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THEME COMMITTEE 2

MEETING: 6/3/95

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Theme Committee 2 - 6 March 1995  
Tape 1

NOTES

1225:  
main ??? of election

2877:  
government of Gough Whitlam???? (not sure of spelling of Witlam)

5023:  
majority not just a ???

5115  
various leinde??? the states

5176:  
Who is speaker???

5347:  
and we tried ???

5494:  
themselves ??? because

5711:  
Who is speaker?

5736:  
the concept of ???

5923:  
they ??? in the Senate

6501:  
happy to the ??? that's here

6549:  
Who is speaker, Prof.???

6670:  
Who is speaker???

6778:  
Who is speaker???

6850:  
Who is speaker???

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Who is speaker???

## Theme Committee 2 - 6 March 1995

## Tape 1

Chairperson

Gentlemen, I think we should begin our in-house workshop on bicameralism. All of us have before us the agenda of the programme for this morning. May I make some suggestions with regard to that? If you see the programme before you, there are five inputs there for 20 minutes each and discussion is only supposed to take place after tea at 11 o'clock. We feel there that since Professor Davis would have to leave us, it would be better if we allowed him to make his 20 minutes' presentation and then we then quiz him for about 20/30 minutes on his presentation. We will do the same with the second item on the programme, the Constitutional Principles and bicameralism and then 3, 4, and 5 appear to me to be a package. We could perhaps have the three inputs there and have a discussion on that after the tea break. Are there any suggestions to that proposal? It is agreed then? Thank you very much. So we'll have a 20 minute presentation now by Professor Davis, who will give us his input on the Senate in South Africa, past, present and future, imperfect experiences and the Constitutional Principles.

Prof. Davis

Thank you very much. I must say that looking at what my brief is, the Senate in South Africa, past, present and future, I am going to leave the Constitutional Principles to an extent because I see that they will be dealt with afterwards. Let me just start off with the Senate as it was from the time of Union, and I must say that I am grateful to Nico Steytler for inviting me because it made me kind of re-think and re-read things about the Senate which are actually

quite fascinating in their own way. The background to our Senate in 1910 and the bicameral structure of the old South African parliament, with the House of Assembly and the Senate started off at the time of the 1909 convention. What was particularly interesting there was that all four provinces at the time, the Cape, the Free State, Natal and the Transvaal, all had upper houses for a variety of reasons, which I don't have to go into. But the point was there was some discussion at the time of the convention in 1909 as to why an upper house was required and the most important reason that was given for that... There were two reasons, which finally prevailed. One was that there was a suggestion that the upper house was a device for protecting the smaller colonies against the larger. At that time the Cape was by far the largest colony, the most important one. I suppose people who live here still think that when it comes to rugby! And the second reason, was "for watching over the interests of the Coloured races" because, as you will obviously know, the parliamentary structure there was for whites only. Now what then happened was that those views prevailed and we got a second house. The interesting aspect of the second house was that it was supposed to be a house of elders and there were a number of different qualifications which were laid down to be a Senator in those days. One was you had to be older, which means you had to be over 30 - it seems a very young age, but nonetheless - you had to have a property qualification, that is ownership of immovable property in the Union to the value of £500, which I suppose was a substantial sort of money; I suppose it was then, and it is still today, if you take £500 compared to the Rand. That was the second aspect and obviously there had to be a third one which was

reflective of the racist Constitution at the time, a white South African. Now, the whole aspect about that Constitution, the constitutional arrangement, was that the Senate was supposed to be free from the immediate influences of the electorate. That is why the suggestion was made that there should be an indirect means of electing Senators and the suggestion was a two-fold one. One was that there were to be 32 Senators elected by the provinces, each province to get eight. Again, the idea being that the smaller provinces were to be safeguarded at the expense of the larger. Eight Senators elected – and I'll come to the main ??? of election – plus an additional eight nominated by the government and they were supposed to be "men prominent in the life of the nation who would otherwise be lost to politics". The suggestion was that they were supposed to be on the model of the House of Lords which, of course, specialises in ensuring that geriatrics can continue. However, in this case they were supposed to be "men prominent in the life national who would otherwise be politics". That was the idea. I stress "the idea". Now the other 32 were to be elected for 10 years. In fact they were all to be for 10 years, the point being that what is important about this is to bear in mind the Senate was to last for longer than the Assembly, the members of which were elected for five years. The idea was therefore that the whole body would continue for longer than one simple period of election and the way in which they were to be elected was that... It was an indirect election. Each province would have an electoral college consisting of members of the provincial council for that province and members of the lower house for each province and that electoral college would then as it were elect by way of

proportional representation the eight Senators for the province, which therefore meant that minority parties would in fact get Senators in proportion to their success at provincial, council and national election. Now, that was in a sense the way the Senate was in fact developed. The interesting thing about the Senate was that the idea was it was to be less powerful than the Assembly, in that the whole idea was that money bills, financial legislation if you want, taxation, could only originate in the House of Assembly, and the idea was as well that the Senate could not amend these bills, it could only approve or reject them. Now, that particular process was then adopted and that was in fact what was reflected at the time of Union. But there were in fact a considerable amount of clashes in the early period of South Africa, in fact in the 1910s and 20s, particularly when the Senate didn't approve, refused to approve, a series of bills which had been passed through the Assembly. The whole idea was that the Assembly began to get considerably concerned about the fact that there was this impasse and the whole range of matters. And what in fact therefore happened was, interestingly enough, that a select committee was then set up in 1920 to re-look at the whole Senate because of this problem. This committee then came up with a particular set of proposals. They said that the number of Senators should be increased so as to preserve the ratio of one Senator to three members of the Assembly; that the four nominated members should hold their seats for the same period as the elected Senators; that in addition to the eight directly elected Senators for each province, the balance be elected by all members of the Senate and the Assembly together; that the Senators hold their seats for seven years, and not for 10; and that the

property qualifications be discontinued. There was considerable discussion at the time as to whether the whole of the Senate should not be elected as it were by the population, by another means, but still elected by the population. The view was that the proposal that the Senate should be elected by the people had been rejected in 1909 and General Smuts decided that the proposals which were put forward to him would have made the Senate too strong a body and accordingly the old approach continued, that is the 32 plus the eight. In many ways that was the way in which the Senate then continued right through until the 1950s and then, of course, we had the so-called Coloured vote crisis case and the National Party decided that a little bit of political gerrymandering was in order at the time and, as you well know, the Senate was changed. The Senate was increased, it now composed of 89 members, 16 nominated vis-à-vis the government and then different amounts for the provinces: 27 for the Transvaal, 22 for the Cape, eight for Natal and eight for the Free State and four – two nominated and two elected – for South West Africa as it then was called, and four members representing the black population. The typical change then was this that no longer was proportional representation adopted. In effect what happened was that the Senators were elected via an electoral college of provinces onto the Assembly, but the majority view prevailed, which meant that you didn't have the minority parties getting any Senators. That, of course, changed once the Separate Representation of Races Act was adopted, the smaller Senate then came back into operation. We had a Senate which then... The 89 was reduced once more and what occurred was that we had a Senate composed as follows: 11 nominated Senators, two

from each province and South West Africa and one appointed for the so-called Coloured population and then one Senator for each 10 members of the House of Assembly and the Provincial Council in each province, again with the principle of proportional representation; a minimum of eight Senators, however, had to be for each province. So you can see the Senate in its own way played quite an important role in a variety of ways in South Africa. One because of the system of proportional representation, one because in the early days of South Africa, you did get changes of government and because the Senators lasted for 10 years, it was possible – as occurred in the 1910s and 20s – to have a Senate where the majority of the Senators were in fact not of the party which was governing in the House of Assembly. That was why you actually had those deadlocks. That was why the law was then changed in the 1920s, to give the Governor General, on the advice of the Prime Minister the right to dissolve the Senate in those cases, which watered down its powers and which is why the convention grew up that the Senate did very little other than rubberstamp the Assembly. Let me say one or two final things about this history. It's interesting to contrast this history with the history of Australia because Australia was also a dominion that meant it was part of the Great Four, with Canada, India, and ourselves and Australia. The Australians also went for a bicameral system. They also had a Senate and Assembly. The difference between theirs and ours was that theirs they did work by way of states, in other words the states of Australia elected the Senate by way of indirect election and that continued right throughout and given the character of the federal structure of Australia, it occurred at various times in Australian history that the



Senate was composed of a different set of people, parties as it were, to the Assembly, or the House of Representatives as the Australians called it. And it was because of that reason in particular that the government of Gough Whitlam??? in 1975... And it is quite interesting to refer to that for one half minute. What occurred in that case, and it's the exact case study of what happens when you have a system of election for Senators by way of allowing as it were the Senators to be elected by provinces, federal structure, giving each province the same amount of Senators, is that you could well have a situation whereby if you have your House of Assembly done by a constituency system, or by some form of proportional representation, but on a different system to the Senate, what occurs then is that you get a different party controlling each house. That's what happened to Whitlam??? at the beginning of 1974. The Australian Labour Party, controlled by quite a good majority got the House of Representatives, but because the term of the Senate was different and because they were elected by a different method, the Liberal Party controlled the Senate. And what occurred in 1975 in Australia is simply this, that the Liberal Party knew it could win in the election because the mood had changed against Whitlam??? even though he could have stayed in power until the end of 1976, early 1977. So what they did, what the Liberal Party wanted to do was to call for an election and the way they were able to do that, or tried to that, was to block the budget in the Senate. Now, recall, that even under the South African Senate, the possibility was open for the Senate not to amend, and not to initiate a budget, but they could refuse it. The convention, of course, which developed was that if you refuse something on two occasions in the

