperson Any other comment?

Mr Rabie I don't understand why (d) must stand over 3(b). The motion of no confidence, why must it stand over?

Chairperson At the end of this we are going to be discussing the motion of no confidence itself so he wants to revisit this issue when we discuss that. That is page 27, Section 20. He wants to revisit that when it comes. Any comment or questions on that? Alright, we move to Section 7.

Mr Eglin There were two clauses, subclauses (f) and (g), but (g) in particular "to negotiate, sign and ratify international agreements". I see somebody has added "and to delegate such powers", that delegation wasn't in the Interim Constitution, but already there is provision in the Interim Constitution which requires parliament to ratify certain agreements and international agreements in order that they should have the effect of law. Now, I take it this is subject to any other provision in the Constitution? Otherwise that clause which allows parliament to actually have a say in international agreements would be in conflict with this. The other one is the question of "appoint, accredit, receive and

recognise diplomatic representatives". I sense a move that there is a feeling that parliament should have some part to play or could well have some part to play in this question of approval or otherwise of diplomatic representatives. But I want to know, once again, that would require an amendment to the Constitution if that was going to be given effect to.

Mr Grové???

Sir, on the first point raised by Mr Eglin. If you look at footnote number 22, the second sentence you will see the advice is that "it is advisable for practical reasons that provision also be made for delegation of the power to negotiate, sign and ratify international agreements" because in practice it is never the State President who conducts the negotiation and in many instances he does not even sign the agreement. It is done by a minister of state so this is purely a suggestion to make it more practical. But it is for the Theme Committee to decide on that.

Mr Eglin

Chairperson, I take it that this delegation would mean it's done with the authority of and on the responsibility of the State President; in other words, the State President can't... and afterwards if there is a dispute over something or parliament is unhappy, say: Well, it wasn't me it was the minister. The minister is acting for the State President in this particular regard. And it is not even the cabinet. It is the direct relationship between the minister and the State President.

Mr Grové???

Chairperson, that is correct because the President here exercises the power without consultation with, or he can act without consultation with the cabinet.

Chairperson Dr Pahad?

Dr Pahad Chair, just in relation to (f). We would have no problem if the footnote said that "the Democratic Party wishes" but not us. It may mean the Democratic Party in parliament wishes to raise an issue, that parliament might have something too. So the footnote should say "Democratic Party"; in other words, the impression might be given that all of us had agreed to that.

Chairperson Footnote in 22, you're referring to that one? OK. Section 7.

Mr Rabie Just include the National Party with the suggestion of Mr Eglin.

Chairperson Include the National Party?

Mr Rabie Yes, he says "the DP feels that parliament should have a say".

Chairperson OK. The DP and the National Party. OK. Section 7.

Mr Eglin Perhaps Mr Grové can help me. Isn't there a provision in the existing Interim Constitution in which parliament becomes involved in ratification of treaties?

Mr Grové Chairperson, yes, I think it is 2.3.(i)

Mr Eglin It says "parliament shall subject to this be competent to agree to the ratification of international agreements negotiated and signed in terms of" so and so. So it says the President can sign, but in fact it has got to be ratified by

parliament, so I don't quite know what the status is of the President signing if in fact it has got to be ratified by parliament.

Mr Grové Mr Chairperson, we will have to look also at 2.3.(i) in the new Constitution. I think Mr Eglin's got a point here.

Chairperson Thank you. Professor Steytler.

Prof. Steytler The question is really that ratification should just simply be deleted. That's the issue: whether that power or ratification is the proper domain of the National Assembly, or parliament, or here the almost control of international relations by the President.

Mr Eglin ...I think he can ratify, but he doesn't have the force of law inside South Africa until parliament has done it. So there are two concepts: one is the relationship between the two governments and the one is where... And I really think that word "ratify" should be read in conjunction with whatever revised 2.5.(i) is. I think you can just delete it. But equally I think you've got to look at it as to whether it's got the force of law inside South Africa.

Mr Groenewald I would just like to refer you to the present Constitution, 82. There it says specifically "so as to negotiate and sign international agreements". So perhaps we should just scratch "ratify" then it would be in agreement.

Chairperson Mr Grové?

Mr Grové Chairperson, no, I am covered now by General Groenewald.

Chairperson OK. Professor Steytler.

Prof. Steytler Just in response to Mr Eglin. The issue is not ratification by the National Assembly, even if they can ratify it, it doesn't become law. It's a separate issue whether it is actually incorporated and that relationship between international law and national law has to be dealt with in the Constitution still. I don't know precisely where it has been dealt with, whether it is automatic once there is ratification, for example, the National Assembly ratifies the convention of the right of the child, but that is not law in terms of the Act of parliament, and that has to be determined by general provision pertaining to the status of ratified conventions if they are not made into law. So, it is possible that you can ratify it here without it becoming law. The present Interim Constitution says that itself is parliament's task and if parliament's got two choices, to simply ratify it at the end and ratify plus incorporating it into municipal law and local law into international law.

