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THEME COMMITTEE 2

MEETING: 27 MARCH 1995

1 TO 5 TAPES

CONTENT OF ENVELOPE:

- 1) PRINT-OUT
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TRANSCRIPTION OF THE ADDRESS BY THEME COMMITTEE 2
ON THE ISSUE OF CHECKS AND BALANCES
HELD ON MONDAY 27 MARCH 1995

(Tape 1)

Chairperson:

Ladies and Gentlemen, it's already ten past nine. This meeting is scheduled to start at 9 o'clock. We were winding some time hoping that people are coming. Apparently we have a problem in getting people in early on Monday mornings. Can I get your guidance? Should we wait another five minutes or start right away?

Well, ladies and gentlemen, I think we better start. Those people who are late know where the workshop is. I was just trying to find out whether everybody got this documentation by Friday last week. The documents were circulated. Is it correct everybody got this document on Friday? So, we all know about this meeting. There is no excuse about it.

Are there some apologies from the Theme Committee members?

Apologies from Mr ?, Mr ? and I think Mr ? as well has phoned that he will come in a little bit late today because he was supposed to be chairing this meeting. And there's an apology from Mrs Marshall and an apology from Mrs ?, Mrs ?, Mr ? and Mr ? will also I think arrive a little bit late. Mr Eglin, also an apology from him and General Groenewald.

If you look at your agenda. Let's go through the agenda quickly for today. What we are having as a first item, it's the Introduction to a System of Checks and Balances by Professor van Dyck and the Judiciary as an important institution in a System of Checks and Balances and the speaker which we advocate, Mr ?, and we have the legislature as a check on the executive of the Judiciary. The speaker there will be Professor Steytler and the Checks and Balances by the Executive, the speaker was supposed to be Professor ?, but I understand he can't make it for today, therefore we will request that Professor van Wyk deals with that aspect. We may not expect a paper from him today because I don't think he prepared a paper on that. A different professor could have done that but I think he will tackle it. He is an "old horse", he knows the story and I don't think he will have a problem.

Having said that the procedure would that we will listen to each professor deliver his paper and then thereafter the members will be allowed questions for clarification, not really debates or discussion but questions for clarification. And after all the people have presented their papers, we'll set out a ? and then we can start a discussion on the issues that they've deliberated. Members would remember that when we dealt with Block 1 of our Theme that was the question of the Separation of Powers, we said we

would deal with the Checks and Balances when we deal with Block 2 and 3. There were a catalogue of those Checks and Balances. So we are introducing this subject to look at what checks and balances could then be built in into the structures of government and their functioning so that members could know exactly what they're talking about. And these would be impossible to do without visiting the Executive and the Legislature which we have already dealt with in the Judiciary in Block 1. So if there is a bit of repetition here and there, we shouldn't be surprised by that because you need to touch those things in order to build up your Checks and Balances. Having said that, then I think we can directly start with the meeting. All those who would be addressing will be sitting with me here for the sake of easier accessibility and answering questions immediately. So we're going to start with Item 1, but just before I do that, I welcome all the people from the Press, the SABC, and I see all the people from the CPG. Mr Lategan, are you representing the CPG? We're glad to be with you here. And I also see the Deputy Speaker of the Legislative Assembly. Professor van Wyk?

Van Wyk:

Thank you, Chairperson. I'm stunned by your unfailing faith in the Head of the Professor. I hope you will never be disappointed. Mr Chairperson, I have a short introduction of nine points. You mentioned the word "repetition" - Members of the Theme Committee may even find that in the introduction, not much is new, but we thought in our planning of the workshop that it would be necessary to give an introductory broad framework within which the system of Checks and Balances operate or can operate. In its classical form, the notion of Checks and Balances is American and closely related to the Separation of Powers. You have referred to the fact that Checks and Balances came up in the discussion on Separation of Powers, so this point I make is that I have gone through the submissions received from the public so far to see whether there were any specific or even general comments, suggestions, reflections on Checks and Balances. It was interesting that a number of members of the public and other organisations endorsed first the principle of Separation of Powers which is also a Constitutional Principle, but in more general terms than specific one's, Checks and Balances to the Separation of Powers. I may have missed one or two submissions. I'm not sure that I had everything, but I didn't find specific suggestions apart from expressions such as the Executive should be compelled by the Courts or the Executive should be compelled by Parliament or we should have a Parliamentary System of Government, not many specific references in public submissions to how Checks and Balances should be implemented. I've said that it's American in form and closely related to the Separation of Powers. Checks and Balances were to qualify the strict application of the Separation of

Legislature, Executive and Judiciary which would have left each of these powers to his own designs and in effect only subject to internal or self control if there were no Checks and Balances. Checks and Balances allowed the three powers in the State a degree of influence on and compelled over one another's affairs. The Checks and Balances of the American system are well known. I will list a few: The Bi-cameral Congress with equal powers to both Houses where one cannot move without the other, a typical internal check according to the commentators; the President's power to initiate legislation and to exercise a kind of veto over legislation; the Congress's power of impeachment over the President, his executive colleagues and judges of the Supreme Court; the power of the Senate in the appointment of judges of the Supreme Court and other key personnel; the Senate's power of treaty ratification; the power of the Supreme Court to review and invalidate legislation and executive action; the reliance of the Courts on the executive to give effect to their decisions. In some minor way in other words, the Legislature performs executive and judicial functions. The executive on the other hand has an influence on the legislative process and the judiciary through its review powers has an affect on legislation and on policy. As such Checks and Balances have become an integral and important and explicit part of American constitutionalism. By contrast, this is the third paragraph, Checks and Balances in the West Minister System which traditionally formed the basis of the South African Constitutional System, do not enjoy the same prominence as in the American System. Partly perhaps because the Separation of Powers has never been the same major issue in the United Kingdom as in the United States. This however does not mean that features comparable to Checks and Balances are absent from the British System. Two notables one's inherited by previous South African Constitutions and by the present one are ministerial responsibility and the power of the Head of State effectively the Executive to resolve parliament especially after motions of no confidence. The final South African Constitutional text will have to provide for Checks and Balances, that is trite, and this is required by the Constitutional Principles in Schedule IV of the Interim Constitution. Constitutional Principle VI prescribes in so many words, I quote: "A separation of powers between the legislature, executive and judiciary with appropriate Checks and Balances to ensure accountability, responsiveness and openness. This Principle is supported, in my view at least, by Principle 4 that the Constitution is the supreme law of the land binding all the organs of state at all levels, by Principle 7 giving the judiciary the power to enforce and safeguard the Constitution, by Principle 9 on the freedom of information to ensure accountable administration, by Principle 14 on the participation of minority political parties in the legislative process. It can further be argued that all the Principles

on the provinces and Principle 29 on the public service commission, the Reserve Bank and the Auditor General, also reinforce the idea of Checks and Balances. The Constitutional Principles position the final South African Constitution to my mind closer to the American model of intentional deliberate Checks and Balances than the Westminster one of incidental Checks and Balances. In fact the Constitutional Principles are very explicit in the objective to be pursued by Checks and Balances on the separation and exercise of powers. And these objectives are, as I've already said, accountability, responsiveness and openness. In designing a System of Checks and Balances, the Constitutional Assembly will constantly have to ask itself whether these aims of accountability, responsiveness and openness are met. In its deliberation to the Theme Committee it would have to keep this foremost in its mind as well. In other words, no Checks and Balances for the mere sake of Checks and Balances. Checks and Balances with a view to, this is my own little acronym, A.C.R.O.S.O.P. - accountability, responsibility and openness. The task can be quite daunting even by mere dictionary meanings of the three terms, accountability, responsiveness and openness. Accountable, according to the Collins Concise English Dictionary means - "responsible to some one or for some action and able to be explained. The latter meaning suggests reason and reasonable action. Responsiveness, in the words of the same dictionary, is to "react or reply quickly or favourably as to a suggestion, initiative etc." Clearly more than just "respond" or "react". Openness, as one can imagine, has many shades of meaning and interesting one is the following - "ready to entertain new ideas, not biased or prejudiced". That all goes with openness. This brief exposition leads to a preliminary conclusion in respect of Checks and Balances in the final Constitution, they cannot be mere mechanisms. On the contrary they are part and parcel of the whole system of values imbuing and informing the Constitution and this is a critical point. Some commentators claim that in the ordinary course of political events in both the American and the British systems, certain of the classical Checks and Balances have lost their significance. Impeachment in the United States for example is virtually dead, while ministerial responsibility and the power to dissolve in the United Kingdom has become fairly weak. So the point I am making here is simply to say the following check list offers useful Checks and Balances and we should have all of them without critically looking at the meaning and especially the ability of a certain Check and Balance to achieve accountability, responsiveness and openness wouldn't make much sense. While one would not argue for these so-called weaker checks to be omitted from the South African Constitution, both examples i.e. the power of impeachment - we don't call it impeachment but in effect, dismissal of the President for instance is impeachment.