South African context, on the third one the Assembly could pass it and take it straight to the Governor General for approval. That is not, however, what was argued in Australia. In Australia the argument was that the Senate could in fact, longstanding convention, refuse a money bill, and did. And what occurred in the Australian context was that Whitlam??? ran out of money or he was about to. And two weeks before they ran out of money, the Governor General called them in and said: Are you going to call an election? Whitlam said: I'm not going to call an election. He didn't want to, he was going to lose. And the result of this was that the Governor General said: Fine, the fiscal bill will not be passed. I am dismissing you because it is in my power as the Governor General to dismiss you in order that some other government will then call an election to break the deadlock. Malcolm Fraser was then appointed as the caretaker Prime Minister. Of course, the bill had already gone through the House of Representatives, it went then through the Senate and a new election was called and, of course, the Liberal Party won. The point that I am simply making by this case study is, and it is relevant to our deliberations, the question of what power you want to give to Senate and what kind of electoral composition the Senate actually has. Clearly your difficulty here is, if you take the Australian example, is that you reach deadlock and in this particular case whereby if you have a direct form of representation on the House of Representatives level, you could well work out that another body, which was there for a longer term, could well abort or subvert the wishes of the electorate as brought about. That in a sense meant that the Australians had gone about the business in an entirely different way to the South Africans, for two reasons: One,

because our Senators were essentially elected by way of proportional representation, the majority party always had a huge majority in the Senate. Once 1948 had come and gone, the National Party were in power then right through so you never had any change to the Senate and the Assembly. Secondly, because of the convention that has applied, that with the fiscal bill, which was the most powerful power given to the Senate, that is to refuse it once the bills had been put twice; on the third occasion, the Assembly could simply pass it and the Senate would be bypassed. That, very briefly, since I've only got 20 minutes and I've almost taken that up already, gives you some very potted history of what happened. What is interesting, if I can just make two or three final points, Mr Chairman, are firstly, what I find interesting, is that clearly the issue about the Senate, whether it should be an elected body or a nominated body. Secondly, what is interesting about our history is that although the idea was that the nominated members should be members who have some high but impartial political profile, that never occurred. It just never occurred. That convention never ever held in South Africa. I might add it never held in Australia either. It's one of the things that I think one needs to learn from this history: you either have an elected system if you want that, but don't allow them any form of nomination through a convention to believe that's going to happen. Let me tell you what happened in Australia, since you think it is not only South Africa under the National Party where these conventions were overridden. The fact was that there in Australia a custom had existed that if a Senator died in mid-term the State would elect to the Senate a person from the same political party as the person who died and that was done

through the Premier. During the Whitlam crisis two Senators did die, they were both Labour Party Senators and the Liberal Party state said: To hell with this convention. In law we're entitled to elect whom we like. And they put two Liberal Party Senators in and there was nothing anybody could do about it. That was the law and that was the end of it. And that was absolutely crucial for the fall of Whitlam. The simple point I am making is, when a crisis occurs don't rely on conventions when political parties see the real possibility of gaining power. Maybe I am being terribly cynical and I am sure that you all are very different, but I am simply pointing out to you what the history was. The other point that I do want to make - I think it is an absolutely critical point - is the question of what powers are given to an upper house. Clearly the upper house, if it's given a form of election which can give it a different composition to the Assembly - the issue that then arises is: to what extent should it have powers to subvert the wish of the lower house which has been the one that has been elected by the electorate per se. Now, if I can just end by saying, you will in fact get discussions of Continental chambers and the US Senate. Let me just make one point in relation thereto. The non-Commonwealth type Senates of course have had very much more powerful roles, particularly the German Senate which is a very powerful body, the Bundersraat, because there in a sense I think we have borrowed from that in our Constitution, that is we've borrowed from it in the sense that matters which pertain to the province per se cannot be passed through the lower house without approval from the upper house. In other words, the upper house then becomes the safeguard of the federal structure of German society. Recall, we never had

that in South Africa, so that never had that role and therefore there was never anything defined quite as explicitly as that. In other words, it's perfectly possible to specify what powers the Senate should in fact have with regard to where it should or should not approve legislation and I think that's an important difference between our past and perhaps the Continental past. And then, of course, the final point that I want to make is that if you look at the nature of federal structures, one of the major issues for the chambers which we started off with and then rejected was the idea that there should be equal representation between the provinces. That smaller provinces should have as many Senators as the larger ones. Now that particular view, to a large degree, was rejected in our history. Perhaps let me just say this, I find it rather interesting that our present Senate in a sense is very much a product of our past history in the way it was shaped, in the way it was created, in the way in fact it was elected. If you followed my reasoning, you will see that to a large degree we've really followed the precedence of the past and perhaps we might want to re-think that too in relation to the way that works and look at the Senate afresh. Of course, clearly if one thing is of any implication it is this that the Senate in South Africa from the time it was elected, really did very little to safeguard "the interests of Coloured people" and did very little to in fact safeguard the interests of the different character of the provinces and I think one has to look at that in trying to focus on your debate. I don't really think it's proper for me to say more than just tease out those implications for discussion. Thank you.

Chairperson

Well I think I would like to thank Professor Davis for his

very important input. I am sure that many of you have very many questions that you would like to put to him. It is now just after 25 past. Can we have discussions from now until 10 o'clock on this particular subject? Did you have your hand up, Mr Eglin?

Mr Eglin

I was interested in your comment on Gough Whitlam... the Australian one. While it is correct that the upper house thwarted the will of the lower house, it actually reflected the wishes of the people because when there was an election the lower house was overturned in favour of the party supporting the upper house. So, while it was technically thwarting a lower house which was properly elected, it had the effect of unlocking the will of the people by forcing a general election, so it wasn't all that bad, especially as the Liberal Party came into power! The point I want to make is this... Let me just point it out... Problems which may occur in a clash between the Senate and the lower house, or the upper and lower houses. It could be because of the composition or the period of office of the Senate is different from the lower house. Can you tell us, are there any countries in the world where the composition of the Senate is not different from the composition of the lower house? It's always that. And I therefore would argue, or put to you, that if this is a problem the solution must be found in the powers that you give to the Senate in order to block or not block the house.

Prof. Davis

To answer your question, just in relation to the first point that you are making, perhaps it's because it's my party that lost and yours won that I am upset about the Gough Whitlam thing, but to be perfectly frank about it, I think the

issue there is a profound one. It is not just a question of whether at that moment the electorate actually wanted the Liberal Party. It was a question of if a government is elected for a term of office the real issue is, can you use this? Does the upper house... Can you use the upper house as it were to subvert that? In other words, Whitlam would probably have said, I think, and rightly so, not that it is right in terms of the argument, simply this that, you know, we had three years, that's what we were elected for. and if we had been given our full chance, we might well have been able to show the electorate our policies were the better. And that I think is what the argument was about there. In relation to your question, is it a question of where in fact do they have the same composition? Is that what you are asking?

Mr Eglin

...deadlock is a real one. You suggested it could be resolved either in the composition of the Senate, this is the lower house, or in the powers that you give them. Now I just put it to you, as I understand it, the Senates in other countries are always composed differently from the lower house. So the solution doesn't lie in the composition of the Senate as much as in the powers that you give to the Senate.

Prof. Davis

No, I think that's correct. I mean the one example where, of course, the Senate doesn't have really much different composition is in Canada because there, in fact, as I understand the Senate, it is a nominated procedure by government for the various provinces so in effect the Senate really is a toothless institution there because to a large degree it reflects the composition of the government of the day. I don't deny at all that the issue is... The issue is two-fold: Do you see the Senate in terms of having

different, not only different powers, but a different role? So if it's role is different, I mean, for example, in the 1920s when, for example, there was a deadlock in South Africa interestingly enough about the Flag Acts and the Mines and Works Acts, quite a lot of important legislation, the opposition said: Well, the Senate is a house of revision, it is there to reconsider and revise and therefore we don't like it, chuck it back. Now, the question I suppose which arises is: a Senate could do that in a vast variety of ways, but I would have thought that if the Senate does have the kind of Canadian type of composition, then it's... If, for example, it is always going to reflect the views of the majority party of the day, then it is highly unlikely to play that role. On the other hand, it might well be that you then have... The structure might be relevant to this extent, if, for example, as I understand, the way we are supposed to work in South Africa at this present point, but if you change the power to the provinces, you've got to get a majority, not just a ??? but of those Senators representing the particular province in question, then in a way, even though you've got a majority which will always be the majority of... Let's say you've got an ANC majority at the moment, but if you want to change powers in the Western Cape, you have to get the National Party Senators to agree, well then you've got in a sense a combination of both composition and powers which become relevant, so you can fiddle around with that menu. But at the end of the day, yes, there is no doubt that every Senate that has been effective has had a slightly different composition to that of the lower house and obviously specific powers and I think the most effective would be the German, which is the most powerful because there the various lende???, the states, are given representation and



secondly, there are specific powers given to them and their most powerful powers relate to the powers of the states. There the bundesrat cannot do very much. A bundesrat cannot do very much unless it's got the agreement of the bundesrat and that plays a very important role perhaps because of a different composition and different powers.

Chairperson

Thank you, Professor Davis. Yes?

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Can you divide the powers to some extent between three levels? You have the house, you have the Senate, and you have the provinces. Now you can add the Senate as retention of your house. You can talk about co-operative type of parliament. Or you can have a Senate that is elected separately, very independent, and you have a kind of juristic or competitive type of system. Or you have the Senate as an extension of your provinces. Now if you divide up in this way, isn't it easier then to allocate powers, it depends what you are going to select to decide on what powers are you going to give to the Senate... I don't know, I try to... an you see? Because if you have a co-operative type of system and the Senate appoints, you end up in you-know-what. You have an electorate, you have the American type of system, and we tried, ??? like more near the German system, but also not correct because they are collective, representing the provinces, and then as if at this moment the powers allocated to the Senate are really not enough to represent the provinces.

Prof. Davis

It's a very profound question that you are asking in this sense that it seems to me that there are two roles that you can ask a Senate to play if you look at the effective Senate.

There are effectively two roles. The one is as it were to safeguard provincial interests. At the end of the day, with all its other powers, I suppose if you ask the German constitutional lawyers that's what they would say has been the most powerful aspect of the bundesrat to keep this eternal federation of the German basic law defined. By contrast, the American Senate is not so much a Senate that safeguards direct state interest. The argument there is that the states themselves ??? because, as you know, the residual powers are with the state. So the structure of the US Constitution at the end of the day is where you find your safeguarding of your provinces. And the Senate to a large degree, although representing each state equally because they've each got two - little states have the same as large ones - the fact of the matter is that to a large degree the Senate is not a body which is geared as it were to safeguard provincial interests directly. It is there as it were as an autonomous part of Congress. The fact that its character and composition are different might mean that it reflects different interests, but it's there as it were as a check on a majoritarian type system to the representatives, even though that's not totally majoritarian. But that's what it is there for. Now, what I am saying is, you've really got two different models. Do you want a Senate which brings a different focus of interest to bear on national legislation? You could have variants of this. That's the one thing. Or do you want a Senate whose essential role is to safeguard the federal structure of the society by in fact refusing to allow provincial legislation through which might amend the provinces' powers? The truth is that both of those have been successful in their own way.

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...to the house. The other one is kind of a more independent type of Senate, people select them, and yet this is really a different level of government if you take the concept of ??? You always have access to another level and the third one is coming in from the provinces where, like the Germans, but okay they were elected, but they give special attention to the interests of the provinces, so it's actually...

Prof. Davis

I get that, but I think at the end of the day what you... All I'm saying is... I take your point. I am saying what leads out of your point is in a way, here is a polarity and we can tailor what we want accordingly. Can I just make one final point in relation to... What is interesting about the Americans, particularly interesting, is the way that the American Supreme Court has used the Senate to justify a federal override. What I mean by that is that the federal government, the Congress, can pass legislation for states and therefore override the powers of the states, pass legislation which ultimately then holds for each of the states and the states can't then turn round and say: Hang on a moment, that's our role, that's our job, you can't pass it. What the American Supreme Court has said is that by using the so-called Interstate Commerce Clause, which overrides the powers of the state, saying Federal Government can pass that legislation, they said: Well, if the states don't like it, they ??? in the Senate. And if the Senate passes this legislation that simply gives power to the point that in fact the Federal Government is entitled to override the state and strangely therefore even though the Senate wasn't composed to directly reflect the state interest, the fact is that it has been used by the American Supreme Court as a means to ensure increasingly larger powers for federal

government at the expense of the state, which itself is perhaps an interesting insight in the overall scheme of a federal structure.