Mr Hendrickse??? What is the difference, in that ??? as it stands there to sign and ratify. What is the difference between signing it and ratifying it, for the President to sign it and ratify it?

Prof. Steytler The usual difference is that within the convention itself would say it's signed, and then ratification... sign its attention to... The minister or government would sign it and then say: Well, we seek gratification, in terms of their own constitutional order which will be the binding, final decision that the country takes this convention on board. So the implication is the deliberate decision to take this convention on board.

Mr Hendrickse So if we were to leave it as it stands there, then somewhere else would have to have the provision that before the State President can ratify, some other action has to take place, for example, parliament agreeing to the treaty. Then only he can ratify it.

Prof. Steytler Well, he doesn't ratify it at all. It is signed and then ratification takes place by the National Assembly so that parliament makes that final decision.

Chairperson Dr Pahad?

Dr Pahad I still think that what Mr Eglin has raised remains a critical area and we might have to come back. We can't resolve this today. This whole question, you see, whether there is a person who can go and negotiate and sign an agreement which will not be acceptable to parliament, in which case you have a problem. This whole question of whether the power to ratify overrides. That's what I thought Colin was asking was whether that power to ratify overrides the power of parliament to ratify international agreement. That was the question he had posed and that question remains for us. It would seem to me that we need to come back to it because it has serious implications for the separation of powers and the powers of parliament with regard to certain things. Certainly, we might still want to go back to the Interim Constitution which talks about negotiating signing, it doesn't talk about ratify and it becomes parliament that ratifies it... The thing is in relation to existing international agreements which we still have to sign, but that South Africa could not sign or be a party to this, and that's what parliament wants to now ratify, this international covenant

on children and on other things. So I just think we need clarity and Colin is right. I mean I don't think that we should discuss it now, but we should bear that in mind and bring it to the notice that we need to make clear this distinction.

Chairperson Dr Pahad, we've summed it up. We'll take it further when we discuss officially the CC. Then it is covered. Mr Grové?

Mr Grové Chairperson, I think we can simply footnote this that it needs further discussion when Section 2.3.1. is dealt with. Whether it is in the Theme Committee or the CC or wherever.

Chairperson OK. Agreed to that? Fine. Mr Mohlamonyane.

??? Chair, you see, as to what we raised is going back, but you see, also you should not try to limit the powers of the President in reaching agreements with the other states. My understanding of these two concepts has always been that here is a president, he goes to India, he reaches an agreement with that particular government say on trade matters etc. etc. or some important things, the agreement is then reached between the two countries. He first of all says: Well, my parliament has got to ratify this. By ratification here I mean "approve" whatever that other meaning may be. My government, my parliament has got to approve this agreement that I've entered into with you. After parliament has ratified that agreement, it is then that the President can sign. That is my understanding of how the things operate, but there are other small agreements which may not require the ratification of parliament where, for example, say South Africa enters into an extradition order

agreement with, say, Botswana; perhaps the President can sign the agreement and come and report to parliament, but on major issues one would expect that ratification of that particular agreement would be made by parliament first of all and then the President signs.

Chairperson Thank you. That will be footnoted and we will rediscover that in conjunction with Section 231 of the Interim Constitution.

Mr Eglin Chairperson, may I say on (k) "to proclaim referenda or plebiscites". This assumes there is going to be a provision for that in the Constitution because I don't think you can just proclaim one unless there is provision for this. And secondly, whether this is not an issue he should do in consultation with his cabinet members. It is not just a one-off thing, having to hold a referendum or a plebescite is a major national thing affecting the politics of the country and I would have thought that, that would be something which would be better done in consultation with the cabinet than as the kind of exclusive prerogative of the individual who is the President.

Chairperson Any comment on that? So, your feeling, Mr Eglin, is that it should be removed there?

Mr Eglin Removed in this sense that these are only matters which exclude consultation with the cabinet and I think that it should be removed in the sense that it should include consultation with the cabinet; not that he shouldn't be able to do it, but it should involve consultation.