Impeachment and ministerial responsibility, both are found in our Constitution. While one would not argue for them to be omitted, the question about efficacy should be on the agenda. This already suggests that there is nothing inherently weak in the notion of impeachment or of ministerial responsibility. The question is merely whether such Checks and Balances or a specific Check and Balance is effectively supported by the values underlying the Supreme Constitution. Which brings me to the final point of this introduction - To be effective, Checks and Balances have to be designed systematically. It is not sufficient to look at checklists. Common and conventional wisdom in this field will clearly be important, but the Constitutional Assembly will have to go beyond that and I suggest that three questions will have to be asked every step of the way in the creation of the new Legislature, the new Executive and the new Judiciary at all levels of Government. The first question is, can all the powers given to the body concerned be exercised in an accountable, responsive and an open way. The second question, what Constitutional mechanisms can be employed to ensure that that power is exercised in such a way, in other words in an accountable, responsive and open way, and finally would such mechanisms, and here I refer you to Checks and Balances, respect the notion of separation of powers. Thank you Chairperson.

Chairperson: Thank you Professor van Wyk. That was indeed very clear. This time is now open for questions. We have fifteen minutes for questions before we move to the other one. Doctor ? and then Mr ?.

Doctor ? : If I can put the following question to colleague Dawood van Wyk. In your presentation you made no reference to questions put to Ministers and to the President as a form of democratic control. My own experience has been that in the New Parliament, question time is not being effectively used in order to get the Executive to account for what is happening in Government. This I think is a criticism directed at all Members of Parliament and not at any particular political party. There is also some debate at present and I know being an advisor it may be difficult for you to comment on the issue of whether the Head of Government, namely the President, should also be accountable to Parliament. He is not a Member of Parliament but we do have Section 200 which permits questions without notice to be addressed to the Head of Government and there is a discussion under way as to whether this is necessary or not. Now, my personal view is that question time does offer unique opportunity for Members of Parliament to put questions of topical interest, matters of concern directly to Ministers and that they ought to reply to these questions. Unfortunately we have developed a convention in South Africa

which has come from the Westminster System where the presiding officer or the speaker may not require the Minister to actually answer the question. If a Minister decides either to absent himself from the House or to give a simple Yes or No and not motivate his reply, there is very little that the presiding officer can do in order to elicit a proper reply from a Minister. So I would like you to comment briefly on the whole issue of question time because I think it's a very important check that one could have on what is happening in the Executive.

Chairperson: Let's take a few questions and then allow the Professor to reply.
Mr ?.

?: Thank you Mr Chairperson. Professor, in your input, I did not quite get how this Checks and Balances as you have introduced them, whether they are being influenced by whether the State is Unitary or Federal. I would like to hear what you say about that. And also how do they affect the treaty level. It is not clear whether you refer to the central outside the regional and the local. Can you express on that?

Chairperson: Mr Rabie.

Rabie: Yes, Mr Chairman. The Professor mentioned the Bi-Cameral System in the United States where both Houses have got equal legislative powers. Now, is that example applicable to South Africa in the sense that a Bi-Cameral System will assist us to introduce some Checks and Balances as far as the legislature is concerned.

Chairperson: Any other questions or should we carry on with this? If you look at the agenda, some of the issues will be dealt with as we go by, but there are questions that already creeps in about the Checks and Balances regarding to the Executive, which we are going to deal with in Item 4 and if it concerns Judiciary or whatever the case may be, we're going to deal with that in Item 3. Professor van Wyk was merely discussing the whole introduction of Checks and Balances on Item 1. But in any way, I'm not going to prevent him from trying to answer the questions which have been posed to him.

Van Wyk: Chairperson, thank you for coming to my assistance. It also leaves the door wide open to be nice and vague about this. Dr ? had a question about questions. I think details we can discuss when we talk about the Legislature and the Executive, but again as a matter of principle, I would suggest that questions in Parliament to Ministers for instance are a good example of Checks and Balances is true, but the next question is, is it effective or is it

not effective? I think you suggested that as it is being done at the moment and I believe in a way as it had been done in the past it is not that effective. My suggestion would be if one says questions in parliament should be there as a Check and Balance, the next question would be how do we ensure that that Check and Balance ensures accountability, responsiveness and openness. If it can't be written into the Constitution, then one will have to look at the Rules of Parliament and change for instance what you've suggested that rule that the speaker or the presiding officer can decide that the Minister does not need to answer. In other words my principle suggestion is that each Check and Balance will have to be assessed in the view of how it can be made as effective as possible and that one should maybe cast aside in this kind of deliberation historical or conventional wisdom. But I think it's a good question and maybe we need to ? it out in more technical detail when we get to the Legislature and the Executive.

The question about the effect of the Unitary, Federal or the different levels of Government, the same kind of answer. I don't see that the fact that a State is a Unitary State is inherently a weaker model for Checks and Balances than a Federal State. One can perhaps argue that the more levels of Government and I've seen suggestions in commentaries, that the more levels of Government the greater the possibility for Checks and Balances at a vertical and Checks and Balances at a horizontal level. But I don't think one can again necessarily say that the one is inherently better than the other. The one may offer better possibilities if it's dealt with effectively but on the other hand I think you can just as well in a Unitary System design very effective Checks and Balances if it's done intentionally and as in terms of our Constitutional Principles with a view to achieving accountability, responsiveness and openness. I haven't referred to the different levels of Government, I assumed that because the Constitutional Principles normally refer to mechanisms at all levels of Government, so I assumed that at all levels of Government there will have to be Checks and Balances. The question by Mr Rabie about the Bi-Cameral System and whether that is an example for South Africa is once again to my mind a question whether it is decided if there is a Bi-Cameral System in South Africa that the two chambers will have equal powers. The effective Check in the American System is the fact that both chambers have equal powers, that the Senate cannot come effectively on legislation and finance without the assistance of the House of Representatives and vice versa. So it will depend on the relationship between the two Houses whether it's an effective Check and Balance and whether it's an example for South Africa.

Chairperson: Thank you Professor van Wyk. As I've indicated before there is

more scope to deal with that Mr Rabie if you would like to repeat the question under Item 3 and Dr ? as well under Item 4. Any other questions for clarification? Alright, can I at this stage then thank Professor van Wyk and say thank you very much, and then move to the next item. But before we move to the next item, we welcome Mr ? there. Thank you very much for attending the workshop and we've got another Check and Balance which has just entered here and I want to welcome him as well, and that's Mr Leon Wessels. The Deputy Chairperson of the CA, is a pure Check and Balance, I am sure he's coming to check what we're doing here. Anyway, Mr Wessels you are most welcome and your participation is also most welcome.

We are now moving to Item 2 which deals with the Judiciary as an important institution in a system of Checks and Balances. Advocate ?.

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Thank you Mr Chairperson. Ladies and Gentlemen, I suggest we go back to fundamentals. That is the only way to deal with issues. If we understand them and we know why we need them, and I always place it in a classical sense as follows: What is the mischief we intend to prevent or what is the good we hope to achieve? And to me that is key, it is basic. Now the traditional history about Checks and Balances emanates from the inherent nature of man. Power corrupts and absolute power corrupts absolutely and power must vest in some people or some institution. Therefore historically and ? the signs develop that you can get fellowmen or institution to check on each other or one another and a sign of Checks and Balances then evolved. Now in that context I'll deal with the Judiciary as an important institution of Checks and Balances. And that Mr Chairperson also helps to put into perspective the much voted separation of powers as a Constitutional Principle. Separation of powers is no more than one of the elements of Checks and Balances. Why is it necessary to separate the powers? Because it's safer if they vest in three or four institutions than if they vest in one individual. The risk is high. So separation of powers is one form of Checks and Balances. Now let's deal with this separation of powers. It's traditionally said that there are three state organs, the Executive, Legislature and the Judiciary. It builds constitutional debate whether that is true. There other functions are difficult to classify them as purely executive functions or as the judicial function. And people use phrases such as kwazi-judicial which means semi-judicial and kwazi-administration, semi-executive. In such a jurisdiction, to solve that problem, you have a system of and I think German has one of those jurisdictions, you have administrative cause. If you don't have administrative cause, certain kwazi-judicial functions will be dealt with by the organs of the Executive. I know there are

institutions which I'm at difficulty to classify, like the Tax Court, Water Court, those arguments whether they fall in the strictest sense under the Judiciary or the Executive or it's one of those high bred creatures between the two, the Executive and the Judiciary. So, when I refer to the Judiciary, I would refer to it in the classical sense. Now, the administration organs or the Judiciary use certain criterion and guidelines as Checks and Balances. First there are principles which evolve over the years called Rules of Natural Justice, for example that in any dispute each party must be afforded the opportunity to be heard and the rule against partiality or for impartiality and biased etc. In other words if an executive machinery or institution takes a decision and that decision affects or prejudice the rights of an individual the kwazi-judicial institution or the Courts in reviewing that action would look at the action and before it looks at the content of the deliberations. it will look at the format of the deliberations. The procedure. And the question would be where the Rules of Natural Justice followed? Where the enquiry was conducted? Does it have an inherent built mechanism to come to a fair conclusion? And if the answer is answered in the negative, it is irrelevant whether the conclusion is fair or not. It cannot be seen to be fair conducted in that manner and therefore the matter will be remitted back to that institution or overturned. This is the system of Checks and Balances. For those who are in power when they execute decisions at the executive level, they are then restrained by this practices and they are forced to do things which in the light of ordinary human experience we then agree that if done in that manner, fair results will then be accomplished. And that applies in particular to the executive and administrative functions. There's another instance and much important and well publicised which the Judiciary as an institution of Checks and Balances plays as important role. The Constitutional Court in this country and in other countries whatever Court deals with the Constitution. In the United States it's the Supreme Court of the United States and in India it's the Supreme Court of India. Now there are two approaches to that. There are those countries which are referred to as Constitutional countries which means they have a constitution with a Bill of Rights. The Constitutional Court of the Supreme Court in that country would use the Bill of Rights as a basis of his decision to check if there's been any abuse of power. In those countries which don't have a Constitution or unmodified Constitution like the United Kingdom ? very wonderful place ? called the Rule of Law and that Rule of Law is the basis upon which the Court tests an administrative decision. I now propose to deal with the Constitutional countries since we never had a Rule of Law in this country, the only hope we have is to be a Constitutional country and I therefore deal with the Constitutional country. In dealing with a Constitutional country I would like to read to you a quotation from a book entitled "A