Chairperson Thank you very much. We only have about 10 more minutes and I think there are quite a few questions. If we could make the questions short.

Prof. Davis I'll make my answers short as well.

Chairperson And I think if you make the answers even shorter, we may get through! Senator Groenewald, I saw your hand up.

Sen. Groenewald Thank you, Mr Chairman. Professor Davis, I think in most democratic countries the lower house is very much the same, its functions, its composition and so on and so forth. I also personally feel that checks and balances should be built into your Constitution in such a way that you don't really need a second house to look after the interests of the people as such. This is a house elected by the way for the people. So the Senate should in actual fact play a completely different role. Now, my question to you is that whereas the composition and the functions of the lower house are normally based on principles of democracy, the upper house should really reflect the country for which it is designed. It should be a house designed specifically for the country in which that upper house must function. Do you agree with this principle? I think that is the most important.

Prof. Davis Could you give me an example of what you mean in direct terms?

Gen. Groenewald For example, in the UK the democratic system evolved from a system where the country was governed by lords and monarchy and with the structures of the monarchy. So the interests of a monarchy were protected to a great degree in the upper house. In South Africa we do not certainly have a homogenous society, we have very much a pluralistic society and shouldn't this for example then be reflected in the Senate as such?

Prof. Davis I don't have any difficulty with that. What I am trying to tease out is what the functions then would be because... Recall your first point. Your first point is that the lower house, you're right, in all countries reflects the will of the people in an election; I mean the majority of the people will elect the majority party. I suppose really what one has got to fiddle around with is to what extent the Senate reflects what might be called the fabric of societal institutions which in a sense should be put beyond the reach of a transient majority in the lower house on the one hand, or give it powers which in a sense can subvert the will of the majority. I would have thought that if that is the case then you're into a constitutional crisis. The one thing you can't do... Take the Whitlam situation. Colin is, of course, right. The matter was resolved by the fact that the Liberal Party won. But one wonders quite seriously what would have happened had the Labour Party actually won, still with a Liberal Party majority in the Senate, still playing its nonsense. What would have happened eventually would have been that, that whole Constitution would have been rendered totally... There comes a point in time when the majority is going to say: We've won this election. If you don't like it, we'll tear up the Constitution or change the

house, which in a sense means changing the structure. You've really got to resolve what are the powers that you think are the ones which in a way by agreement should be put beyond the reach of a simple majority and I suppose the Germans have said, for example, the powers of the provinces, once we've agreed to them, should be beyond the reach of the majority because, quite obviously, if we're living in Bremen, it is unfair for the rest of the country to turn around and tell Bremen what it wants to do. I am happy to ??? that's here, but it seems to me that that's really what you people, as the elected representatives, have to decide for us. I say "for us". I am one of them.

Chairperson Thank you very much. I do believe that we are having a very interesting discussion on this issue. Yes, Professor?

Prof. ??? What is the rationale for not allowing the Senate to originate money deals? What is the historical reason for giving this limitation?

Prof. Davis I think it basically comes again from the British system where your elected representatives were in the Commons and they were the government of the day and it was thought to a large degree that it was for the government who was elected to fashion the critical issues, mainly taxation, without representation. Clearly you wanted the representatives to impose the taxation. Indeed that convention then followed through to most bicameral systems as a result. I mean, it does seem to me that it is right that if I am going to be taxed I should be taxed by those people who in fact I have elected. That I think is the rationale.

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I would regard that as a somewhat unfair indication because all of the matters that are handled do have financial implications. It is important that the Senate should have the ability to debate and also to originate some legislation relating to finance of the country.

Prof. Davis

Of course it doesn't mean that an upper house can't deal with money bills. You might want certain... you can amend, you can change. But the actual initiation, it will always be that initiation should come through the duly elected representatives. I mean, that's the reason. If you've got a different view, that's fine.

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The Professor never mentioned about native representatives who were there for the natives when we didn't elect. As a native I never elected them. How were they representing us in parliament?

Prof. Davis

Well, I suppose... There were four members who were nominated, you are quite right, representing the black population, nominated through the Governor General. The short answer is, of course, once you've got that, you are going to be represented badly. But it was a nominated procedure to the Governor General.

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...it was that there were eight nominated, men only. And you never mentioned about the representatives from the Governor General.

Prof. Davis

I'm sorry. No, what I said was, when it started out - I mean, it changed and what have you - but when it started out in 1910 there were 40 members, eight were appointed

by the Governor General, four of them, sorry, were appointed for "their knowledge of the needs and desires of the 'non-white races'". And further it says that eight nominations, four for black South Africans, four I suppose for anyone else in authority – we desperately needed more representatives – and 32 in the provinces. So you had four of the eight!

???

Thank you, Mr Chairman. I'm sorry I came late and I don't know whether the Professor did resolve these things, but as I came in I heard him sort of, perhaps in passing, proportional representation, I don't know in what respect he used that context, but I don't even know whether my question is going to be relevant here because I was looking at the programme...

Chairperson

Why don't you pose them and then we'll decide whether they are.

???

My question is: There are talks outside this house that proportional representation destroyed the multi-party system. To what extent is that destroyed? I don't know whether it is relevant, Mr Chairman.

Chairperson

Not relevant in this particular... Maybe... I don't know whether you want to say anything.

Prof. Davis

All I wanted to say was, just to clarify, the system of proportional representation in the upper house, in the Senate, was simply on this status that each provincial council, let's say for the Cape, and the lower house, let's assume that they are 100 representatives, of which 60



represented the National Party and 40 represented the United Party and there were 10 Senators for the Cape...

(end of tape 1)

**Theme Committee2 - 6 March 1995  
Tape 2**

**NOTES**

0399:

Professor Ndlovu/Glova???

0692:

the more ??? aspect of the ???

0763:

to the ??? pact

1135:

chamber of parliament ???

1272:

a conscious deviation???

1335:

as a legitimacy or lawmaking lapse???

1431:

constitute ??? of powerful

1524:

??? of ??? in the three professions are prominent ???

1585:

??? ??? recognition in the

1718:

in the ??? of population or territorial ??? of

1917:

and a ??? of a non-elective

2018:

excluding ??? in the 1960s.

2096:

reflect the ??? of the different

2216:

the act of ??? as a state

2577:

??? ??? include

2689

18 ??? dealing with

3090:

the ??? of substantial

3454:

Who is speaker???

3475:

is not a ??? sine quo non

3497:

a provincial ????

3530:

provincial ??? therefor

3787:

Who is speaker???

3791:

more or less ??? it because there is the fact ???

3888:

rather than a ???

4602:

on a ??? basis

4941:

not a ??? or something else

5518:

executive ??? from the

Theme Committee 2 - 6 March 1995

Tape 2

Prof. Davis

...there were 10 Senators for the Cape, the National Party would have got six and the United Party would have got four. That was the indirect form of proportional representation. I steered clear, thank goodness because you haven't asked me, there would be an enormously complex issue as to how and whether we should have proportional representation for the lower house. That isn't what I was asked to deal with. I was only talking about an indirect system... I've given this example on the upper house.

Chairperson

Thank you very much, Professor. I think on your behalf I would like to most sincerely thank Professor Davis for his very important input. The first item was on the question of the Senate in South Africa. I don't know whether we discussed whether we need it or we don't need it, but that was one of the issues, and the powers that we give to it, how it should be elected, who should be elected or nominated, and the question of whether it should have equal representation or whether it should have proportional representation. These, I think, are important issues, Professor, for us in the Theme Committee to discuss. As you know, this in-house workshop is not to decide, but to collect as many views as possible so that we can pass them on to the Constitutional Assembly where the matters will be debated and decided. So, once more, we thank you very much. We know you are a very busy man, both during the day and at night, so we thank you very much.

Prof. Davis

OK. Thank you.

Chairperson

Can you now... If you want to help yourself to some tea in the meantime. Can we then have Professor Ndlovu??? here so that we could start with the second, the Constitutional Principles and bicameralism. The second item that we have on our agenda is the Constitutional Principles and bicameralism. I think we'll have an input by Professor Ndlovu for about 20 minutes and then we will have about 20 minutes discussion thereafter. Professor Ndlovu.

Prof. Ndlovu

Thank you. Well as the toughest Constitutional Principles and bicameral, we will focus mainly on the second chamber because that is where the contention may be. I don't think anybody doubts that a lower house is indispensable to a democracy. Now before we attend to the more ??? of ??? a short background note on the key phrases may be necessary here. Now, what do we mean by Constitutional Principles? Reference is being made to the ??? pact or declaration which is contained in Schedule 4 of our Interim Constitution which qualifies or restricts the mandate of the Constitutional Assembly in dealing or in deciding on the context as well as the form of our Constitution. As is well known, the product of this process of constitution making has to be vetoed by the Constitutional Court against such principles before they may certify that a new Constitution is in accordance with the Constitutional Principles. It is important therefore that we familiarise ourselves with the stipulations of the Constitutional Principles whenever evaluating the efficacy or otherwise of any constitutional option that we may wish to exercise. Now we come to what we understand by a second chamber. A second chamber here means a chamber of parliament which is additional to the one that is likely elected on the majority

rule or popular mandate principle. That is on the basis other, or additional to the numbers gained. A chamber of parliament ??? on another principle than popular mandate or a chamber of parliament that considers as central other additional centres to its composition that the will of the majority simply stated. Now, what are the conceptual underpinnings of a second chamber? What is the philosophy behind it? A second chamber is not cosmetic, must in its very nature a conscious deviation??? from the basic democratic model that the majority must invariably and at all times rule. This is a species of institutional check to majority rule as a legitimacy or lawmaking lapse??? It brought into the legislative process for one reason or the other parliament that ordinarily could have been excluded if the basic democratic model would have been strictly adhered to. What elements may constitute ??? of powerful forces of yesterday who would be sidelined by an unadulterated principle of majority rule. In the British model such elements include the leaders of the Anglican Church, hereditarily such persons also landed nobility. ??? of ??? in the three professions are prominent ??? politicians etc. Who may at the discretion of the Prime Minister, in consultation with the leaders of opposition parties, ??? ??? recognition in the House of Lords known as life peerages. In most secular formations, including the United States, such protected interests relate to disproportionate or unfair representation of such national units which is embodied in the principle of equal representation of regions, provinces in the second chamber, in ??? of population or territorial ??? of the state in question. It is a principle that is currently followed in our Interim Constitution also. Of course, the second chamber is but one of possible institutional checks