Chairperson	Mr Grové
Mr Grové	Chairperson, if that proposal is acceptable, then I think we should simply delete (k) because the result will be then... It says here "that the President acts in consultation with the cabinet".
Chairperson	Any objection to that? Agreed to? Thanks. Sections 7, 8 and 9.
Prof. Steytler	...is a technical issue about the confirmation of executive acts by the President: the decision of the President taken on the discharge of his or her powers; in fact it shall be exercised in writing, under his or her signature; decisions taken in consultation with other members of the cabinet, shall be countersigned by a minister; and then the signature of the State President on any instrument shall be confirmed by (seal of the Republic). The remuneration issue: the allowances, salaries, benefits of the State President shall be determined by parliament; the President may hold no other public office, perform any other remunerative work.
Mr Eglin	Sorry, may I just ask... 8.1 "for parliamentarians or cabinet ministers it shall be done in terms of a national law". I am just wondering why it should be different, why we put "done in terms of a national law"? It's not just by parliament. It is in terms of the law, I take it. If you look at the remuneration of members, I don't know why it should be different.
Prof. Steytler	The question here is. You can say international law, but the question is then that the national law can delegate it to any

person or any organisation who determines it then in terms of that national law. The question here is which body in fact should determine the salary of the President and clearly parliament would be the appropriate body. One can say "in terms of a national law where parliament shall determine it". There will clearly be a national law determining the allowances, the particular details of it, the pension schemes, etc. There will be a national law, but then such a law must provide that parliament determines those benefits.

Dr Pahad

I am not sure that the footnote 27 isn't slightly misplaced. I mean insofar as what the ANC has raised whether that footnote should then not come after 2. The issue addressed is the way it is put here. It is not clear. If I may bring it to your attention. "The decision of the State President taken in consultation with the other members of the cabinet, shall be countersigned by a minister." We moved then that if it's going to become an Act, it can become law. The President and the cabinet act in consultation with each other. Now does this mean that every Act of parliament is also going to be countersigned by a minister? I am just asking the question. If you are going to have that, what is the meaning of that particular thing? That's the one thing. The other is: on all matters other than what is specifically spelt out, every time the issue is the decision. I mean, if it cuts across ministerial responsibilities as many decisions do, then does it have to be countersigned by each of those ministers? I am just asking these questions because they are not clear to me. First of all, I want to repeat that the footnote is misplaced insofar as the ANC's queries are concerned, and secondly, that I was just explaining again the ANC's query because as it stands now it is not clear what the ANC was

querying.

Mr Grové Chairperson, yes, sorry about this. The footnote is misplaced in fact. It should be at the end of 7.2, not 7.3.

Chairperson OK. Thank you for that comment. Can we then take up Sections 9 and 10?

Prof. Steytler Section 9 is then the question of the Deputy State President and Prime Minister which is a matter of contention. It is noted there. Then a separate issue is the acting President and the issue here is the determination of a sequence of steps to make sure there is always a President, a person appointed then as acting State President performs, has all the responsibilities, powers and functions of the State President. The first line of replacement is the Deputy State President. Then the minister appointed by the cabinet. Then when it is none of the above, the minister is appointed by the members of the cabinet and then the question is if there are no ministers who then takes over? And the suggestion is then the Speaker (any person who would then be the next in line to take up the responsibilities).

Chairperson Question and discussion? When there is no minister who can act as a President, can the Speaker act as the President?

Prof. Steytler The example used was: The President has just sacked his cabinet immediately after he becomes capable of performing his duties. There are no ministers to appoint an acting President. What then?

Chairperson

Inkosi?

???

Chairperson, the Speaker can act provided it will be the "winner takes all" government, not the Government of National Unity.

(end of tape 5)

Theme Committee2 - 2 August 1995
Tape 6

NOTES

0278:
(mike off for a short spell)

Theme Committee 2 - 2 August 1995

Tape 6

Dr Pahad ...or parliament to make its views felt very strongly about the cabinet without threatening its own existence because that's the leverage which people then have to say: Well, if you become too difficult, I am going to dissolve you and I'm going to have elections and you might not be re-elected. This is what happens in the British parliament to some extent. So we were saying: No, we need to look at that thing because we need to give some powers to parliament without threatening their very existence. That's the discussion, now we need to look at that.

Prof. Steytler To do that, you simply add the present Section 93.3 in and that's the end of the matter. Section 21.1 remains because the definition of cabinet there includes the President. With the addition of Subsection 3 it excludes the President in the definition of cabinet and then you limit also... you can then delete the paragraph (c), Mr Rabie suggests otherwise, then that (c)... (mike off for short spell)

Chairperson So do we take that route. Mr Grové?

Mr Grové Chairperson, so the instruction is to add 93.3, but what about paragraph... (a) and (b)? And not (c)? Thank you, sir.

Chairperson Agreed? Fine. Now that brings us to to conclude our talks, brings us to an end of this discussion of the brief draft report. Now we need to instruct the technical advisers. What shall they do? What is the way forward from here? For the legal advisers together with the technical experts,

what do we do from here?

Mr Rabie They must now submit it to the Constitutional Committee for discussion on Friday.

Chairperson Do they have to bring it back to us?

Mr Rabie No.

Chairperson Not? OK. You are authorised to proceed with the amendments given by the committee. You can proceed. The report is to be tabled to the CC on Friday. I don't know whether you will finish on Friday. You have only tomorrow. Get everything ready, but table it on Friday. Mr Grové?