Constitution for a Democratic South Africa". The forward to that book was written by Justice Bakwate, the former Chief Justice of the Supreme Court of India, and I think it's instructive what he said there. I now deal with Section 32 of the Indian Constitution on the issue of judicial review. Justice Bakwate said "I am of the view that the power of judicial review ? on the Constitutional Court should be granted in the widest terms so that the Constitutional Court can effectively prevent violation of the citizen's right and also affirmatively direct the State to take action for realisation of rights by the citizen". Now that is very important. People think of Checks and Balances as a negative institution to stop other institutions from doing what they are not supposed to do. The whole thing is the opposite. Nature allows no imbalance. The Checks and Balances are also there to make sure that other institutions do what they're supposed to do and it's also a vital form of Checks and Balances. If you fail to do what you're supposed to do Checks and Balances would force you to do what you're supposed to do. I continue with the quotation. "The power of judicial review must itself be made a basic fundamental right so that it cannot be ? tinkered with parliamentary immaturity". In fact the Constitution of India in Article 32 ? the power of judicial review in the widest possible terms and the Supreme Court of India has held that the power of judicial review is the basic feature of the Constitution and cannot be taken away by any amendment they find in Parliament. Because this is important. If Checks and Balances and the function of the Constitutional Court is to check on the legislature and makes sure the legislature toes the line. If you don't entrench that, all what the legislature needs to do is to go and amend by an ordinary majority that article which gives the Court the power, and therefore that Court has lost its power to check on the legislature. So it comes as a useful Check and Balance unless its entrenched that even the legislature and any majority cannot take that power of the Constitutional Court away. Mr Chairman, the system of judicial review, the judiciary checking whether legislation is in line with the Bill of Rights, be it primary or secondary legislation or even as a third tier of Government, it sounds very wonderful after what I said. The model of civilisation and democracy. People cannot do what they are not supposed to do. But it's not as simple as all that. And now I deal with the situation in the United States and the problems that were occasioned by the system of judicial review. It is said that there are times when democracy is very undemocratic and the line is very fine, and therefore democracy remains a very nebulous concept which men continuously aspire to refine. This depicts and illustrates what I've just said. In the US the Congress vote the House of Representatives and the Senate is elected by the people and therefore reflects the will of the people, how the governments would like to be governed. That is basic democracy. And the

(Tape 2)

institutions must support that. The Supreme Court of the United States of America is made out of nine individuals, eight men and one woman. And I think of those eight men, it's one Black. Nine men appointed by the President, confirmed by the Senate for life. Now people are arguing that that's not democratic. The institution of judicial review is undemocratic because the representative in the House of Representatives, the congressmen, and the senators in the Senate have the mandate of the people who elected them. Both initiate legislation and it goes across to each depending where it was initiated and its passed. Therefore the people once parliament or congress pass legislation, the people have spoken and that's the will of the people. But those nine individuals can overturn the will of the people. They can tell congress that that's unconstitutional and that law cannot be law in the United States of America. It doesn't matter that the entire United States of America including the two branches of the State, the Legislature and the Executive may want that law. If those nine persons say No, that law can't be law. Can that be said to be democratic? Isn't the Judiciary also, by the system of judicial review, also legislative? You can legislate by making laws and some people much more brighter than I am, argue that you can legislate by blocking laws. You decide which legislation becomes legislation and therefore they argue that the system of judicial review is undemocratic. Because a Constitution is a very dynamic document, it changes with the time. Those nine persons thirty years later or forty years later, they might be overtaken by events, the thought process and the mood of the country and it might be very important that the country should go into a certain direction. And you can't lobby them, they are not politicians. Therefore as we talk of these Checks and Balances, let's go back to what I said, our fundamentals. What is the good we hope to achieve and what is the mischief we hope to prevent? All this beautiful systems, gimmicks, schemes, institutions are all intended to serve the ultimate goal and the larger good. Now that ultimate goal and the larger good is for the country itself to determine. And on this aspect I intend reading something to you. I quote from the same book from what the speaker has written and I can't find much more appropriate terms this morning to ? and I want to be consistent and reach that. "The constitution of a country is an organic instrument which defines the power of relationship between the different organs of the state and lays down the basic principles and ? which must inspire and guide the governments of the country. It is a document which is intended to endure for a reasonable period of time unlike a restricted railroad ticket which is good only for a particular day and for a particular train, the Constitution reflects the hopes and aspirations of the people and lays down the direction in which the country must proceed. It has a tremendous impact on the future of the country and the well-being of its people

and it is therefore required to be drafted with great care and concern. The people who draft it must be Statesmen with a sense of history, incisive mind, must have intellect and profound political vision. But it is not enough to have outstanding men to draft a Constitution of a country because however deep and profound they may be intellectually, however learned in law and political science and however well-dressed they may be in the constitutions of other countries, they may not understand the problems and difficulties which cry for solution through structures and institutions which are to be set up under the Constitution, and they may not therefore reflect the genuine needs and requirements of the people". I want to conclude on that note because for me that is ?. As we sit here and debate Checks and Balances against what, in aid of what, for what purpose? It therefore then calls upon us that we have a vision and there's a goal we hope to achieve. And in achieving that goal, we therefore want to prevent certain things or allow certain things to happen and that will then begin to inform us what types of Checks and Balances we need and in what form because we then know what we want to achieve. Mr Chairman, I have concluded.

Chairperson: Thank you Advocate ? for the aspiring address. It is now question time for clarity. I will also give you fifteen minutes to ask questions and we'll move to the next item. Mr Levona and then Mr Hendrikse.

Levona: Thank you Chairperson. I have never understood the Judiciary in the Checks and Balances as an impartial or independent body. When the ? indicated the element of political supremists, even within the process of appointing judges, political influence is there and political authority is there. Therefore to my simple mind, it's been difficult really to see how that body can be that impartial. That body can serve without trying to satisfy the master, no matter how good a Constitution is. The element of political supremists as it is always stated.

Chairperson: Thank you Mr Levona. Mr Hendrikse.

Hendrikse: Are there any Checks on the Judiciary itself in the sense that you mention an example that if the whole country in both Houses wanted a particular law, the Judiciary could turn it down. Do all nine have to conquer or is it a simple majority of five of the nine?

Chairperson: Any other questions? Mr ?.

?: I'm still thinking of the question? How I should phrase this question? You know, Advocate, we usually talk about these concepts of Checks and Balances, Judiciary, checking the

Executive and so on. Well I don't know how effective that system is? And secondly, I don't know why we should choose the Judiciary to do that function. I'm saying this against the background that we had Courts in this country, we had laws and so on, but I don't know how effective the Judiciary was in checking the system of apartheid or the executive in this instance. And therefore when we talk about this concept of Checks and Balances and talk about the Judiciary being an instrument of the situation, what makes the Judiciary tick, why do we choose the Judiciary and how can we ensure that the Judiciary is going to be effective? Is there anything that assists it to make it effective or what? So I would really like to get the context of this institution and its role.

Chairperson: Thank you. Whilst other people are thinking, can I allow Advocate ? to respond to the three questions posted.