of majority rule principles. At the legislative level, there are many others. Few, however, can contradict that it is by far the most conspicuous within the legislative process. Now we come to the composition of the second chamber. A second chamber may be elective or non-elective. That is it may be a direct thought restricted popular mandate or no popular mandate at all and a ??? of a non-elective second chamber is the hereditary qualifications to second chamber status, which is embodied in the British model. Executive or law houses nominated second chambers have some interest for popular status, but are often vulnerable to manipulation by majority party interests as was demonstrated in our Coloured franchise excluding ??? in the 1960s. It is also possible, as is done in our Interim Constitution, to allow parties represented in the lower house to nominate upper house deputies in accordance with a constitutionally prescribed formula. This must reflect the relevant ??? of the different parties in the various regional assemblies. This may provide an effective check to turning the second chamber into a pliable extension of the majority party acting through its majority in the executive or the law house. Now we come to the issue of competence, of power of the second chamber. At first in a limited category of matters, fundamental in, for example, the act of ??? as a state or the survival of the democratic model in the perception of the founding fathers, the competence of the second chamber is like that of an institutional check or junior partner rather than an equal partner with the House of Representatives. This junior partnership may be reflected in numbers of the second chamber vis-à-vis the first chamber and the powers that may be assigned to it. In the British model, for example, many feel that its bills relating to collection of

revenue, expenditure or raising of loans may be passed without the co-operation of the laws. This is important within that system since the upper house potentially can muster more than double the numbers in the House of Commons. However, when it comes to extension of the life of parliament beyond the maximum five years, the British system demands the co-operation of the upper house. In federal formation, the co-operation of the legislature or the legislatures that embody regional interests, is usually required when issues of internal boundaries or powers of the constitutionally recognised sub-units are at issue. Of course, for the extreme examples given above, the power of veto of the second chamber will usually be suspensive that is allowing for more time for issues to be aired and canvassed under the glare of the public. That is a role of scrutiny and revision rather than that of partnership or equal competence and status with the lower chamber. ??? ??? include joint sittings or enhance majorities in the lower house to override a second chamber veto. Now we come to the Constitutional Principles. A second chamber does not perform parts of the essentials to other constitutions that are embodied in the peace treaty or solemn pact known as the Constitutional Principles. Reference is made to a second chamber, of course, in Schedule 4, Principle 18, ??? dealing with amendments to the Constitution that alter the powers, boundaries, functions or institutions of provinces. Such amendments require two-thirds majority of a chamber of parliament composed of provincial representatives. A crucial addition, however, to this provision is that yes, there is such a chamber. Furthermore, this requirement is made as an alternative to approval by a special majority of the legislatures of the provinces. It should be noted, however,



that a central frame in the negotiation process, especially on the part of those classes and elements that stood to lose in an unadulterated numbers game, was the need to marshal a formidable array of institutions that would keep the majority in check by powerful or substantial minorities, be they corporate or territorially stated. The question that will have to be answered in due course is whether the key parties and interest groups will consider the formal and distinct voice to load the dice to some degree in favour of a non-majority interest is defensible or not at this stage. The question of more significance is the idea of constitutionally prescribed collusion at executive level is not extended beyond April 1999. If we do opt for a second chamber, then a right balance between the two houses will need to be struck, especially on issues of composition, competence of power. The experience of the Interim Constitution will need to be carefully evaluated in this context. If we dispose of the second chamber then we may have to find a formula outside the legislative process or within the lower house that will retain the ??? of substantial minorities in the constitutional process. This must be done without overexposing our Constitutional Courts or casting it into a fire brigade function. Thank you.

Chairperson

Well, I thank Professor Ndlovu for his important input. His input is now open for discussion. Do I have any hands?

Mr Eglin

Chairperson, may I ask the Professor... He alluded to the British upper House of Lords, which is really a relic of a hereditary people representing either the monarchy or the nobility as part of the structure. Have you got any experience of in Africa... Is there any evidence in Africa that

there is either an upper house or whether hereditary people, whether they be traditional leaders or others, have a role in the legislative function, either in an upper or lower house, where they are not properly elected? In other words, I understand the British one, I am not au fait with the African one. Are there instance of upper houses, or even lower houses, where non-elected people in the form of hereditary leaders, play a role in terms of the functioning of that house

Prof. Ndlovu In the lower house?

Mr Eglin Well, in the upper house, if there is an upper house.

Prof. Ndlovu OK. Well, the African systems were based on the Westminster model, most of them and often what happened was that in most of these they substituted chiefs or traditional leaders for their hereditary principle of the British system and they substituted appointed upper house members for the life peerages which are at the discretion of the British Prime Minister as it were so that was mainly the case, for example in Lesotho, that was the case.

??? Professor, you are obviously of the view that in terms of the current Constitution the existence of an upper chamber or a second chamber is not a ??? sine quo non. Now you seem to say that there is an alternative, there can be a provincial ??? as it is. Would that be a correct assumption by me that you are in fact saying that in terms of this Constitution it would be possible to do away with the second house by substituting a provincial ??? therefor?

Prof. Ndlovu Well, what I was referring to was principle 18, Subsection

4, which says that when it comes to boundaries of the provinces, when it comes to institutions of the provinces and when it comes to the power of provinces you need a two-thirds majority of the upper house and that principle goes on to say that if there is such a house, which it leaves open, the issue of the upper house, but it goes on to say alternatively if there is no such upper house, then the special majority of provincial legislature would have to be carried along in any decision that impinges on these areas of provincial competence. Now, I would say if you wanted me to comment on that, that it is an elaborate process, the provincial legislature process is an elaborate process. The other problem that you may find there is that you may have either to create a forum for those provincial legislatures or you may dispense, of course, with a forum for those provincial legislatures, but you wouldn't have a central voice of provincial situation within the framework of the legislative process. So it would come more as a veto after everything has been done within the house as it were or within parliament.

Chairperson

Do you have a follow-up on that?

???

I think we do have a follow-up, but, yes, more or less ??? because there is the fact ??? United States Constitution where the state may in fact veto an amendment of the Constitution if 75% of them do so. I think on those lines in our Constitution in a sense now.

Prof. Ndlovu

Except that in America that veto is an addition to the Senate. In other words, this is a fine comb for those things that the Senate, perhaps for political expediency, have

decided to overlook and the provinces still feel strongly about. So it is an additional gear of provincial protection rather than ????. But what I am just saying is that here our Constitution makes that a possibility.

Chairperson

Thank you, Professor Ndlovu. It seems that there are no other questions on this particular issue. So can we then move over to the next set of ... Thank you very much. We want to thank Professor Ndlovu for his input and we can say to him that the points he has raised have been noted and I think it appears that everyone is satisfied with the position that he has put forward. Can we now move to the other three? We have about 40 minutes and I think if we can have an input by Professor van Wyk for the next 20 minutes and then we can start with the others to follow, and then have discussions after the tea break. Well, we have Professor van Wyk here who will give us his input on the Continental second chambers. Professor?

Prof. van Wyk

Thank you, Chairperson. Ladies and gentleman, just to show you that we haven't conspired beforehand with your so-called experts to give you a certain kind of picture, I think what I have to present may contradict some of the things that Professor Ndlovu has just told you. The theme on the programme is a bit ambitious. To give you here, in 20 minutes, a review of all the Continental systems, or even most of them, is simply impossible. So what I've done is to take six countries, I've cheated a little because one of them is not Continental. Three of these countries are in essence so-called unitary states, the other three are federations. The unitary states I propose to say something about briefly are the United Kingdom, is not part of the

Continent of course, Spain and Belgium. The United Kingdom I don't have to say too much about. You've heard about it and I think many of us know about the system in Britain. The Spanish and Belgium systems are a bit naughty here, because although they are not formal federations, they are on their way to some kind of federal arrangements and especially, maybe in view of the debate in South Africa, where there are current Constitutions, for instance if federal or not federal, Spain and Belgium might be good examples. The federal systems, I would like to present briefly, are Australia, that's the non-Continental one. One could have looked at Canada as well, but by all accounts the Canadian system of second chamber is a very weak one because there the Senators are appointed by the government and they have few powers so Australia, Switzerland and Germany... Unfortunately I didn't have access at fairly short notice to the new Eastern European constitution. It might be worthwhile for this committee at some stage to have a look at that as well. I also wanted to say that maybe we should have had something on Africa on the programme as well. Mr Eglin, Botswana for instance, also has a house of chiefs as a second chamber. I'll start off briefly with the United Kingdom. Of course, you know that is the House of Lords, the second chamber. Professor Ndlovu has told you about its composition. It's a weak second chamber. It mostly has delaying powers and not very effective delaying powers, but I think the important thing to note here is that it does represent a class and certain interests. But I think in some way one can say that the British House of Lords is more of an institution than an effective organ of government. That's what their judgement is, a kind of evaluation. Spain has a Senate called a senate and here creeps in an interesting

phenomenon, the Spanish Senate consists of 300 members so it's not, as I think Professor Ndlovu suggested, invariably a small body, 300 members, 200 of whom are elected by the Spanish provinces which are smaller units and so-called autonomous communities and the autonomous communities elect the other 100. They are directly elected by the population and each voter has a choice of three, each voter can vote for three persons, in other words, on a first ??? basis. But, interestingly, despite its size, the Spanish Senate essentially has only delaying powers. In other words, in the final analysis it is the representative chamber; the lower house, or the first chamber, has the final say. In Belgium, again, the Senate is fairly large, between 180 and 190 members, but in the Belgium instance an interesting mode of composition. 106 Belgian Senators are directly elected in exactly the same way as their National Assembly, 106 of them. 52 of them, that's according to the formula, it can change, but at the moment, according to the census of 1991, 52 members of the Belgian Senate are so-called provincial Senators, in other words, come from the Belgian provinces and the number of Senators from each province depends on the population of the province. There is a third way of becoming a Belgian Senator and that is by co-option as the Belgians call it. It is actually a form of indirect election. The directly elected Senators, 106 of them, and the provincial Senators sit together and they elect a further 26, half of the number of the provincial Senators, the number of provincial Senators is uneven, one more than half of the provincial Senators are indirectly elected by the other Senators. Interestingly enough, one commentator says that this was intended to bring in expertise. That's also a notion in South African politics. People from outside parliament,