Mr Grové Chairperson, I think the documentation for Friday's CC meeting has already been distributed and so on. It's already Wednesday today. So shouldn't we rather table these new drafts now in the CC's meeting of the 11th, next Friday?

Dr Pahad What I suggest to do is to let the CC know that it is ready. If it's possible by Friday, table it. Not for discussion, but table it so that it can then be discussed at the following CC meeting. Because what I am afraid of is that you might be late for another 2 weeks. I mean, the CC will decide it's on the agenda afterwards, but if you can have it ready by Friday, we can then say it is now tabled and we would like it to be put on the agenda for the following week. If there is a CC meeting the following Friday. Is there? I see the latest things didn't have it.

Chairperson OK. Thank you. That brings us then to the end of this

meeting. Thank you, ladies and gentlemen. The meeting is adjourned.

Dr Pahad

Chair, what they gave us today and I am taking that, that is the one which is accurate... If you look at what they gave us today, page 4 is missing here, we didn't have that. OK. It's OK.

Chairperson

OK. The meeting is adjourned until Monday, so we are not meeting tomorrow. Alright, until Monday we're discovering the electoral system. ANC components just remain for a moment.

**Theme Committee2 - 2 August 1995
Tape 7**

NOTES

0585:

Who is speaker???

0602:

to ??? other things

3740:

will have to ??? what we state here.

4380:

the difficulty ???

4394:

Constitution ??? and I would

4548:

on the ??? or

4564:

Who is speaker??? Mshana?

Theme Committee 2 - 2 August

Tape 7

Chairperson No comments or are we leaving it for a further debate? Mr Mlangeni, then Dr Pahad.

Mr Mlangeni If in the event of the President being unable to fulfil his duties, and an acting President is appointed then that acting President perhaps happens to be the Deputy President or the Premier, what is the position of the acting President himself? Do we have him taking over the position of the President temporarily? What about his position? Is he also to appoint someone to be his deputy while he is acting for the President? Or is that position going to be left vacant until the President is able to assume his duties and the Prime Minister or the Deputy President goes back to his position?

Chairperson He handles both positions. You don't have to appoint another one in his place. I actually want to hear the voice of Professor Steytler.

Prof. Steytler Mr Chairman, you probably gave the answer – he performs both. Clearly the notion of the acting President is a temporary one and it is not foreseen that the whole line function should change. One may want to think of an acting Deputy State President. We haven't paid any attention to that and one must think, would there be a real need for such a person, also particularly with a view to: Are there any particular functions that only the Deputy State President can perform? And if there is such a person or if the Deputy State President becomes the Acting President,

can he still perform those functions designated to the Deputy State President? I would think that he can do both and therefore it may not be necessary to have the legal machinery to work to appoint an acting Deputy State President. Perhaps Mr Grové may have a different view.

???

...President, leaving the duties for the whole year to ??? other things. Then we have the Deputy President acting for the whole year. Are we saying that his position should not be filled, that of the Deputy President who is now acting for the President, for the period of a year? That is the position. He is to handle this position.

Mr Grové

Chairperson, we haven't dealt with the acting Deputy President. There is no provision in the Constitution for that. That being the case, it is open to parliament to pass a law to deal with this matter whether there should be a Deputy President, an acting Deputy President, or not, because parliament remains sovereign to pass any law that's not inconsistent with the Constitution. So it can be dealt with. If that eventuality happens, then it can be dealt with. But otherwise if the Theme Committee wants a provision on an acting Deputy President, we can include it.

Chairperson

Thank you, Mr Grové. Maybe you've got to look at whether Members of Parliament can also act as State President in the absence of the President. Dr Pahad and then Mr Rabie.

Dr Pahad

I was wondering whether the footnote which says "the formulation may have to be adjusted" if that shouldn't be the direction we want to move. Because obviously the ANC itself I think may have some additional things to say on this

matter later in terms of powers of the Deputy President or otherwise. You see, I can just raise the question of an acting Deputy. I mean, it's a new matter. We ourselves haven't really discussed it, but it perhaps needs some discussion as to whether it is necessary or not to help such a position. What did worry me, however, is (d) when you put Speaker in brackets. You see, are we going to make a constitutional provision that in the event of a number of things not happening, then somebody who was never designated to do anything, other than run parliament, should now be constitutionally able to run the country? And I can see the implications for this because the Speaker is elected for this specific purpose and that's to help run parliament. To give that person constitutional possibilities of becoming head of state, raises for me many questions and many problems and I am saying that we are not going to resolve it now, but we need to come back to that question because I don't know who put the Speaker in this bracket. But, I mean, I agree, it might need to be put there, but can we then leave this open? It's a matter of contention all round that we would need to come back to. The CC would need to look at it and decide who should continue with this important area of discussion.