Advocate ? : Mr Chairman, I propose to reply to the three questions in the following manner. The first and the last question tie with one another. I'll deal with that as one and the middle question is independent, I'll start with that because it's a simple answer. The question is whether you need a consensus or a simple majority? But in matters of national importance the Supreme Court of the United States has always tried to give a united decision because if you have a dissent in judgement the politicians will then take the dissent in judgement of your brothers or your sisters and then you see they're not even at ? on this point and we think we like this judgement and the majority has misdirected itself. And let me share with you on that question how at least the Supreme Court of the United States work. It's more like political lobbying, every judge has a clerk and a registrar, once you've reached a conclusion and every morning the judges go and the clerks stay behind. After you've written and researched the law and given your judge the paper on what you think the opinion is and the judge takes his judgement in Court or his opinion and then they go into Judge's school which is like a boardroom, and then they start debating, and as you're debating you can see what your brethren's think like and who are closer to you and where you differ. And then you are jammed and then you decide that Mr ? is not very far from you and then you go to his chambers and then nail him and win him to your point, but in the meantime Mr ? has gone to his ?, Mr ?. When you come back the following day or two days depending on how long the session has adjourned, you'll see a grouping develop. Certain people will move closer to others and they'll keep on debating that and there's also barter and exchange there. If you remove that paragraph of not difficulty with the thinking but the language is strong if you can redraft the introduction or how you define the issues. And it will be four, five or six ? and then the senior judge in that category will write the

judgement for the dissent in judgement or for the majority. So there's a lot of bargaining and some people end up joining judgements which may differ entirely from their initial view. Now if you have strong characters either in terms of massive intellect or just commanding presence, that judge especially if he is the Chief Justice will do a lot to carry everybody along with him. If you're going to have a very soft personality, you're going to find lots of split decisions. That is the answer to that question. The other two questions are very difficult to answer. It is true that in interpreting anything, a judge is not a super human being, he is an ordinary human being, so in interpretation of anything, we'll bring into that interpretation our own upbringing, our own bias, our own prejudice. I will give you an example. I appear frequently in the Courts and one of the things you deal with is credibility of weaknesses. I lead my witness from ? somewhere in the Northern Transvaal, a very decent respecting ? woman, and when his Lordship asks questions she first looks down and put her hands together and in a very soft tone says "yes" or "no", and she pauses before she answers. I'm not a student of cocknative psychology but the judge because of his background which more often than not is a Calvinistic background, Afrikaner "bos uit, praat reg uit" - a look in the eye to show you are not lying. When he makes his finding on credibility, he says the least said about this woman the better. She lies ad nauseam and she cannot be relied on. She has no integrity, no character. She couldn't answer any questions straight. Before she answers she fiddles around with her hand and look left/right. She can't even raise her head and look me in the eye. She's a classical example of a pure liar, and I said "My Lord, with respect, she's a classical example of a respecting and a decent and honest woman, and all what you heard during her testimony was utmost respect. You see, with the most noblest of intention, because his Lordship comes from a different culture, he brings his biased background into the judgement and he finds that she's lying because she doesn't look him in the eye and she thinks it's disrespectful to look him, particularly being a man, right in the eye. That much you have. But there are certain things which we can agree upon. I guess that's why in this country you have an institution of the Constitutional Court. I guess the mischief we tried to prevent there was because the Judiciary was all White, men for that matter, an Afrikaner by and large, you want to infuse the Constitutional Court and make it representative so that it can be sensitive to what I just said. You would want that to be sensitive to the feelings of others. And I may just mention, I thought Mr Chairman protected me when I think it's Mr Bears remark there, I owe this House nothing else but my honest and to the best of my ability what I think would help debate the issue, and when I make a statement here it's without favour or fear. And I take very strong exception to people here being intimidated to say what other

people want to say. We can move out of here and we can deal with our differences.

Chairperson: Advocate, let's stay with the matter. You are protected by my good hands.

Advocate ? : Maar, Meneer Voorsitter, dit maak my ook "die moer in".

Chairperson: No, you are in my good hands. You are well protected. I think Mr Bears is quiet at the moment. He will make his remark later on that.

Bears: On what is the speaker reacting, Mr Chairman, to what is he reacting exactly.

Chairperson: I think you remarked - I don't know exactly what you were saying.

Advocate ? : Mr Chairman, maybe if we clear this relationship. We are going to live with each other for a long time and we need to deal with one another with dignity. We need to respect one another. Mr Bears said, when I referred to the bench being majority Afrikaner males and I used the word Afrikaner again, Calvinistic. He says "Dit maak my in die moer in nou", when I keep on referring to the Afrikaner. I smiled and I thought the Chairman would ask him to keep quiet and this is why I took up the matter.

Bears: I didn't use those words. Mr Chairman, what I said is that I think you are a political activist at this point in time and not a technician. That's what I said. I said that to my colleague, I didn't say it to you, but that was the position as far as your comment was concerned.

Chairperson: For the sake of progress in this workshop, could you please avoid words which would really interrupt our work this morning. We are here dealing with the workshop, dealing with Checks and Balances and can we really get into the subject of the issue and let's avoid that for the sake of progress, please. If we need time to debate upon those other things, we will do so but I don't think this is a relevant time to deal with that now. Advocate you're protected.

Advocate ? : Thank you Mr Chairman. The question was asked in the light of this country's history can the South African Judiciary serve as a basis of Checks and Balances, and I'm in the process of answering that question. And I cannot avoid history and I wasn't part of that. But the fact remains people, if the Judiciary is an important institution of Checks and Balances, the people must have faith in that Judiciary because if they don't, it doesn't matter the Judiciary is doing a good job or not. That will affect the

Constitution and the Constitution is as good as the people respect it. If you don't develop a constitutional culture and people don't respect that constitution, it doesn't matter how good that constitution is being phrased. The people must respect it. If they don't respect it, it's a useless piece of paper. And I agree and you'll find various people, Mr ?, differ with you. There's an inherent problem about the Judiciary in this country, and that's why the institution of the Constitutional Court to try and deal with that. But it's not the Constitutional Court only that deals with constitutional matters, the ordinary Judiciary will deal with constitutional matters and the fact that judges are appointed for life and can be impeached only for certain limited conduct which relates to integrity. You are going to have them for a long time. The only consoling factor is and some people say that man can surpass their masters because once appointed and for life they then concern themselves with a ? and does themselves, their integrity, they have a sense of destiny and they would like future generations to remember them not as the best guys who served their masters, that their living has not been in vain. And that's a redeeming factor in man that they can then outgrow their political masters and have a sense of destiny. Thank you Mr Chairman.

Chairperson: Thank you Advocate ?. Those are the three questions. I'm prepared to take another one or two questions, then we close this matter. ?, any other questions?

?: Thank you Mr Chairman. In the first place I would like to remark that I'm really delighted by the presentation of the Professor and for the first time I start to understand what is meant by Checks and Balances especially when it comes to Judiciary. This brings me to some conclusions that in South Africa all these years from 1910 up to now we had laws that were passed some of which must have been very wrong. Nobody ever checked on those laws except that the few majority from one section of the population of course were responsible of making those laws to work on people who did not want them and they could not be checked by anybody. It is well understood now that we must have these Checks and Balances so that we also may not go wrong because if we don't have those Checks and Balances, if we must rely on the right of the law, then we shall have a lot of wrongs which we shall do to our people. I think this is a matter of being honest, whether I've been a very wrong person in the past or not. I was wrong because I understood I was right and now I understand I was wrong. I'm right now. And when I take this way of right, I must stick to that right way. I just wanted to say that Professor, I'm very thankful.

Chairperson: Thank you ?. That was just a comment and not a question. Thank you very much anyway for the comment. I didn't want to stop you.

Thank you very much for that comment. Are we raising questions? Mr ? and Mr ?.

?: If a Constitution that is constructed at a time when the whole community is completely in disarray, divided, barren, from every angle. The vision which we seek to promote plus the good that is starting to be promoted and the evil that we seek to get rid of, what could that be in a community of that kind? What Constitution can we be expected to come up with in a divided community, pathetically tragic. What kind of Constitution can a people be expected to come up with to be respected for ages.

Chairperson: Mr ?, the last one on this issue.

?: Thank you Chair. I just want to pose this question. What will happen if you have a strong unitary centralistic government which leans nearly to dictatorship, then you'll have to make this Checks and Balances and that President of that government will be the one who'll appoint each other. Who will check who on this system?

Chairperson: Advocate ?.

Advocate ?: I'm not quite sure whether it's legal or comes within my presentation, but I'll venture an answer. You see there's a common good in human nature by definition a survivalist, that's why the human race to this date is not extinct. So, when the division reaches to a stage where it destroys all of us, I think common sense will prevail and you'll find the majority of people will see the light. It's ideal to carry everybody along with you but nowhere in the history of mankind and even with homogenous societies has everybody ever been on board. So all what man and women of integrity owe themselves is the strength of their conviction. If you think you're right, and yes, wisdom will prevail. I have no answer except for people to follow the dictates of their conscience and stop playing games with the future of a nation. I don't know how else it divides a society. But that's so much about a divided society. Unitary ? government which leans towards dictator or tyrant, it depends. You see if the President appoints the judges, it depends what are the other provisions. Are they appointed for life, their salaries fixed by another organ and he can't remove them? And if that is so, it goes back to my earlier answer that man have a sense of destiny. People, once they are in a position and are given power, why not just enjoy it and decide to be their own man and have their own identity. And they'll refuse to be dictated by the President including even the President who appointed them because they judge differently. They don't get credits and stars from the politician that they deal with. They know

they're in their job and that they being looked by their colleagues and the world is getting smaller and smaller and the international community, and they want to know that they are good judges and when they flying about they can make it with their colleagues. But if those Checks are not in, he can appoint and fire and reduce their salaries and promote. Obviously he still has a hold on them and in that sense whether it's unitary or federal it doesn't matter. If you don't make your Judiciary not only free from the Executive but independent. You see that's an operative word. The Judiciary must be independent. And then the question arise, what are elements which makes the Judiciary independent. It's what I said, appointment, for what period and salaries, to remove them from the control of the Executive. Thanks.