the non-politicians, those who don't want to get involved in the dust or the cut and thrust that ordinary politics bring, as indirectly elected Senators. What happened in practice though was that it became almost a kind of catch all area for politicians who didn't make it in either the National Assembly or as directly or indirectly elected Senators. In other words, it became a political thing and not a ??? or something else. And then, of course, fourthly, there are a small number of Senators who can claim to sit in the Senate by virtue of their relationship with the king or the queen of Belgium. I think at the moment there is only one of them. The powers of the Belgian Senate for its size are equal with that of the House of Representatives on a strict basis. In other words, everything that the first chamber passes must be passed in exactly the same way in the same wording by the Senate as well. And unless that happens, the bill cannot be signed by the king. Interesting, commentators say that this phenomenon of passing the bill from one house to the other, which is called by the nice French name of "mavette" doesn't occur frequently in Belgium, probably as a result of very sound, solid prior consultation between committees and individuals in the two chambers and they solve conflicts or difficulties about bills – I get the impression more in the passages and in committees than formally across the floors of houses. Turning quickly to the federal constitution, from Australia, small Senate, 76 members, 12 provinces, 6 members from every province. They are directly elected, interesting, directly elected on a proportional representation basis which we all know by now. They are elected for six years. Half of the seats become vacant after three years. Every three years there is a Senate election. Australia's Senate equals ours to the Australian House of Assembly. In

the event of conflict, again another interesting procedure, messages are sent between the two houses. If they don't work, a joint conference is organised between the two houses, but not the whole houses, seven or eight representatives from each house. Whatever comes out of that, goes back to the houses and up to two times a bill can be rejected by the Senate or by the Assembly and if that happens there is a so-called double dissolution; in other words, both houses are dissolved and everybody has to stand for election again. And even then, if the deadlock continues, only then a joint sitting of the two houses takes place and the bill is passed by ordinary majority, which means because the Senate is small and the other one is large, normally the first chamber or the representative one gets its way. Now in Switzerland the Senate is called the Council of State, directly elected by the population on a majority basis. An interesting feature here is the cantons or the provinces who themselves decide on this procedure. In other words, it is for the cantons to decide how I am going to send my representative to the Council of State. He is elected for a period of four years, only two per canton. I am not quite sure how many cantons there are, but there can't be too many so that means that the Swiss Council of State is a small body, two members per canton, half a canton gets one member. An interesting feature also of the Swiss model is that a member of the Council of State may at the same time be a member of a canton legislature translated into South African terms, a member of the provincial legislature may also be a member of the Senate, but the so-called free mandate applies; in other words, the Senator or the member of the Council of State may not vote on the instructions of the persons from the province. That small



Senate or Council of State in Switzerland has the same powers as the first chamber; in other words, the laws must be passed by both of them. But what in history plays a role? Because commentators all tell us that the history of consensus in Switzerland, the collegial nature of its executive, the fact that members of the executive ??? from the right of parties and, of course, the phenomenon of the referendum in Switzerland ensures smooth operation and relationships between the first chamber and the second chamber. There is no provision in the Constitution for conflicts, but conflicts are more or less avoided as a result of historical factors. Germany, the last one, I would like to present shortly. It's an interesting one and I think few actually know how undemocratic the German second chamber is. First of all, it consists of approximately 50 members, depending on the size of every province or region or lund??? as it's called in Germany, it gets three, four or five members. These members of the Bundesraat, as its called, or the Senate if you like, are not nominated by the government of the provinces; in other words, the equivalent of the premier and the political parties, of course, would sit down and decide who is going to the Senate. And it's a normal thing that the Premier, the Minister President, if you like, sits in that German Senate. Now there, because they are representing the "lende" with a very strong emphasis on that, the German Senate has no legislative term; in other words, it goes on for ever and ever as long as the Constitution lasts and it's not dissolved because it represents the lende and their interests. Another interesting feature about the German one is that its representatives from a specific lund or province must vote as a bloc, they don't vote as individuals and they vote... Unlike in the case

of Switzerland where they also may hold double positions as it were, in Germany the members of the Senate vote on the instructions of the provinces where they come from, or the lende where they come from. Predictably the German Senate has an effective veto on anything that passes through that parliament which affects the interests of the lende and then, I think, they also have a veto on the amendment of the Constitution, but apart from that, they can be effectively overruled on all the other matters which do not affect the interests of the provinces, but as a result of interpretation, the commentators tell us that in 50% of the cases the agreement of the Senate is required and in the other 50% of the cases not required, and ultimately, of course, the Constitutional Court, the federal Constitutional Court decides on what are matters affecting the interests of the lende and what are not matters affecting the interests of the lende. The German Senate does other interesting things like nominating or appointing half the members of the Constitutional Court and the other half of the members are appointed by the first chamber. Procedure for conflict resolution. A mediation committee of 11 members from each house sits together and in the event of a conflict work out a compromise which goes back to the houses and they keep on doing this until they have an agreement. That's just a brief overview, Chairperson, from which I think one can make a few deductions. The first one is that the historical background to the development of a second chamber is important in a specific or in a given situation. The second conclusion I think one can draw is that second chambers are popular. One finds them all over the world. One finds them in so-called unitary systems, one finds them especially in federal systems and even those with very little power

somehow seem to remain, which leads one to the next conclusion that there is no right or wrong reasons for having a Senate; in other words, one can't really say that unless the conditions are so and so and so and so you cannot have it or if the conditions are so and so and so you must have it. There is no such rule. the next conclusion, which is more on the statistical side, is that the sizes of Senates differ, the powers of Senates differ, the ways in which they are elected differ, which leads me to the final conclusion that, on a comparative basis, it would seem to suggest that one can tailor a Senate or a second chamber to suit your own peculiar needs. Thank you.

Chairperson

We thank Professor van Wyk for his input. We have 20 minutes left. We can decide here. Either we have a discussion on Professor van Wyk's input and go for tea at 11 and then take the two others after the tea break, or we go ahead with the other two. Can we have that? Thank you very much. Professor van Wyk, you will be around when the discussion comes up? I now call upon Professor Steytler to make his input on the US Senate.

Prof. Steytler

Thank you, Mr Chairman. I would just like to start off or take on where Professor van Wyk left off. He said you can tailor a Senate to your own likes and I would like to disagree on that in terms of the experience of the US Senate. It has often been said that there is an association between federalism and bicameralism and so picking up from what Professor Dennis Davis said this morning, to say that if you have a federation, then there must be a second chamber to protect the provincial interests or the state interests against the central government. Now this is not

necessary. The majority of federations do have a second chamber and the question is whether it is inevitable and secondly, whether the second chamber serves a useful federal function, that is to say protecting the provincial interests. And here I would just like to discuss the US Senate as an example. Other Senates should also be discussed in this context, particularly the Australian one because it was particularly modelled on the US Senate. Now the first link between federalism and the bicameralism in the second house is often the consequence of political negotiations which establish the federation. The aim here is to give small states or provinces representation at the centre. In the US an upper house, the Senate, embodying the principle of equal representation for all states was the principle which the larger states had to swallow in order to get a federation in the US. When the Constitution was drafted in 1787, the fierce struggle for power centred on the representation in the legislature. The small states wanted all the states to have equal representation. The more populous states wanted representation based on population size. So the great compromise broke the deadlock. Small states received equal representation in the Senate, two each, but the House of Representatives, there it would be populace, the number of each state's presentation would depend on the number of people living in that state. Secondly, the House of Representatives retained the sole power to originate money bills and the same argument that Dennis put forward is why in the representative only the right to originate money bills. The result is that every state has two Senators and that the Senate is skewed in favour of smaller and rural states. There are 100 Senators, two from each of the 50 states,

while there are 435 Congressmen distributed proportionately throughout the various states. In the North Western states the number of Senators equals, or sometimes even surpasses, the number of representatives. For example, in the state of Idaho there are two Senators and also two Congressmen, while there are six states which have only one representative each in the House of Representatives and two Senators, e.g. Wyoming and Montana. The same principle of equality of the state happened in Australia. The less populous regions feared that their interests would be swamped in the legislature composed by the popularly elected lower house. Again the quality of the state principle prevailed and in Australia, as you know, there are 10 Senators for each state; Tasmania with 282 000 voters elect the same number of Senators as New South Wales with 3 million voters. That applied to the original six states. Now in view of the reason for the creation of a second chamber, the method of appointment has been very important and the aim has always been to secure the protection of state or provincial interests so for the first 100 years in the US Senators were elected by the state legislatures. It is only as recently as 1913 that the election of Senators was done directly. So in Australia when they copied the US model in 1901, they followed that it was the state legislatures that appointed the Senators. It is only in 1949, with the increase in the House of Representatives, that the Australians started using proportional representation by a single transferable vote for the selection of Senators. Although the aim of the second chamber has always been the protection of provincial interests or state interests, there was also a secondary principle as well, that it was to be a limiting or a house of

review of the more populous first house and this was particularly so where the Senate had received a direct mandate from the population. Now in the founding of the US Constitution, it has been argued that some of the founding fathers said that the function of the Senate should also be seen as that of a house of review. The original intent was that each piece of legislation should pass first by the people in the House of Representatives then also by the states. But, as we shall see, because of this duality in function it very often becomes the case that the Senate no longer pursues the interests of the provinces, but are more interested in the national issues so it can be said now of the US Senate that it can be maintained quite separate from its original commitment to provincial matters. So with this duality in functions, provincial interest, national interest or this reviewing function, very often there takes place a shift from the provincial interest to the national and that very often, contrary to the express interest and express intent of the founding fathers and mothers. So, most second chambers, there are very strong powers to nationalise the activities of the Senate, to minimise the interest of the provinces and this is a combination and this is a result of a combination both from the method of election also the structures of the Senate, for example its powers, and thirdly also the political context in which it operates. If you look at the US, one can see how this operates. In the US the method of election of the House of Representatives is that Congressmen are elected for two-year terms, very short two-year periods, while Senators on the other hand are elected for a period of six years.

**Theme Committee2 - 6 March 1995**  
**Tape 3**

**NOTES**

1349

Professor who??? Huysamen???

1579:

we don't carry ??? to the debate

2473:

as we have done with regionalists???

4124:

Who is speaker???

4216

Professor ???

5166 - 5212

mike off

5493:

Professor who???

5712:

can have ??? of this workshop

6957:

??? ??? because if bicameralism does not only ??? in

6676:

Who is speaker???