Chairperson

We agree with those suggestions? OK. Thanks. Sections 11 and 12. Professor Steytler? Oh, Mr Rabie, I'm sorry.

Mr Rabie

When it comes to the question of appointing an acting Deputy President, I think in that regard we must follow the conventions that have been in practice even with this government that when a minister is not available to perform his duty, somebody is appointed to perform his duties

together with his own portfolio, so we mustn't make provision for an acting Deputy President at all.

Chairperson Sections 11 and 12.

Prof. Steytler Chairman, Section 11 is that disputed one, the impeachment of the President and Deputy President, and the question then is the necessity of having such a provision once you have the power to dismiss a President simply by a simple majority vote and it has been noted as a point of contention. The cabinet, Section 12, the definition of cabinet 12.1, consisting of the State President, Deputy State President and the ministers. And Section 12.2 the power of the State President to preside over the cabinet. Section 13 is the appointment of ministers. One will have to correlate that with the powers in terms of Section 6 because there at Section 6.3(i) there is "to appoint and dismiss ministers" so, clearly, those two will have to be tied... what the procedure should be. Then Section 14 is the oath or solemn affirmation which ministers or Deputy Ministers must make.

Chairperson Comments on Sections 11, 12, 13 and 14? Mr Eglin?

Mr Eglin Just, I don't want to re-open the question of Deputy Presidents and Prime Ministers and all the rest of it, but it relates here, and I am really saying this because I think all the parties should think about it... Our view was when it comes to running the cabinet and especially having the relationship between the cabinet and the legislature, in fact there should be somebody specifically deputed and we have suggested the Prime Minister. There is a different view and

that is that, that work can be done by the Deputy President. I am not opposed to... We would not oppose it being the Deputy President, but then we think that should be specifically mentioned. In other words, even on this thing where it says, cabinet 2: "State President or in his absence the Deputy President or any other member of the cabinet should be the State President, in his absence the Deputy President and in his absence, another member of the cabinet." In other words, it should be quite clear that the Deputy President has a very specific role to play and he is not just another member of the cabinet. And it could be either him or anybody else because we would argue later that there should be some provision in the Constitution that the Deputy President, as a function, should have a specific function to represent the interests of the executive in and to parliament. We would prefer, as a party, a separate office. We think that the executive President and his Deputy are going to be so busy running around the world, that they won't be able to do that. We would prefer a Prime Minister. But if you cannot have the Prime Minister, then we really think the Deputy President must be specifically designated to be the man who stands in when the President isn't here and has a specific function of representing the cabinet in parliament. So we are just raising this as a conceptual issue for further consideration.

Chairperson

Thank you, Mr Eglin. If no further comment, then we can move to Sections 15 and 16.

Prof. Steytler

Section 15 is a general statement of accountability of ministers to the President and National Assembly and the national collective responsibility of the cabinet and 15.2 is

then the execution of their duties by ministers in accordance with the policies of the cabinet. This is much the wording of the present Interim Constitution. 16 is the requirement that the ministers and deputy ministers shall at all times act in accordance with the code of ethical conduct, which shall be prescribed by national law. And then the particular activities which are forbidden, take up employment, engaged in other activities where there may be conflict of interest and then finally, the issue of the use of official information for enrichment of them and any other person. Much of this wording again comes from the Interim Constitution.

Chairperson

Any comments? Sections 15 and 16?

Mr Eglin

I see, I think in this morning's newspaper, a report that Minister Ashmal has been in charge of producing a code of ethics for ministers. I just wonder whether one shouldn't see whether any new ideas emerge from that which should be included in the Constitution. I don't know what it involves, but that is the press report that there is now this code and it is going to be put to the cabinet. The question is whether that in any way involves re-looking at these clauses in the Constitution. I don't know.

Chairperson

I don't think you want us to entertain that now, Mr Eglin? Just a comment. OK. 17 and 18?

Prof. Steytler

The remuneration of Deputy Ministers in terms of the national law, and in that national law obviously can be indicated who in fact determines the salaries. 18 is the temporary assignment of ministers' powers and functions

to another minister which is to ensure that the work is done. And 19 is very similar, the transfer of powers and functions from one minister to another, which apparently is this whole provision necessary for the conduct of government business.

Chairperson Any comments on 17 and 18?

Dr Pahad At the moment I don't know what the Interim Constitution states, but as I understand it, when a minister is not here, what he or she does is they just go to another minister and say: Can you actually look after my portfolio and represent me in the cabinet? I don't think they go to the State President and ask the State President. Now the reason I am putting this is because in the Constitution you said the State President may appoint. Now, would it then be unconstitutional later for ministers to enter into this kind of bilateral agreement that we have? Would they always have to go to the State President for permission? I am only asking this, where we could not perhaps have some problems later.