Chairperson: OK, Mr ?. Follow-up.

?: Advocate, having said that, what is the situation in South Africa? I read over the weekend that the President has determined the salaries of the judges of the Constitutional Court. Shouldn't an independent body have decided the salaries of the judges?

Chairperson: Advocate, are you ready to answer that?

Advocate ?: Two problems we've had. One, I don't have the facts. I've also heard about that but I thought that was determined somewhere and sent to the President for approval. And he just approved.

Chairperson: Thank you. That concludes questioning under this section. We have forty five minutes before we break for tea. Can we take the last speaker before tea time and then after tea we will have the last speaker and a general discussion of what we've been doing. Let's take now Professor Steytler who will be dealing with the legislature as a check on the Executive and the Judiciary. Professor Steytler?

Steytler: Thank you Mr Chairman. Now it's said that the Legislature or Parliament is the foremost democratic institution of the three branches of government. In parliamentary system where the Executive is drawn from the Legislature, Parliament is by definition the only democratic institution and even in a presidential system where the people elect the President directly, the Legislature can claim greater democratic legitimacy because they represent not 51% of the people the winner, they represent 100% of the people. So in classical theory parliament should then be an all powerful institution because of its strong democratic base. It makes laws, it scrutinises how they are executed by the Executive. But in practice, however, as you know, the Executive has tendered to be more powerful. It formulates policies which is translated into

legislation and it executes those laws. While legislatures are often shifted from the centre stage of real politics they remain the core institution in any system of Checks and Balances vis-a-vis the Executive. So whatever the real politics is, one would have to invest legislatures with their capacity to be an effective Check and Balance on the Executive. At the Supreme Legislature the parliament diffuses state power between it and the Executive by the only institution that can pass laws. The Executive therefore can only delegate powers to pass legislation. An equally important function is its function to scrutinise the formulation of policy and the execution of laws and policies. And there are a number of parliamentary controlling devices which have been developed over the years. Now the first most strongest medicine which the parliament has is to adopt a motion of no confidence. In the parliamentary system the Legislature can dismiss the Executive by a motion of no confidence. This method is usually not very popular because it's linked to the dissolution of parliament itself. Only with the prospects of creating a new government would this power be used and it's not very often done. More important is the other controlling mechanisms and here it scrutinises the activities of the Executive and important here is parliamentary question time. So short of dismissing the Executive, parliament can scrutinise the activities of individual ministers and their departments. And tradition has it, developed from the British parliament, is the importance of parliamentary questions, and linked to it is the more recent development of the right to call for interpolation. And I think one here should deal with the mechanics of question time and already the deputy speaker has mentioned the difficulties of not being able to compel an answer. And the obvious solution to the problem is that it should be written into the Constitution the right to ask a question and thus the right to expect an answer and therefore often more a yes than a no, but also a motivated answer. So I think one will have to give teeth to these parliamentary traditions to say well how can one constitutionalise this very important power, the power to question. A second form of scrutiny is through the select and standing Committee's of Parliament. They serve as a very important watch dog over the functions of the Executive. They may call members of the Executive to appear before them and give account of their ministries. They are very important because in these committees expertise are developed so that there can be true accountability, knowledgeable questions can be asked and answers given could be questioned. If you look at the Interim Constitution, we see that Parliamentary Committees may be established, not must be established - Article 58(1). So if there are no committees established, it does not constitute a constitution. So what one will have to give attention to is whether you don't want to constitutionalise the existence of standing committees, select

committees, and then once you've established that, for example someone suggested to me why not write it into the Constitution that for every ministry there should be a standing committee. Once one establishes that principle of standing committees then of course importance is the powers of such a standing committee and I think one can't do any better than what it is in the Interim Constitution now - Section 58(ii) - which says the standing committee has the power to subpoena any person to give evidence before it and compel the production of documents and information. So the question then is constitutionalise the existence of standing committees and then empower them to do a proper job. Now these are through the major devices pertaining to the controls of the Executive and I'll come to some other methods later particularly the Offices of Parliament, the Public Protector, the Human Rights Commission and the Auditor General. So the Parliament as the supreme democratic institution has this controlling role to play over the Executive. At the same time it plays some role in controlling the Judiciary. We have seen that the Judiciary can be an extremely important institution with an enforceable Bill of Rights. Parliament has traditionally had some say over the appointment and dismissal of judges. At present Parliament has a limited but significant role in the appointment of judges, 4 senators, 4 members out of the 17 members are from Parliament. They appoint judges of the Constitutional and the Supreme Courts. In the past the Executive appointed the judges but usually only the Parliament could dismiss judges on the grounds of misconduct, and this tradition has been replicated in the Interim Constitution. The National Assembly and the Senate plays an integral part in the dismissal of judges on the grounds of misbehaviour, incapacity or incompetence. So, it is not their power to dismiss when you disagree with their decisions but very clear more precise and more detailed grounds are required that of misbehaviour, that's not spelt out. Incapacity, not spelt out either or incompetence, but it's more than simply politically differing from the decision of judges. So the Parliament then plays a backstop controlling over the Judiciary. When one mentions the Judiciary one should also mention the Attorney General. This is a new development where the Attorney General has been placed almost under the tutor ledge or made accountable to Parliament. Although Attorney Generals are entrusted with an executive function that is instituting prosecutions and therefore should fall theoretically under the Executive as is the case in most countries. The Attorney Generals have been given by the outgoing government or it has been placed under the control of Parliament. Whilst they are still appointed by the Executive their dismissal now is in the hands of Parliament. More over the Attorney Generals must report annually to Parliament on their activities. Now this relationship between Parliament and the Attorney Generals has

not been fully fleshed out. It hasn't developed yet. If one looks at the first year in which Attorney Generals have reported to Parliament, there hasn't been much scrutiny, not to my knowledge, and one would have to see how this accountable relationship will develop in the future. Now this is the theoretical basis on which Parliament assumes great controlling powers vis-a-vis the Executive and the Judiciary. Now this is in theory mainly. In practice, Parliaments as I said earlier on are overshadowed by the Executive. Where there's harmony between the Executive and the Legislature as is the case in parliamentary systems, Parliament often becomes an appendage to the Executive. The reason for this is simple. The emergence of mass parties with strict discipline shifts power away from Parliament to the party hierarchies which is often also outside the ruling parties caucuses in Parliament. Where one party dominates the Legislature this is also reflected in the Executive. The prospect for example of a motion of fair confidence exists only in theory. It is thus not possible to talk of Parliament as a unitary body but rather it should be seen as a collection of parties in competition for power. It is in this competition for power that Parliament can be a Check and Balance against an all powerful Executive. The question is thus, within Parliament where one party enjoys an absolute majority, how can Parliament be made to perform its role as a supreme institution to check on and the balance the power of the Executive. In short how can the dominance of the ruling party be softened. Pertaining the dominance of the ruling party constitutes in affect the Check and Balance of the Executive. Now the answer is to be sought and this appears in the literature is by making Parliament function as a multi-party entity. That is to say the rules constituting Parliament should seek first to make Parliament diverse and competitive in terms of political opinion. And secondly, and also contradictory, make Parliament function inclusively, that is as a whole rather than exclusively in the interest of the ruling party. Now how can Parliament be made competitive. Parliament is competitive, I would submit, when there's a diversity of views and opinions. When different parties compete for power they attempt to show the faults and weaknesses of the ruling party. A precondition for a competitive Parliament is that it should include all shades of political opinion within it. This obviously also consolidates the strength of democracy when people see that their views are represented in Parliament. Now, how can one achieve a competitive Parliament? I would suggest the following stands to reason. Firstly, Parliament must represent the people, that is to say it should reflect the people's choice and no one else. Consequently appointment to Parliament should be by the people and not by any other body. So nominations by President to Parliament disturbs the balance of power, disturbs the views of people and it could undermine the competitiveness of Parliament

where for example the Executive can appoint a number of persons to Parliament. Secondly, Parliament should be inclusive as possible of all shades of opinion. And this regards electoral systems to play an important part to ensure that as many shades of political opinion are reflected in Parliament and proportional representation with a low threshold for entering into Parliament should thus be pursued. Thirdly, Parliament should be accountable to the people. Where parliamentarians are elected without reference to constituencies members of the ruling party in Parliament would not be directly subjected to the pressures that one may experience if you are elected by a constituency. There would be these competing pressures, one from the party, one from your constituency. So one would argue that the representativeness of Parliament via proportional representation should be complimented by a constituency based electoral system. Fourthly, Parliament should be independent. The greatest danger of a competitive Parliament is that bodies and institutions outside Parliament may control or dominate it. Of particular importance here are political parties. Should they be able to control the tenure of members in Parliament, then clearly they control what is being said in Parliament, how Parliament conducts its affairs.