Prof. Steytler

...A Congressman must thus fight every two years for re-election and the issues, the domestic issues in his or her electoral district, dominate their activities. They have a smaller constituency and this constituency can obviously demand greater accountability. In contrast, the Senators have three times the amount of time to devote to other matters particularly national matters and they are not so solely linked to local constituency politics. Moreover the constituencies in the states are much larger and are therefore not so much bound on the small day-to-day issues that an elective member or a Congressman would have. So the method of appointment and the length of appointment bear important influence to bear on the type of activities that the Senate will engage in. The second important structure influencing the activities of the Senate are the powers. The powers of a US Senate are decidedly focused on national issues. Together with House of Representatives it must pass all legislation. The only limitation is money bills may be introduced only in the House of Representatives, but it's a practicality of little consequence because all bills, including the money bills, must be passed by both the house and the Senate. Secondly, the house of the Senate has the power to impeach the President. The House of Representatives has only got the power to initiate, to start the impeachment process, the Senate has the power to act as court and convict the President. Certain important powers of the Senate are that it must ratify all international treaties by a two-thirds vote. So one can see the powers that are given here to the Senate tend to focus the Senate's



activities on international matters not the local state matters which was the original intent. Further, and finally, the Senate plays an important role in terms of approval of federal appointments. So again the intention here is on federal issues, appointment of ambassadors, cabinet ministers, federal judges. So the powers of the Senate clearly indicate what type of activities they will be engaged in and there has been a clear shift from looking after state interests to looking after international interests. A third important factor determining the type of activities and the interests protected by the second chamber, is the political context in which it takes place. Here the role of mass parties, political parties, is critical because if a political party has strong discipline then it doesn't really matter whether the person comes from a province or not, it is loyal to the party, that often comes first. So the result is now that particularly in the US, that the US Senate is eminently a national institution dealing with national issues for a national audience. Some go as far as to state that regional representation and the regional base or state base of Senate is only important as far as elections. It has been said that the US Senate is a national institution first and a federal one at a very poor second. Now, it is argued that the same has happened in Australia, but from this very brief comparative perspective it appears it is often difficult to force a second chamber to perform a particular function, that is to protect state interests, the state from where they come, those interests. As one commentator said: Constitutional engineering is an imprecise science. Designing an institution is not only likely to be bedeviled by major differences over the goal and direction of change, but it is subject also to the uncertainty of trying to guess the political context or range

of contexts in which such institutions must operate. While second chambers have often been designed to protect regional interests, this has been countered by the influence of nationalising pressures coming from mass parties and the existence of these very national institutions where the national debates take place. However, if federalism is rather seen as an aspect of constitutionalism which stresses the dispersal of power and the limitation of government, then bicameralism is a natural ally of federalism. So the argument is if federalism is concerned solely with protecting provincial interests, then second chambers usually do not perform that function very well. If, however, the second chamber is seen as an act of federalism and federalism here seen as limiting powers, dispersing power and the number of institutions, then it is a natural ally to federalism. But this speech poses the existence of a powerful and also autonomous upper house such as the US Senate. Thank you, Mr Chairman.

Chairperson

I thank Professor Steytler for his important input. I would now like to call upon Professor Huysamen??? Professor Huysamen will give us an input on the possible roles for a second chamber.

Prof. Huysamen

Thank you, Mr Chairman. Two preliminary comments. First of all, I must say I speak in my personal capacity and, of course, don't represent the President's office where I am based. Secondly, I am not going to traverse all the possible utilities to which a Senate can be put. I am really here because of a view which I have been developing amongst inter alia members who are here and outside and in academic fora, and which I was asked to present to you. I hope it leads possibly to raise what I believe are kinds of

questions which need to be raised in trying to devise or answer the questions as to how the Senate should be structured and what role it should play if indeed it should play any role at all. And I think we come to the debate with the capacity to devise a structure which best suits certain purposes. We don't carry ??? to the debate on the Senate. Some of it is historical baggage which other countries had to bring in, such as Australia and the United States, in conceptualising a role. My own exploration of this issue really comes from a re-visitation of our federal structure and looking at the existing function, role and composition of the Senate and I think at least some questions can be asked as to whether it performs its function. If we assume that its function is largely to represent, as in other regional federal systems, some set of regional interests, then we should ask whether it has the powers to effectively perform that role – and I would argue that some of its powers would undermine its capacity to play an effective forum for provinces – its composition is one certainly I would suggest in practice which leads it to be viewed as a mirror image of the National Assembly representing more or less the same parties in the same proportions, re-looking at the same questions. So, in upshot, it has neither the distinctiveness which I think would lend itself to a very specific and targeted function to which we could ask the question, and answer it, does the Senate perform the function which this Constitution gives it? I think the first question, the question we would want to ask in regard to the Senate is basically: How is it composed, what does it do, and the important question which links those two, is why does it do it? And I think if we can't come up with a clear answer then there must be serious questions as to whether within a cost

benefit assessment of the need for a secondary chamber, such a second chamber is needed at all. And I think, broadly, the line of argument that I am going to be developing arises from the questions, the three options which basically confront our beleaguered Constitutional Assembly. Do we dispense with the Senate because its role is weak and relatively unclear or do we tinker with it so as to fashion it into something more appropriate along the lines of what it does or do we reconceptualise its role within government as a whole? And I don't think the question of the Senate should be dealt with as a truncated question, something separate from an overall perspective of government and all its organs and instruments. My own thinking was prompted by a debate recently by a Harvard law professor who argued that there were distinct kinds of federalism or regionalism which manifest themselves in Constitutions. The one is to adopt a spatial, legal separation of powers, very much based on a regional distinction, division of powers, as between provinces, that is amongst themselves and between themselves in the centre. And the second one which gives the regions, as regions, greater power and influence at the centre. The second we might call a kind of co-operative federalism and the first a more competitive federalism. Very briefly, the Canadian model would represent something along the lines of the competitive federalism and, I believe, the German model would represent something of a model of co-operative federalism. If we look at our existing system, it seems to me that there are some immediate issues which arise. The first is the degree to which important questions of governance are determined by the courts on an analysis of the relatively complex legal provision which attempts to

divide powers and it seems to me that in trying to look at a new model, we might want to question whether the courts should be determining which powers should be allocated by the centre and which powers should be allocated by the regions or between the regions. Secondly, we need to find a mechanism which would refocus our questions around good governance, cost effective governance, accountability in governance and not the questions which are set out in our existing Sections 1 to 6. We need to approach the whole question of institutions of government, which didn't simply layer instruments of federalism, or regional interests, as we have done with regional ???, the Senate, and regional legislatures without clearly defining, analysing the structure and the reasons why we would want some or other regional influence. And I think it is in answering those questions for me that the Senate came to represent a potential mechanism to answer those questions. In short, what I would say in the model I have tried to develop in answering those important questions: what functions, how must the Senate be composed, whether we need a Senate? The Senate suggests itself as an institution which can play a much larger role in determining which functions are exercised in the regions and at the centre and it can do so, as in the German model, by endorsing national legislation. And in doing so, it largely sets the terms. It ascribes the powers to the province or to the centre. Secondly, it does so by building in a regional model in which the regions collaborate in national legislation affecting the provinces rather than separating the regions to deliberate on possibly even national questions within a regional context. So what are the implications for such a model? What are the implications for such an institution in conceptualising its

structure? Well, I think in the first instance, if we are going to retain a Senate, it should have more concrete powers. Unless it has powers, the sense that provinces have of their ability to influence national legislation will largely reside in their regional legislatures and not in any participation in national legislation so the Senate offers the possibility of bringing regions together at the Senate to have a more deliberate and extensive influence over national legislation which affects the provinces. The question as to whether they should also have influence over national questions in the proper meaning of the word, dispense justice and so on, is a question I leave open and there are arguments which would say that provinces should also have some lesser power, some perhaps delaying influence over some of those issues, but the primary focus, I wouldn't want to as it were develop the same ambiguities in the conception of a Senate, it should be primarily the place in which provinces come together to manage the country together with the National Assembly in regard to provincial affairs. It allows us, I think, to shift the model we have developed of regionalism away from competing regional legislatures, competition over executive powers, competition over who exercises powers, and shifts it, quite frankly, back to national parliament in which the Senate plays this decisive role. The provinces then, perhaps in accordance also with the German model, their role is perhaps more properly identified as one of carrying out and executing national legislation. The implications for the Senate, apart from the kind of powers that it would have, there are implications for this for the way we structure and compose the Senate. If it's going to play this role, I believe it has got to have a more on-going relationship to the provinces than the current Senate has. I

think it can be an accusation, or certainly it has been raised, that provinces don't regard the Senate as the place where they really exercise any effective power. The Senators themselves appointed for five-year periods don't have an on-going relationship with their provinces and it might be that one wants to think of a way of comprising the Senate instead of direct selections, but have representatives come directly from the regional legislatures in an on-going way, subject to mandates and recallability. In that way it cannot be said by the province, or the provinces cannot feel, in any way distant from that process so there is an actual presence. One of the implications of this is that it changes the notions of the way in which the Senate works. In that way the Senate comes to be a place where even regional experts, people involved in the administration and the executive in the provinces would possibly come to the Senate wherever the Senate will be and form joint committees with the National Assembly, determining questions of national education and on the specialist areas which require some determined impact by the experts of the executives of the place where services are actually delivered to play a part in determining patterns and programmes in legislation dealing with service delivery on a national scale. Just simply I perhaps need to finally remark that I think that the two are linked. I have given you a conception of the Senate which is more expanded in certain respects, but it goes together with the new model of regionalism in which, as it were, there is the shift of authority in lawmaking towards the centre because of the role of the Senate and at the same time a shift in execution and administration to the provinces. This is undoubtedly a different conception to federalism to the one envisaged in the Constitutional

Principles, which seems to more or less assume that we will, in the new Constitution, merely replicate, with some tinkering, the existing framework we have developed. In my view, the critical Constitutional Principles, I am not going to refer to them now, the ones which say "the provinces shall not have any inferior powers in the new Constitution" is accommodated in this model because one is giving them substantially more significant influence in devising national legislation at the expense of their powers to annexe provincial legislation. I might just say that I think it is a model which probably doesn't offer existing institutions a hell of a lot, but I think for those who bear the responsibility of devising an effective institution of governance, and effective separate institutions of governance, it provides more harmonised a system. I give you those thoughts because I think the question needs, to go back to the beginning, the question needs to be raised: What function will the Senate play? If it doesn't have a distinct form of representation, it doesn't justify itself. If it doesn't provide to a distinct constituency some level of influence and a reason for that influence, then I think the question of the future existence of a Senate has to be raised. Thank you.

Chairperson

We thank Professor H??? for his input. I think it is a very important one. I am now going to adjourn for tea because I understand it has already been there since 11 o'clock. We have had three very important inputs by Professor van Wyk, Professor Steytler, and Professor Huysamen. I hope, I am sure that they will be here immediately after tea. Can we than come back at 25 past 11 to start the next session where we will discuss these three papers that have been given, the three inputs. May I take this opportunity of



thanking you. When we come back, I'll hand over to Mr Mahlangu to chair the meeting. I thank you very much.

(break for tea)

Chairperson

I think we should resume. I have been asked to continue. I hope you have no serious objections. Before I call for questions or contributions, I just want to make two short announcements. There is a register that is being circulated. Members of the Theme Committee's names appear on that register, please sign that register. But those who are not members of the Theme Committee 2 and who are present here, please enter your name in the space provided on that sheet so that we could also keep a record of that. The other question is that when you ask questions, because the whole discussion is being recorded, and will be transcribed, I would be grateful if you would identify yourselves so that when the transcribing takes place, they are able to state who said what. I would be grateful for that as well. Now, as you know, we have Professor van Wyk, Professor Steytler and Professor Huysamen with us here who made the three important inputs. I was trying to find out how we could structure this discussion so that we can have a more fruitful outcome from it. I thought what we would do now is to allow you to ask questions of the three persons who made the necessary inputs, and then after that we can try and structure it on the question of... Because what we are talking about mainly is: Do we need a second chamber? If we need a second chamber, what would be its specific tasks? How should it be elected? Should it be nominated? What should be the form of representation in it? Should it be equal? These are issues that can then be discussed along those lines.