Prof. Steytler Chairman, the importance here is when the minister performs a function, a prescribed legal function, which you then can say: Well, it's not just simply a standing-in at a cabinet meeting or whatever, which may easily be done, but if you perform a legal function which requires, which prescribes X minister now, suddenly just by internal arrangement, is minister Y, then that I think would require an official appointment to make that standing-in with proper legal consequences.

Dr Pahad

If you read this thing carefully, it says: "Whenever a minister is absent or for any reason unable to exercise and perform any of the powers and functions entrusted to him." So, it includes all of the powers and functions entrusted to a cabinet minister. I don't make a big deal. I am just saying: Can you note that? At the moment the convention is they don't go to the State President. They just make arrangements basically among themselves, as far as I understand it. They hardly ask the State President's permission at the moment when they want another minister to stand in for them.

Mr Rabie

From what I understand, it is the opposite. The State President appoints a minister to act on another minister's behalf. If I am absent from a cabinet meeting, then I can request a particular minister just to put this case for me in front of the cabinet. That is an internal arrangement, but when it comes to acting on behalf of that minister then the State President appoints because that minister is accountable to the President and not to that individual minister.

Chairperson

Mr Groenewald, are you walking out?! Mr Grové

Mr Grové

Chairperson, no I don't want to pursue the matter, but if you look at Section 90, you will see it is a formal matter. Section 90 of the Interim Constitution.

Chairperson

Do you want to be excused? OK. Dr Pahad? Fine, OK. Sections 19 and 20?

Prof. Steytler

Mr Chairman, I have dealt with Section 19. That is where

the President assigns, actually on a permanent basis, a function say prescribed in a law to another minister and then the other minister then exercises that power or function. Section 20 is now the issue of vote of no confidence. What is provided here is two possibilities. The one is vote of no confidence in the cabinet, which... The cabinet here is then read: "cabinet including the President, the Deputy Presidents and other ministers". Then the State President's child is dying, or dissolve the National Assembly and call an election. The second one is where only a motion of no confidence in the President alone and then the President shall resign. There is a third possibility in the Interim Constitution which says "only a motion of no confidence in the cabinet", now excluding the State President. And then the State President has got a couple of options: 1) reconstitute the cabinet; 2) resign; 3) call an election.

Chairperson

Mr Hendrickse.

Mr Hendrickse

Mr Chairman, if we look at the provision in the Interim Constitution I would suggest that it's a much better provision because it allows for one "where a motion of no confidence is passed in both the cabinet and the President, unless the President resigns, he shall dissolve parliament". That involves the President and the cabinet. If it is only in the President, the President shall resign. If it's only in the cabinet, at the moment the Interim Constitution says: "If it's only in the cabinet excluding the President, he, the President, may resign, he may reconstitute the cabinet, or he may dissolve parliament." And I would suggest that if we leave out (c), we would then have the option of either

a motion of no confidence in the President, where he resigns, in the cabinet, where he then has to reconstitute his cabinet, or alternatively, in both the cabinet and the President, in which case the President then has the option of dissolving parliament.

Chairperson So you are proposing that what is contained in the Interim Constitution be contained in this draft?

Mr Hendrickse Ja. With the deletion of 3(c) in the Interim Constitution. Division 3 says that if "a motion of no confidence is passed in the cabinet only". Section 93. 93.1 says "passes a motion of no confidence in the cabinet including the President", the President then has the option of either resigning or dissolving parliament. Subsection 2 says that if it is a motion of no confidence only in the President, then the President shall resign. And then the third option is that if it is a motion of no confidence in the cabinet, excluding the President, the President then may resign or may reconstitute the cabinet or dissolve parliament and call an election.

Chairperson 3(c) must be deleted.

Mr Hendrickse The effect then would be that you can have a motion of no confidence in the President, in which case he will resign; in the cabinet, in which case the President has an option to resign or to reconstitute his cabinet and then the third option that if you pass a no confidence motion in the President and the cabinet, then the President can call an election. So he cannot call an election if you only pass a motion of no confidence in the President or only in the cabinet.

Chairperson

Dr Pahad? Mr Rabie?

Mr Rabie

Just a question. We've just approved the definition of the cabinet. If we go back to what's stipulated in the Interim Constitution, then we will have to ??? what we state here. We say "the cabinet consists of the State President, the Deputy President and the ministers". So now there's the separation between the State President and the cabinet in the Interim Constitution. How are we going to reconcile that?

Mr Hendrickse

You will do so, Sir, by phrasing it as it is in the Constitution where it says "if parliament passes a vote of no confidence in the cabinet, excluding the President", you are writing into... excluding the President.

Chairperson

Dr Pahad?