(Tape 3)

So the present rule that a Member of Parliament loses his or her seat when she is expelled from her party should be examined very carefully. Further the dissolution of Parliament should not be in the hands of an outside body particularly the Executive, it should be determined by the Constitution itself. Finally, under the heading, Independence of Parliament, the salaries of Parliament should be controlled by Parliament itself. The fifth element in a competitive Parliament is that Parliament should be able to be outspoken. The freedom of speech in Parliament is one of the key values in a competitive Parliament. The right to criticise without fear of civil or criminal law repercussions is critical. So one should constitutionally entrench the rights and immunities of Members of Parliament as it's done in the present Interim Constitution. Sixthly, Parliament should be knowledgeable. Freedom of speech is only of value when Members of Parliament have access to information held by the Executive. Now one can gain information through various means, informal means, through the newspapers, from constituency members, but also Parliament can appoint officers which can gather information from the Executive, and here three very important parliamentary officers should be mentioned. Firstly the Public Protector or as also known as ? in other countries. The ? as developed in Sweden, the country of its origin, is a parliamentary officer appointed and answerable to Parliament. The ? assists in scrutinising the activities of the Executive and the Administration. Through reports to Parliament, the ? provides Parliament with information which it can use in

assessing/scrutinising the activities of the Executive. It's important to note that the ? as a watchdog of Parliament has neither executive nor legislative powers. More over it should not have those powers. It's through the power of information which it can persuade the Executive to act in a particular way. I say that this is also the model which underlies the position of our present Public Protector. The second institution of Parliament which assists in getting information is the Human Rights Commission. The Human Rights Commission has a similar brief as the ?. Now more broadly to cover also human rights violations other than administrative justice. The present Human Rights Commission has also the mandate to advise Parliament and provincial legislatures on the constitutionality of a legislation. So one should see the Human Rights Commission as advisors to Parliament. Finally, the Auditor General. The task of scrutinising the financial administration of the Executive is entrusted to the Auditor General. Again he or she should be regarded as an officer of Parliament. He or she is appointed by Parliament and can only be dismissed by Parliament. Being answerable to Parliament it provides Parliament with valuable information about the financial conduct of the Executive. Now these are strategies of making Parliament competitive which underlies any system of Checks and Balances. Now Parliament is by definition a collection of political parties. Parliament is also in practice the forum on which the party enjoys the absolute majority dominates proceedings and likely so in any democracy. However, should the domination of Parliament by the ruling party be complete, then some of the Checks and Balances which Parliament exercises over the Executive and the Judiciary could become meaningless. For example the selection of parliamentary committees, if that is totally dominated by the ruling party and selection is done by majority vote, then minority parties could be excluded. Furthermore, the effectiveness of the officers of Parliament, the ?, the Human Rights Commission, the Auditor General could be undercut should the ruling party appoint parliamentary officers who because of their partisanship or lack of skills would be unwilling or unable to inform Parliament and particularly minority parties of the mal-administration of the Executive. The concept of Parliament as an effective check on the Executive requires that Parliament operates not on an exclusive basis i.e. as the lapdog of the ruling party but on an inclusive basis in the interest of all parties. Parliament as a whole should scrutinise the performance of the Executive. This requires in affect strengthening the position of minority parties by giving them also a say in the appointment of members of parliamentary committees and the appointment of Officers of Parliament, the Public Protector, the Human Rights Commission and the Auditor General. One method of securing that Officers of Parliament serve also minority parties is to acquire weighted majorities for

their appointment. This appears to be the principle underlying the present procedures for appointment and it could also be interpreted as being required by one of the Constitutional Principles which says that minority parties should participate in the functioning of Parliament. So for example, the appointment of the Public Protector, the Human Rights Commissioner, a joint committee of both Houses of Parliament with representation of every party in Parliament makes nominations to a joint sitting of the National Assembly in the Senate where at least 75% of the persons should be present and voting should conquer in the appointment of such officers. In the case of the Auditor General, the majority should be two thirds. Although one may argue about the precise mechanics of how to fashion a weight of majorities, the principle is clear. All parties should have a say in the appointment of Officers of Parliament because these officers also work for them. It's important to note that these persons and commissions are Officers of Parliament and their powers should be limited to gaining information and they should not have any executive or legislative functions. So in conclusion, in the parliamentary system Parliament as such is not much of a check on the Executive. It's rather opposition in Parliament than opposition of Parliament which is the most effective check on the Executive. The principle of multi partyism is thus of equal importance to the principle of Checks and Balances which underlies the doctrine of the separation of powers. A last word in this context on the question of uni-cameral versus bi-cameral Parliaments. Is a bi-cameral Parliament the definition of a greater check and a greater balance than a uni-cameral Parliament? The answer must be again, it depends whether the second chamber, the Senate is a competitive body. And particular competitive vis-a-vis the first chamber. If in fact the second chamber is simply a reflection of the first chamber, then clearly it is no more than a shadow of the first and therefore performs no extra function as a check or balance. If however, the second chamber is separately constituted with a separate constituency, then there's a possibility of competition and then it may serve as an effective check and balance on the Executive. Thank you.

Chairperson:

Thank you, Professor Steytler. You said a lot of things in a very short space of time. Thank you very much. You've been running very fast. We have fifteen minutes for question time. Questions of clarity? Then thereafter we will break for tea. I have two hands, a third one. I'll start with Mr ?, Mr ?, Doctor ? and then Mr ?.

?:

Thank you Mr Chairman. Professor, I hear your sort of trying to balance or sort of some fear for a dominating party. I say balance and fear. You'll forgive me for that, but I don't hear you come on a party that has involved and come to grips with democratic culture

which has within itself the balance infectors. A party which has the ability to criticise itself. In cases whereby it happens to be the majority. How doubtful that can be within a democracy with a parliamentary system. I want to say it is clear from what you have said of course there is no 100% check and balance but I want to say when it comes to the issue of questions and extracting answers, I have the fear that too much democracy is also not good for the State in the sense it depends on the type of question and the state of affairs. Thank you.

?: Thank you Mr Chairperson. My question is partly covered by what the previous speaker has just said, but this concern about the input that any organ of government gets regarding the minority parties. We are in a situation where we come from a background of minorities deciding for the majority people in South Africa, but now we are saying that the concerns of the minority must be taken into account. If we agree with that, what happens in a situation where the minority insists that the majority must not move forward because of one, two, three things which are of their paramount concern and ? progress in any given situation.

Chairperson: I'll take the last question, Dr ?.

Dr ? : I don't know whether Professor Steytler has dealt with the questions that I raised earlier.

Chairperson: Yes, he did.

Dr ? : Well, I think out of fairness for our colleagues, perhaps I'll deal with my question later.

Steytler: On the question of the balancing and checks within the dominant party. I think obviously it's extremely valuable culture developing that there is a freedom of parliament vis-a-vis the Executive developing. But it may also be a fact that it's a unique situation where there isn't complete harmony between the Executive and the ruling party in Parliament where you have a government of national unity vis-a-vis a strong dominant party in Parliament. And therefore there are greater possibilities of disharmony because the point is if there's a strong party with a strong control, then there is unlikely to be dispute between Parliament and the Executive because this matter is solved by the party itself. But clearly one can establish, this is more at a level of a culture that you establish rather than writing it into the Constitution. What we are concerned here is to write in the long term into the Constitution the ability of Parliament itself to form some type of check on the Executive. And clearly it is a gadfly element as well in the hundreds of questions that has been asked often not relevant, often more nuisance, but one has to take that gadfly with the true and very

important questions that are asked. So it's not one that one can be truly selective on which are the good questions and which are just the also questions, also asked questions. In terms of the strength of minority parties, what one must be very clear in one's mind here is that minority parties are not able to hold up progress. The power of minority parties in Parliament is simply access to information and that access to information is the issues on which politics are debated. That you have an open government, that you have access to it and then you can ask is the majority party going in the right direction, is it performing a proper role. So the minority parties in Parliament with simply access to information, asking questions, criticising, is not able to stop legislation. So the argument here is simply the officers to be appointed should have broad representation that they don't become simply lapdogs to the dominant party. But they are not placed in a position to hold up legislation. Your usual rules of democracy, absolute majority to pass legislation continues. The final point is that it is very often also in the interest of the ruling party to have a critical body within parliament, to have the Officers of Parliament criticising the administration. Because it can then rectify those problems and in the end can produce a better administration which often will then stand the ruling party in good stead. So it's not simply a destructive role, it also is a very constructive role - critiques, reviews, checks ? government. Very often in some African countries where the President appointed the ? was clearly to make the administration more effective to get greater support from the people for his policies to be able to rout out corruption etc. So it also works in the favour of the dominant party. Thank you.

Chairperson: Dr ?.