???

Thank you, Mr Chairman. I would like to ask you a question, Professor Steytler, first. I wonder whether you could say something about the relationship between the US Senate and the executive. We often hear or read in newspapers that the Senate has vetoed the decision of the President. What is the position? And to perhaps, Professor ???, I would like him to give us the difference between federalism or a confederation. People often talk about the two. I don't know whether they are the same, or not the same. If they are not the same, is the Senate also in a state of confederation? Thank you.

Prof. Steytler

Just in terms of the relationship between the Senate and the executive, the powers of the Senate are limited in terms of executive actions, particularly in the appointment of senior officers in the executive, like cabinet, so-called Senate approval, of judges, of cabinet, of ambassadors. So in that sense they don't make appointments, but they can be a blocking device and in a number of occasions there has in fact been blocking. I think the last one was when Judge Hawk of the Supreme Court, when he passed Senate. With treaties the same thing, ratification... So it is a blocking mechanism as opposed to for specific provisions like the ratification of treaties. The other more important controlling factor of the Senate is that a legislation initiative coming from the President can effectively be blocked by the Senate. The difficulty which President Clinton has at the moment is that both houses of Congress in fact are controlled by Republican parties and, for example, his health legislation, which he can initiate in either house, simply will not go through in the form that he would like it. It would have to be something which the majority party, the Republican Party

in both houses, would agree to. So the great block at the moment is that he must co-operate to get through most of his important legislative... or his campaign promises. That is, I think, the greatest block on and the controlling device which the Senate has on the executive.

Chairperson

I thank Professor Steytler. Yes, Mr Andrew? Sorry there was a second question about the question of confederation and federation.

Mr Andrew???

I think we have tried in our debates to avoid the actual labels because the labels tend to fix an attribute and then the debate is concerned to squeeze a system of government into the label, but by and large there are two poles, the one being unitary and in the most unitary system rather like the old Roman emperor, the governor, there is no independent government out in the provinces, there is simply the governor and he does what Rome tells him. There is no independent executive. That will be the ultimate unitary state. On the other extreme is your confederation which is almost separate countries who come together, stay as separate countries with autonomy to make laws, but agree amongst themselves that some or other central institution will represent them either as far as foreign affairs or defence, but only to the extent that they continue to allow it and in general, in a confederation, in the most extreme model, any province or any state can opt out at its own instance without any hold by the rest of the states to compel it to belong. Somewhere in the middle is the vast

range of permutations and the issue is further muddled by the fact that real politics can actually make a unitary state extremely federal in character and in operation and in another country with a federal constitution, one would find an extraordinarily unitary system of government. For example, it is said that Australia is a very unitary system with formerly a very federal Constitution. There would be a number of questions which constitutional scientists would direct at any system. Is there an independent legislature? Does it make its own laws? What is the extent and powers of its own executive? Can it make its own decision as to whether it will be part or not part of the institution? So I think confederation is the ultimate form as it were of federalism and unitary is the other end of the extreme.

Chairperson            Yes, Mr Hendrickse???

Mr Hendrickse        To Professor van Wyk. You mentioned some figures there for the various Senates, in particular Spain having 300 Senators. What is the relationship between that number and the number in the lower house? How many members are there in the lower house? And then for the other countries you mentioned also.

Prof. van Wyk        Chairperson, unfortunately as regards Spain I am caught out. I can't give a precise figure. It won't be more than... Dr Maree has it.

Dr Maree              No, no, no...

Prof. van Wyk I don't think it will be more than 400. In Germany there are I think at the moment 520, something like that. As a general rule I think that one can say, depending on the population of the country, first chambers vary between about 250 and exceptional cases – I think the British House of Commons is one of the largest with approximately 600, 635 or something like that... Any second chamber consisting of more than 120 members in relation to the first chamber, is already a large one.

Chairperson Thank you very much. I now recognise Dr Pahad.

Dr Pahad Thank you. (mike gone off).

Prof. van Wyk ... the other one, of course, are the Constitutional Principles in terms of which provinces are almost guaranteed an existence in the future Constitution. I think Mr Eglin is correct that in details one can perhaps not work out at this stage, but it may not be unfair to assume that in terms of the existing Constitution and the Constitutional Principles... there will have to be some kind of link, connection between what has been called regions or provinces at the moment and the national government. I think that's where, in my thinking, the role of the Senate in the national government also comes in. I happen to agree on many scores with what Professor Huysamen has put forward here this morning.

Chairperson Professor Huysamen, do you have something you want heard?

Prof. Huysamen Just to agree with what Mr Eglin has said. In fact, I think that was the first point. You've got to start with what you

want. How you want government to run. What is the principle? And in my view, as I have indicated, the idea of a more co-operative relationship between provinces, a guiding light or a beacon behind which then to say the Senate could play a role. If at the end of the day, you don't come up with the role of the Senate, I don't think we should create a Senate to copy other people or because it seems a good idea.

Mr Ligege

Mr Chairman, a general one. It's on the house of chiefs in Botswana. What are the functions of the house of chiefs in Botswana compared to the house of chiefs that is going to be formed in South Africa which will advise the President once a year? Whereas these people are the owners of this country, have their matters only once a year. I want to know the functions.

Chairperson

Would anyone like to take that question? Yes, Professor ???

???

Mr Chairman, I just wanted to comment. I don't think I will answer that question except to say that the purpose of workshops is that we try to focus on a certain aspect. Some of the issues, like the electoral system, the traditional chiefs, and whatever, have their own sections within our programme. I am not saying that we should not refer to them, but we should in future look more closely on the issue of preparing for seminars. I think the Core Committee, the Secretariat, the Technical Committee should meet so that some of the questions are discussed beforehand as to what we want because the question that was asked by Mr Pahad is a very well real one. Our whole seminar today was on bicameralism and not on unicameral or bicameralism and

if we had sat down and planned... We were phoned last week and told: We don't think it is necessary for you to come and so on. And later we were sent programmes etc. as to how we should come and present some papers. And we end with the situation – I am not saying that we have not done very productive work, we have done very productive work... But the most important thing for us is to meet beforehand, discuss exactly what we want to come out of the workshop. I should think that is one thing...

**Mr Matamela** I think this is an in-house workshop and the question by Chief Ligege so I want to throw it back at him, so that he can have ??? of this workshop. I would like to know from Mr Ligege and I picked it up that he is unhappy to have the House of Traditional Chiefs to advise the President once a year. Maybe it would be more helpful if we can take it a step further and he suggests what he thinks the role should be and then those issues will be...

**Chairperson** Would you like to follow that up, Chief?

**Mr Ligege** Yes, Mr Chairman. In the traditional role, there was also three tiers of government. Also in the government of South Africa is the same. So the traditional leaders must not be bound to advise the President once a year. They must be also in the tier government because what is being debated in the parliament is a section the subject of the traditional leaders. I'll stop there because I'm not asking the gentlemen of Theme Committee 2 to submit...

(much laughter)

**Chairperson** Let me just say this here that our discussion today it has

been clearly stated is on the issue of bicameralism and I think we are going to have a specific discussion and a block as far as the traditional chiefs and the traditional authorities are concerned. I think it would be best spoken there. If, however, it affects the question of whether in a unicameral system or a bicameral system, where they fit in then, of course, it is quite relevant. What I was hoping would come out in this discussion here was if there is a place within that structure that it will come out. I do not know whether we should... May I ask Inkosi Holomisa there for his input on this question so that we can find some solution to it.

Mr Holomisa

I don't know whether I can help you in getting that solution, but it is the question of concern that I want to stress. That is that we have to deal with certain of the things that we are dealing with. When it comes to the question of traditional leaders, it is always shunted aside, always said no, no, there is a second question that has been set aside, we're supposed to deal with it later. And it is clear, like in this question of unicameralism or bicameralism, ??? ??? because if bicameralism does not only ??? in Washington in the United States of America or in Europe. It is part of the Constitutional Principles in Africa as well and if one is going to be talking then about bicameralism, let's not forget about the things that are closer to home, here in Africa, in South Africa. So I don't believe that really it is a matter that is not quite relevant to the issue that is discussed. I think in future when we have to conduct workshops of this nature, people should start looking through... They must not try to avoid the question of such matters because avoid is mentioned, but in the end we have to deal with it. And the sooner we deal with it, the better, Mr Chairman.



Chairperson

I thank you. I don't think there is any attempt on the part of anyone of us to avoid discussing this issue. We are just trying to structure it in such a way that we could have a meaningful discussion on...

Dr Pahad

Mr Chairman, it must be said here because it is not a fair comment, as part of the Core Group that was responsible for this. There is a certain section dealing with traditional leaders. There was a meeting this morning of electing Theme Committees to deal with this matter. So the question of the type of representation should come in. People have the right to come here and say they think traditional leaders should be part of the second chamber, traditional leaders should be part of a first chamber... That's not a problem. It wasn't the intention of this in-house workshop to go into those kinds of detail. I wanted to make that statement. But I wanted to say something else about the conceptualisation of unicameral or bicameral because I agree to some extent only with Mr Eglin, but sometimes it raises the question of whether it is the chicken or the egg that comes first because in a sense it is difficult to visualise a structure of government without visualising certain other elements that go into it so it becomes very difficult then to say where should we start and where should we end. It seems to me what should be the guiding principle must be the process of democratising this country. And we have to be guided by from where we have come in South Africa, never mind what happened in Botswana or what happened in the United States or Germany. They're important, but of fundamental importance is our own history, from where we have come and secondly, where we want to go. I think that's very important. If a bicameral legislative system is

going to make a contribution towards the process of democratisation and towards the process of taking governments closer to the people then I think that's what should guide us in terms of whether or not we have this. We then come to the issues about how the structures could be formed. The second general point I wanted to make is in looking at... If one starts from the assumption that there should be a second chamber, call it what you want, then it seems to me it is necessary to discuss the relationship between those who are going to be directly elected, whether it is constituency based or proportionately, who are then elected on the basis by people and they are elected through their political parties, but at least with the notion that these people are supposed to go to some institutions to defend some kind of national interests including local and provincial interests. Why don't we count relationships between those who are directly elected and if you have a second chamber of people who are indirectly elected, or maybe not even elected at all? Because this an important form of relationships that it seem to me we need to discuss. We are not taking positions here, we are throwing ideas here. We need to discuss in terms of a process of democratisation. This relationship is between those who are directly elected and those who may be possibly indirectly elected. If we take Professor Huysamen's point of view, then they would be elective anyway, because they would be coming from provincial legislatures, they would be elected by provincial legislatures, they are not indirectly elected in that sense, they are directly elected. But if you are going to have indirectly elected people, as you have in some other situations, then it does raise the question for me: How can an indirectly elected person actually exercise

as much power as the person that is directly elected by the constituency in terms of the process of democratising this country?