Dr Pahad

The first thing to say is that 20.1 as it stands is wrong. It's just wrong. Ja, 20.1. You can't have a situation in which you just say no confidence in the cabinet and the President shall dissolve it or call an election. It means that the President has ultimate power. Now you want to put in a motion of no confidence and then he says: "no, no, it's okay, I'm going to call an election." I think it is wrong in the way it is put. And I agree with Peter that the Interim Constitution one is better. We may come back to what Mr Rabie is raising, whether or not it has an impact on the cabinet... At the moment, off-hand, I don't think it does if one says "the cabinet, excluding the President" it may be possible for parliament to say they don't have confidence in the cabinet as presently, but they have confidence in the

President. So they don't want to be against the President, but they want to be against the President's cabinet, in which case it could be damned impossible to pass a motion of no confidence only in the cabinet, excluding the President, in which case the President... All the person would need to do is to reform the cabinet with new people. So I think put that in such a way that it requires further discussion, taking into account what Mr Rabie said. But I really think the important thing is that 20.1 as it stands now it should certainly be drastically altered.

Chairperson

Professor Steytler?

Prof. Steytler

Can I just get clarity. Is the problem that the resigning or the dissolution of the National Assembly is the difficulty? Because whether you... because earlier I think Mr Eglin was saying that there are constitutions which simply say "after a motion of no confidence in the government of the day". That government collapses and the same parliament then re-elects and forms a new government. Whether one wants to link it with the dissolution of the National Assembly. If the State President resigns after a motion of no confidence, as it now is, a new person is elected and that person would then constitute the new cabinet. That's a possibility. But do you also want the second possibility of the dissolution of the National Assembly? That linkage, is that the issue that you are raising?

Dr Pahad

I thought the point the speaker was raising was to say that the Interim Constitution - maybe we want to look at it again - makes provision for a motion of no confidence in the cabinet, excluding the President, in which case the

President doesn't have to dissolve the National Assembly or call elections. The President, he or she, may then form a new cabinet. As it stands here at the moment, it's no confidence in the cabinet, then certain consequences follow. What Mr Rabie then was raising, which I think needs further examination, was to say if you put it that the cabinet excluding the President, what possible consequences does it have for your definition of the cabinet? But that's what I understood him to say. Because in your earlier definition you said the cabinet consists of the President. We need to look at the consequences. I think that there may not be consequences in the sense of saying in this particular case, it's cabinet, excluding the President. But we just need to look at the legal side of it, whether it is possible to say so. But we need to take into account what Peter was saying and Jacques was saying and change 20.1 as it stands because 20.1 is not only unclear, in my view it is wrong to have such a provision in the Constitution because it gives far too much power to the State President vis-à-vis the National Assembly. It can have serious implications for other motions of no confidence in the State President.

Mr Rabie

That's the difficulty ??? when we just write the Interim Constitution ??? and I would request you to retain (c) as well. We can debate that in the CC.

Mr Hendrickse

3, Chairperson, that option is covered when you have a motion of no confidence in the cabinet and the President, then the President dissolves parliament. You see, if I can put it almost crudely: We want to fire the President, then he turns around and he fires us by dissolving parliament. So we

want to make a provision where you can get rid of the President or get rid of his cabinet, without him getting rid of you.

Chairperson

I think in our discussion as well if you refer to block 9 of the report. That's 24.2, page 40, block 9. It also says, number 2, under agreements "term of office determined by membership of parliament" and number 2 says "vote of no confidence by parliament in the cabinet or in the State President". We are due to deliberate that. A motion of no confidence could be passed in the cabinet on ??? or the State President. Mr Mushwana

Mr Mushwana

What happens if you pass a motion of no confidence in your President and not your cabinet? Do you retain your old cabinet or do you expect the new President to set up his own cabinet?

Chairperson

The new President appoints the cabinet. He may decide whether he maintains that cabinet or he reshuffles, or he appoints a new cabinet, whatever the case may be. But I am not a professor.

Prof. Steytler

Mr Chairman, Section 20.1 is exactly the same as the present Constitution so it clearly links the... No confidence in the cabinet here defined as "President plus ministers" and then the two options: one resign, one dissolve. So there shouldn't be difficulties with 20.1 unless one wants to unlink a motion of no confidence in the cabinet which includes the President, with the power to dissolve the National Assembly. A third and separate issue... A third possibility is the motion of no confidence in the cabinet now

excluding... And one can redefine the cabinet. You don't have to stick to the same definition. You can say: Well, for these purposes, we are talking about the cabinet, excluding the President. Everyone knows precisely what you are talking about. And then simply say: Well, there should be reconstitution. Then one will argue what if the reconstitution, if there's one change in the portfolios, is that reconstitution? But then, I am sure the National Assembly can comment on that again and pass another motion of no confidence. So the real issue is the linkage giving the President the power then whether he can then dissolve parliament after such a motion of no confidence in his cabinet, excluding himself.