Dr ?:

Thank you Mr Chairman. I was dealing with the earlier intervention with the importance of question time in Parliament and I now want to just illustrate the weaknesses we have in our present system. Questions are put to ministers which are not satisfactorily answered. Our rule which we have inherited from our past traditions is that the presiding officer does not interfere. If a minister behaves in absolute contempt of Parliament, there is nothing that the presiding officer can do to elicit a proper answer. Now this may be putting it very strongly but let me give you an example. If false passports were issued to certain officials, this particular question has been posed thrice in Parliament without a satisfactory answer being given, if it's possible for the Press to speak to the regional commander of the Western Cape Police and obtain confirmation from him. Now somehow this to me does not seem right. Here we are, the elected representatives of the people, and we are incapable of eliciting answers from ministers on matters of public importance. Because every one of us has to

fill in a form when we apply for a passport. We have to go to a Commissioner of Oaths and swear under oath that the contents of that document are true. So obviously there has been a degree of perjury. But this has not been followed through effectively by MP's. The point you make about a large majority in Parliament I think is an important one because the view was taken right at the outset of this new Parliament that Parliament will not be a rubber stamp of the Executive. Yet we do not see critical questions coming from members to the Executive or follow-up questions, supplementary questions, to make them account to us as representatives of the people on their actions or what happened in their departments. And it's irrelevant whether this happened before the elections or since they've taken office. But I think Parliament must play this role and I think we need to also focus on the importance of having good parliamentarians who are able to play this role as a check on the Executive. It's not good enough if we have four hundred members in the National Assembly and ninety in the Senate but are we in fact good parliamentarians who read newspapers, do we follow up on things which appear to be irregular in the form of questions or interpolations to the ministers. Thank you.

Chairperson: Could we try to be brief in our questions. We have an hour's discussion of the whole problem. If we could just ask questions of clarity at the moment. You'll have time to comment and debate the issues. Let's take another question. Mr ? and then Mr ?.

?: The Senate and the National Assembly. What is the idea? Because simply between those two Houses to make sure that the one checks the other or the one is not frustrated by the activities of the other or rendered nothing than the other. Seeing that our Senate is supposed to represent our provinces in Cape Town.

?: I just want to ask the Professor how we can we make our present situation of asking questions or a system because at present I think it's not effective as the Deputy Speaker is saying. At present I don't see how a member for instance asking this question or interpolating with the Minister or whoever can really say he is satisfied with what the Minister has answered him.

Chairperson: I don't know whether the Professor would have an answer to that one or should we have an answer as politicians in that regard. Any other question this side? OK, Professor Steytler.

Steytler: On the question of questions, I find it a bit startling to hear that the tradition of the past is simply carried over into the new Parliament where one thought that the new start would commence, and it's precisely because of lapdog's role of Parliament in the past that

one would have thought that a more vigorous would have emerged, and that the speaker of the House who would control the events should be able to demand an answer. Because if you compare the given answers in the whole House as opposed to giving answers in Committee, there the Committee has extremely powerful powers to summon subpoena by law for members to give evidence before them and I can't see why they can't conclude a Minister and also ask for documents. So there is a reality that on one hand you are able to enforce answers and question people thoroughly and their follow-up answers whilst in the more important chamber in the National Assembly you do not have that. But clearly one would not be able to write into a Constitution and the speaker could demand an answer to the satisfaction of the questioner that will have to be the tradition that is established but at least one could write it into the Constitution that every member has the power to question a Minister in Parliament. The other question in terms of the role of the Senator vis-a-vis the National Assembly, again if one looks at the past history in South Africa how the Senate was simply a reflection of the parties in the National Assembly it played no Check and Balance because if there could be no check and balance in the National Assembly it is not going to be done in the Senate unless there is separate ways in which you appoint people to the Senate and that their composition are significantly different and are given particular powers to stop legislation either on a waiting period that is to delay it. I wouldn't like to see it.. that it may veto it because the National Assembly must be the final body which controls legislation. It is a democratically elected body and power already should vest there. So it may be that the Senate may have a delaying action in terms of general legislation or perhaps in very specific cases vetoing power in terms of provincial legislation. But that has to be done once one has clarity precisely about the functions of the Senate and the functions of Senate will be determined about the powers and also who are elected. Whether they will have an independent base from the National Assembly to contest policies to contest legislation. So I think one can see in the end Checks and Balances is a whole system. One cannot say well this is the checklist, if you have those questions standing committees then you've done it, it is a broader system of which an element may be the Senate, but then constituted to give it some real powers, some real clout. Thank you.

Chairperson:

I'm taking the last question. Mr ?, you had your hand up. Didn't you? OK, fine. Any other question? If there's no question this concludes item 3 of our Agenda. Thank you Mr Steytler, it was very good. Call Group members, could you remain with me for about two minutes. The rest of the members have your teabreak until half past eleven, we're starting again.

The next item on the Agenda is the Checks and Balances by the Executive. Professor ? was supposed to do this as I said earlier. He couldn't make it today but Professor van Wyk is ready as a professor who carries all the books in his head. He will deal with the subject quickly. Professor, over to you.

Van Wyk:

Chairperson, during the last two and a half hours that I had to think about what I have to say now, I suddenly discovered that I do not have all the books in my head and I further, and that is the more disconcerting thing, discovered that my colleagues have really put me for some reason and I believe it wasn't malicious, in a very difficult position to talk about the Executive. Because Mr Chairman if we think about Checks and Balances and separation of powers clinically, it is easy and nice to say that we have three powers in the State as you have heard now, the Executive, Legislature and the Judiciary, and that they exercise mutual control and check over one another. It's easy to say that, but I think and this may be a bit of a provocative statement, in practice it's a completely different situation. The Executive is in a different situation from the Judiciary and the Legislature. The Executive is where things happen. They've got their hands on the levers of power. They, unlike the Judiciary, where things normally go a bit slower, you will know that it's often not that quickly that one gets judgement from the courts. There's a lot of argument, a lot of procedure, there's a lot of reasoning. It's more aloof so to speak unless of course it's an urgent interdict application and even then the Judge can take a week or two to give his reasons. The Legislature on the other hand is normally a more numerous body people elected by the people. Their deliberations as you know from your own experience also take time. It's an open by definition public body. What happens in Parliament is open for everybody to see so openness is much more easily achieved in the Legislature. The same applies for the courts. Normally court procedures are open to the public. The Executive is the place where it is the most difficult to get openness because they normally sit in a room and they discuss and one doesn't see them. It is most difficult to get accountability because it is not open to the public and they have to be called to account for their actions. Response in the Executive is the quickest of the three branches because they can act almost at the spur of the moment. So I would maintain if one looks also at the system of Checks and Balances or systems of Checks and Balances that the Executive is actually the branch to be checked and balanced and that the Executive checks and balances in far fewer instances than the other two branches of Government. I think it's as a result of this different function of the Executive, the Executive is in possession of power. And I hope in the little exposition that I will give you now, this will become clear. If one starts making a list of the so

called Checks and Balances in which the Executive is involved, it's interesting to see that mostly they affect or check and balance the Executive and not the other way around. Maybe also because the Executive would like to be in control, to check and balance, but if they, and this is common wisdom, are left because they have power in their hands to their own devices one gets ? Authoritarian Government. What I will do in the next couple of minutes is to take the three branches of Government quickly and look at controls exercised by the Executive. But it will give an incomplete picture if one doesn't at the same time also look at the flipside of the coin and that is controls exercised over the Executive. And I'll try not to repeat what my colleagues have said. I'll deal with it somewhat differently. I'll start with the Judiciary and the Executive. Mr ? has given I think a very good exposition of how the Executive is checked and balanced by the Judiciary. All I need to say is that in the past in South Africa, it was a very incomplete kind of control. Parliament was supreme. Parliament could ask the jurisdiction of the courts, Parliament could empower the Executive to make unreasonable decisions, to take unreasonable action. The most notable case that I can remember was in 1962 when the Appellate Division said in regard to the Group Areas Act, "We all admit that it's unreasonable, it's grossly unreasonable, it's a massive social engineering programme, but that's the will of Parliament and we can't say a word if the Executive does it." There were even certain areas of executive action which were beyond the control of the courts and I refer here to the so called prerogatives' power to be exercised by the Head of State which were not subject to any form of judicial control or control at all. This situation has completely changed under the Interim Constitution which now binds in so many words the Executive, the Legislature and the Judiciary. The courts are there in terms of the Constitutional Principle also and in terms of the Constitution to safeguard and uphold the Constitution. So the Executive is under much tighter control in principle at least by the Courts than before and Section 24 of Chapter 3 now talks about administrative justice, in other words, the Executive in all its forms and at all levels have to act reasonably now, have to give reasons for their decisions, so that situation has changed completely and I think that was a massive step forward in terms of control of the Executive by the Judiciary. The one thing that the current Constitution is still silent on is the powers of the Executive in relation to Foreign Affairs. The Constitution doesn't say a word about it and it's a question whether there is judicial review of the actions of the Executive in Foreign Affairs. If one looks at the other side and this is what I'm supposed to talk about, controls over the Judiciary by the Executive, one finds that normally if it can be called a control it relates to the appointment of judges. You will remember in Kempton Park about two years ago the large debate that raged around the question who should appoint the judges of