Chairperson Will any of the panellists take on that issue or is that a comment?

??? Professor Steytler mentioned something very interesting. Your Senates, and they are elected, and they moved away from provincial or state interests onto the national level. Isn't this promoting democracy because your voter now has a choice to vote for one party or a house and for another when it comes to the Senate and you create a more comprehensive situation, and actually that is what is happening in some parts in America. This is the one question. The second one, coming back to my first question, with regard to a court, the Supreme Court. The Supreme Court, federal, throughout it regards the interstate commerce, throughout the provinces, the states you don't have protection under the Constitution, I throw it back now to Congress to decide. But now the problem is there is nobody specific to look after the state in the Congress. Again there is a weakness in the system there. There is a gap in the American federal system.

Chairperson The question is posed to Professor Steytler.

Prof. Steytler It's an interesting question and it ties up with what Mr Pahad said about if your system is to be democratic, and then to define what is democratic and one element that has come through in our Constitutional Principles is proportional representation, there have been linkages between the

people who are in a particular chamber and who are elected, direct proportion. Which now brings us to the question of the disproportionality that you often find in second chambers because it is equal representation of states very often and therefore each state can get 10 seats or whatever number, which are disproportional very often to the people in their constituencies because now you want to compare states as opposed to people. One way to grapple with that issue is if you are serious about proportional representation and that notion of democracy, then it is going to affect the methods by which you are going to appoint persons. So you can't just simply say: Well, each province will have x number of seats. Because then you can get the dominance or the overrepresentation of a number of people. In terms of a competitive position between the Senate and the second chamber and the lower one, in the US you have what some people even call the undemocratic Senate because its skewed in favour of certain states. You can have a competition between the two and very often it could be personalities. At the moment there is a very clear lining up of the political forces and political parties are the dominant feature as opposed to the personalities in the Senate. But, clearly, unless there is a different way in which you select your Senate and a different constituency, you very often, because of the position of mass political parties, you are going to have alignment. And unless there are different tenures or periods or the representation is different, for example having non-proportional representation there, then you won't have that competition. So it's going to be that competition you are referring to is the product of the method of appointment, duration of appointment.

**Theme Committee2 - 6 March 1995**  
**Tape 4**

**NOTES**

0124:  
Who is speaker???

0582:  
many of these ??? people

1105  
you don't ??? at all

1226:  
Who is speaker?

2253:  
Who is speaker???

2733:  
Who is speaker??

Theme Committee 2 - 6 March 1995

Tape 4

Prof. Steytler ...brings us back is that the difference in appointment is it compatible with the fundamentals of the Constitutional Principles? We talked about proportional representation as the guiding principle, as one that was underlying institutions.

??? I would just like to know, if an accord is reached that there should in actual fact be a second chamber, the Senate, does the panel have any specific views on what size this chamber should be, given the fact that presently many people feel that the 490 parliaments that we have in the country is much too large and also that in the other house there is already a tenet, those people elected on the regional lists, so in actual fact we have two Senates: one inside and one outside. The fact that we were given sizes of Senates, but not in relation to the other houses that existed in the other countries, are there any other countries where the Senate is in actual fact larger than the lower house? Thank you.

Chairperson Professor Huysamen???

Prof. Huysamen It obviously depends on why you are setting up your Senate. There could be an argument that you need more people. It says direct election. Because there is a closer relationship between that person and the number of people he represents. The proposal I made basically says people come to represent their provinces, they are on a terminable mandate, they just basically are messengers from the

provinces. They can change. In that system it really does not make any difference whether you have three or thirty representatives and under that system I would suggest somewhere round about five to a province. And that would accomplish... It would be that you structure your size to fit your purpose. The problem with so many of these ??? people just start off with a figure, 10 sounds good, 20, 30. If you ask people why 10 and not twelve, or eight or six, people very often are unable to fix an answer. With the National Assembly at least their motivation is that on the one hand you've got costs and on the other hand you've got quality of representation. In the Senate very often that argument doesn't apply to the same extent and the Senate can be reduced in size, in my view, quite considerably.

Chairperson

Professor van Wyk?

Prof. van Wyk

Chairman, an interesting observation was made that there is a perception that at the moment in the National Assembly there is already a Senate because some people were elected on the regional list. I think a clear distinction should be drawn in the kind of debate like this between where representatives come from, whether it is in a National Assembly or in a Senate and what they are in terms of the Constitution supposed to do. They can come from a region without really promoting the interests of that region as they should. They can then be of a large number. On the other hand, as Professor Huysamen has just said, if the task of the so-called regional representatives or the link between the regions and what their representatives are supposed to be doing at the national level is clearly spelt out, I don't think numbers are important.

Chairperson Professor Steytler?

Prof. Steytler Just a comment on the size. The American visitors here are actually struck by the size of our legislature and the size of our Senate if you compare it with the US, which is comparable in terms of 435 members in their House of Representatives and there you talk about 300 million people. And the Senate there 100. Here we talk about 80. It's simply extremely costly for a country of our size to carry so many public representatives so the amount of saving that you can use, I think this is... In Professor Huysamen's model, you don't ??? at all because they are already saying part of the provinces, so that may be a consoling device, but it is an extremely costly exercise to have large numbers of representatives and I think if one learns from elsewhere, smaller numbers can in fact do the job equally well.

Chairperson Senator Groenewald?

Sen. Groenewald ...halve the salaries and double the sizes! (much laughter).

??? Must the house still vote on that?! Mr Chairman, thank you very much. Just a short comment on numbers. I think when you determine numbers I agree with Professor Huysamen, let's not do not it arbitrarily. A lot depends on the functions which the Senate has. For example, in the present circumstances, my party is one of the smaller parties; to try and have five Senators participate in all the portfolio committees and the Constitutional Assembly and all the activities, in other words, is impossible. Normally you have a criteria where you have a few Senators and then Senator



has three or four staff, paid by the taxpayer, to assist him in doing his job. Or you have a larger number of Senators and not so many staff. So the cost is not the real criteria, as to the number. The fact is that the smaller your Senate is, the more pay you will have to give the Senator to do a proper job and specifically if the state of functions are as large as we in this Senate have at this stage. Going back to the other problem, Mr Chairman, we all... I think it can be expected that once you have majority rule, you don't really need a Constitution to protect the majority. The majority has an in-built protection: the number of votes that they have. But you certainly need a Constitution to protect minorities and without going into detail about the definition of minorities, the question which we should ask ourselves at this stage and which we really haven't looked at is: What system is best suited to look after the interests of minorities, say bicameral or unicameral system? And I would like to ask the panel that specific question, but before they answer, just a question about minorities, and this goes back to the question about the traditional leaders and other interest groups, even corporate institutions. I agree with Professor Huysamen that certainly the question of if you start representing these groups within the Senate for example, where do you stop? Where do you start and where do you stop? I agree that this is a basic principle, but when we make statements and say that if you represent a large number of groups then the interests of the Senate are so divergent and so widespread that you can't really fulfil a specific function. But isn't that really the function of a Senate or a National Assembly? The scope of interest that they have to cope with is the total scope of interest of the whole society so I don't believe that this is such a very

important argument. So when we talk about representing minorities specifically, I would like to say to the panel, I would certainly rephrase the whole spectrum, the question of traditional leaders, the question of the business community, organised business, corporate interests, agriculture, even the civics, the labour unions and so on and so forth. These are all minorities in some way or other. Isn't this one of the most important functions of a Constitution to see that these interests are also protected and isn't the Senate ideally suited for this purpose? Thank you. I thank the Senator. Will any one of the panellists, Professor Huysamen, I think some of the questions were directed to what you have said.

Prof. Huysamen

Perhaps I need to state... I think whether the Senate... The minority protection will not come as it were to the Senate unless minorities are particularly represented in the Senate and I don't think there's been an argument along those lines that the Senate should be constructed to protect special interest groups, special ethnic groups or other groups, but it needs to be said that democracy takes many forms and I think that there is a simple view that well, democracy you just need one vote for one kind of institution. But in fact the very same person may want somebody to represent his clerical interests, somebody to represent his labour interests, somebody to represent his provincial interests, somebody... He may have different feelings according to it. The Senate, or any other institution that you might vote for, is a different way of allowing people to be represented; people who in fact are a majority in one context and a minority in another. So when one looks at the Senate you are just talking about enriching that level of representation

rather than having one democratic form subject to checks and balances by another unrepresentative form. Certainly to the extent that one would think of any chamber, any system or even regional governments, one is thinking about enriching representation, not simply as brakes on democracy, in fact to the contrary, a richer form of democracy.

Chairperson            Any of the other panellists would maybe like to add to that?  
Yes?

???                        I just wanted to say that history is important in any institution. For example, at CODESA we had representatives from the Bantustans – who talks about Bantustans anymore now? The more stable that society becomes, the less representation perhaps, but this is not an all time formula, basically. But what I am saying is that once the interests are too diverse, there is no consensus, then you need small people there. We have got Volkstaat, for example, in our Constitution, we have traditional leaders in our Constitution. We have got all these other things, but as we progress, we will be casting a little... Now on the issue of the Senate, I just wanted to remind people that the United States Senate is operating within the framework of total separation or near total separation. They have no ministerial responsibility to the House of Commons or to the lower house and so on. So the inclination to watch the national interest is also dictated to some degree by that relationship, which are not proposing in this country. So much of our history will determine how our institution finally shapes.

Chairperson            I thank Professor Ndlovu for his input. Are there any other

questions? It appears that we have exhausted this very interesting debate. I think we have had very important inputs and if I may be allowed to say so, I don't think we have come across any classical model that we can follow. I think what we have been told here are different experiences and we have also been told that these experiences have come about as a result of interest groups as a result of the titularities in those countries. But I think we as the Theme Committee have a task of putting forward all these ideas, bearing in mind that we are now working towards establishing a democratic Constitution for our country and that the interests of all our people should be foremost in drawing up these... I just have a few announcements to make. Because of the electrical fault, I have been told there that not all the recording has been done. It is now requested that our analysts, if you have your papers, if you could hand them over to the Secretariat it would be extremely useful in the compilation of the report and we were supposed to finish at 1 o'clock. I am sure the Speaker won't mind and won't deduct if we finish now. So, with that, I want to thank you very much... Yes, Mr ???

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Just one announcement. The meeting scheduled for our Theme Committee meeting tonight will then be postponed until next week Monday.

Chairperson

Did you hear that? The Theme Committee meeting for tonight has been postponed until next week Monday, the 6th. It is postponed until further notice next Monday. You come next Monday at 6 o'clock. I thank you very much.