Chairperson

So how do we take this forward? Leave it as it is for further discussion?

Dr Pahad

What we think, it needs further discussion. We can argue until the cows come home now if that's what the Interim Constitution says then it's contradictory in what it is saying. It won't be the first time. So all we were saying was that it needs to be discussed. Whether when you want to pass a motion of no confidence in the cabinet, excluding the President, that should ipso facto lead to the power of the President to now begin to dissolve parliament because what we are saying needs to be discussed is: How do you empower the National Assembly or parliament to ...

(end of tape 7)

These tapes were typed in sequence (1 – 7) and numbered sequentially. However, from the contents, it is pretty clear that the numbers of tapes 6 and 7 have been transposed.

Tape 7 clearly follows on tape 5 and tape 6 clearly follows on tape 7 and is the final rounding off of the meeting.

I have not taken it upon myself to re-label the tapes, re-number the pages, or change the relevant headings, but this must please be pointed out.

3 July 1996

Prof. Steytler Section 8 is then when a member of the National Assembly, the ??? these are a seat ??? eligible to be a member, I think there is some difficulty with that word "eligible" or being disqualified, resigning as a member or becoming a member of provincial legislature or local government. Filling of vacancies: that will be dealt with under the electoral system. Then the oath and affirmation of members: the aim of including the actual oath in the text in the past has just been placed in a schedule and sort of the philosophy that is emerging in drafting is that to say what you are doing in the text itself rather than hiding things at the back. So the idea was to place all these actual oaths in the text. Those were sections 8, 9 and 10.

Chairperson OK. Any questions or discussion, questions 8, 9, and 10?
Mr Mshana???

Mushwana
Mr Mshana Mr Chairman, on the footnote, Section 43 (d) which requires vacation of ??? after ??? ???. So this will come into the Constitution or should we leave it for parliament recirculation???

Chairperson You're dealing with footnote 22?

Mushwana
Mr Mshana 15(b).

Chairperson OK, 15(b). Alright. Is it a matter of legislation or should it be in the Constitution? Mr Eglin?

Mr Eglin Chairperson, I mean, on the face of it I would say that it's a matter of legislation, but I don't know whether you can have legislation which would disqualify a member if there is

on children and on other things. So I just think we need clarity and Colin is right. I mean I don't think that we should discuss it now, but we should bear that in mind and bring it to the notice that we need to make clear this distinction.

Chairperson Dr Pahad, we've summed it up. We'll take it further when we discuss officially the CC. Then it is covered. Mr Grové?

Mr Grové Chairperson, I think we can simply footnote this that it needs further discussion when Section 2.3.1. is dealt with. Whether it is in the Theme Committee or the CC or wherever.

Chairperson OK. Agreed to that? Fine. Mr ^{Mohlamonyane} ~~Manyane~~???

??? Chair, you see, as to what we raised is going back, but you see, also you should not try to limit the powers of the President in reaching agreements with the other states. My understanding of these two concepts has always been that here is a president, he goes to India, he reaches an agreement with that particular government say on trade matters etc. etc. or some important things, the agreement is then reached between the two countries. He first of all says: Well, my parliament has got to ratify this. By ratification here I mean "approve" whatever that other meaning may be. My government, my parliament has got to approve this agreement that I've entered into with you. After parliament has ratified that agreement, it is then that the President can sign. That is my understanding of how the things operate, but there are other small agreements which may not require the ratification of parliament where, for example, say South Africa enters into an extradition order

want to make a provision where you can get rid of the President or get rid of his cabinet, without him getting rid of you.

Chairperson

I think in our discussion as well if you refer to block 9 of the report. That's 24.2, page 40, block 9. It also says, number 2, under agreements "term of office determined by membership of parliament" and number 2 says "vote of no confidence by parliament in the cabinet or in the State President". We are due to deliberate that. A motion of no confidence could be passed in the cabinet on ??? or the State President. ~~Mashana~~???

Moshwana

???

Moshwana

What happens if you pass a motion of no confidence in your President and not your cabinet? Do you retain your old cabinet or do you expect the new President to set up his own cabinet?

Chairperson

The new President appoints the cabinet. He may decide whether he maintains that cabinet or he reshuffles, or he appoints a new cabinet, whatever the case may be. But I am not a professor.

Prof. Steytler

Mr Chairman, Section 20.1 is exactly the same as the present Constitution so it clearly links the... No confidence in the cabinet here defined as "President plus ministers" and then the two options: one resign, one dissolve. So there shouldn't be difficulties with 20.1 unless one wants to unlink a motion of no confidence in the cabinet which includes the President, with the power to dissolve the National Assembly. A third and separate issue... A third possibility is the motion of no confidence in the cabinet now