the Constitutional Court. Should it be the President of the Republic or some other body. There is no uniform system in the world, often the Executive has a substantial say in the appointment of judges, but it does not have to be so. In Germany for instance the Lower House and the Upper House so to speak appoint members of the Constitutional Court. But in the United States it's well known that the President appoints judges of the Supreme Court, but here comes in something of what I prefaced my little talk with - the Executive isn't quite trusted on its own in this matter and then one gets a kind of weblike system of Checks and Balances. The Senate in the United States is also brought in. I think we have a similar situation in South Africa where the President appoints judges but there must be some other control also in our case and the same applies in Namibia, the Judicial Service Commission. So what one sees here is that it's not a single check or a check on its own by the Executive, it's a check checked by another check or another balancing factor built into the system, almost once again limiting the Executive in its involvement in this other branch of Government in this case the Judiciary. If one looks at the Legislature and the Executive, Professor Steytler has given us a number of good insights there. It seems to me that the way the system of Checks and Balances operate there depends of the system of Government. Whether it is in broad classifications a Presidential System or what we call a Parliamentary System or perhaps as in South Africa, a mixed kind of system. In Presidential Systems such as the United States where the President is elected by the people, where the President stands on his or her own with his or her Cabinet so to speak which are not drawn from the Legislature, there's greater separation. That President is not a member of the Legislature therefore the President is not directly checked by the Legislature but the President also doesn't have the kind of direct influence on the Legislature that one has in a Parliamentary System. So where does the check come in. The check comes in or the balance comes in that the Legislature makes laws and those laws need the approval of the President. So the check on the Legislature in this case is the President who can say "No, I don't like that law and I veto the law" but by the very nature of checks and balances where it's not originally intended to be a complete interference in the workings of the other branches of Government, in this case the Executive President in the workings of the Legislature. The President in the United States for instance has a limited veto. He can veto up to a certain point but that's a check because the Congress knows that if the President vetoes, we need special majorities to override that veto. An interesting result of this system of Checks and Balances is that the Legislature and the Executive are almost forced into negotiated compromises, but you may remember that when the Republican Party took over the Senate

and the House of Representatives in the United States recently, fears were expressed that President Clinton will be doomed now. Is the Republican President faced by a so called hostile? But I think that "hostile" is a misnomer. By a hostile Congress what we are seeing at the moment is that President Clinton and Congress have to find some way of living with each other and in an ironic sense of the word, outcome of it, that may be that they end up with better legislation than when the President and the Congress belonged to the same party. There will be much more critical analysis probably, but eventually maybe also much more openness and much more responsiveness in the whole system. On the other hand in a Parliamentary System, and you will know that the British System, the Westminster System is the typical form of Parliamentary System, the Executive are drawn from the Legislature. That means the Ministers of the Executive sit in the Legislature, they need the confidence of the majority of the Legislature, in other words the support of the majority of the Legislature. The check and balance operating there is in principle a phenomenon which is called Ministerial Responsibility. Which means as it stands in our Interim Constitution also that Ministers or that Ministers are individually and collectively responsible to Parliament for their departments which on paper is a very effective check on the Executive but in practice a rather weak one. Because it depends to a large extent on the culture underlying a specific system and if one looks at the way in which Ministerial Responsibility operated in and still does in the United Kingdom and the same principle which has been part of the South African Constitution since 1910 effectively in which it operates in South African one sees huge divergencies. A few years ago for instance a British Minister of Labour resigned her post, I think it was a woman, because of rumours and later a few confirmed cases of salmonella in either eggs or in milk and it was seen as such a major dereliction of duty on the part of that Minister over what's happening in her department that she simply resigned. In South Africa we've seen over the last number of years often accusations and in many cases also proof of for instance massive corruption in Government departments and Ministers consistently refuse to take that political responsibility. What they did and this is how the system began to operate in South Africa, what they did was to say I'm the responsible Minister and I'll try and do something about corruption. If it worked the same way as in Britain, the Minister would have said the fact that there's corruption in my department means that I am not in control of my department which means I am not a fit person to run the department and I must resign. It doesn't work that way here, here the Minister is irresponsible and I have to route out the corruption. There's a very fundamental difference in the approach. That's why I say on paper it looks like a good thing, in practice it may not be such a strong check on the

Executive. It depends to a very large extent on the political culture in a country. Now South Africa since 1983 and also under the Interim Constitution has what one can describe as a mixed system. The President who is also the Head of Government, in other words part of the Cabinet, is not a member of Parliament, but the President is elected by Parliament. So the President to a certain extent and the Legislature affects the Executive by electing the President. Ministers on the other hand are members of Parliament except now for the amendment that a Minister of a small number of Ministers may be appointed from outside of Parliament, but as a general rule Ministers are members of Parliament. And here's an interesting kind of chain of Check and Balance in the South African system. The President is not by name responsible to Parliament. The Cabinet, however, of which he is a member is

(Tape 4)

individually and collectively responsible to Parliament, but there's an indirect parliamentary check on the President because the President has in the majority of instances to perform his or her functions in consultation with the Members of the Cabinet and if you look at the definition of "in consultation with" in our Constitution, it means that it's not simply a matter of I listen to them that's after consultation with them and then I make my own decision. It's in terms of the Constitution effectively in agreement with the Ministers of the Cabinet. So the Ministers of the Cabinet are on paper responsible to Parliament, the Ministers of the Cabinet in most instances have to agree with what the President wants to do, the Ministers can always tell the President listen here if we don't do this we must go back to Parliament, we must report to Parliament and Parliament can kick us out if they don't like what we are doing. So indirectly Parliament does have a checking function on the President in any event, so some system of Ministerial and call in Presidential Parliamentary Responsibility does still operate in South Africa. The question now is and I think that's what was asked by Dr ? , how effective is this parliamentary control over the Executive. But that's not actually my job to answer that question, that was answered by Professor Steytler. How does the Executive check and balance the Legislature? That's the question that I have to answer. Once again it depends on the system. If it's a Presidential System the only effective formal check that the President has over the Legislature is through his or her veto power, which as I've said is a limited, a restricted veto, it can eventually be overridden by Congress. In the Parliamentary System and that is what we have at the moment, it's a different matter. I would allege that the Executive does not only check and balance Parliament, the Executive is in affective control of Parliament. Through just ordinary mechanisms, the fact that the Executive needs to enjoy the support of the majority in Parliament to get its laws through a procedural rule which flows from the fact

that the Ministers need to be part of Parliament and that is that Government business normally take precedence in Parliament which means that normally in the South African and British context it is the State Departments, the Ministers who take the legislative initiative. As a rule laws are introduced in South Africa and in Great Britain by the Ministers. Private members' bills are also entertained but private members' bills have historically become a kind of anachronism. One finds that interestingly enough University bills for instance are still treated as private members' bills but they are dealt with in the so called public bill procedure because they are in effect also public bills. But private members have actually very little legislative initiative. So the Executive is in effect in control of the Legislature. I would venture to say that that goes further than check and balance in the classical sense especially where there is one dominant party in a system and this is not a reference to the present system or the present system only. We've seen this for forty years since 1948 when the National Party was in power and it increased its position that with the increased numerical strength of the National Party in Parliament, its dominance and control of parliament became more and more pronounced. Which introduces of course another dimension in the whole check and balance debate and that is the role of political parties and the participation of political parties in the whole system of Government. The so called mixed South African Executive System is in essence still a parliamentary system and I've already referred to the so called internal checks that the President has to act in consultation with Ministers, they can control and check each other there in the Executive, and something which one can explore if one would like to is the exact role of the notion of a government of national unity as a check and balance mechanism in the Executive itself but also in and on parliament. Mr Chairperson, some things which haven't been, well references have been made to them but they haven't been addressed are other mechanisms for checks and balances. We have concentrated mainly on the three formal branches of Government, Executive, Legislature and the Judiciary. The question was asked earlier what about the other levels of Government - provincial levels of Government, Local Government with its various branches. A reference was made to the Public Protector. I think we can also refer to the Human Rights Commission, to the Auditor General. If one takes a broad look at checks and balances some of these institutions can be described or related to as the Executive. Our Interim Constitution has quite a number of these bodies which perhaps can neither be said to be Executive or Legislature. In other words which defy categorisation but which perform a certain kind of checking or balancing function. The Commission on Provincial Government for instance, that is another topic that one in dealing with checks and balances should look at the system built into the

Interim Constitution of so called constitutional committees and I refer here to Human Rights, Land Restitution, Finance and Fiscal, Public Service, Judicial Service, a whole number of them which I think essentially were also designed to operate as compel mechanisms in the whole constitutional setup. In conclusion Chairperson, I think it's important to repeat that unless there is an awareness and a culture of checking and balancing and that as I've said in my introduction in terms of the Constitutional Principles they should be directed at the accountability, responsiveness and openness. The institutions that we create may be less efficient than we intend them to be. In other words institutions are very important and they should be carefully designed, crafted and reinforced but they should also be reinforced by a culture and awareness of the exact purpose of checking and balancing. Finally, just to repeat what I think is the critical aspect around the Executive and the way it checks and is checked is that by its very nature the Executive is more given to be checked than given to be a checking mechanism. It seems to me that is almost the kind of obvious truth that one must take into account. Thank you.

Chairperson: Thank you Professor van Wyk for that contribution and after such short notice you've managed to prepare. We will now allow the members to ask questions. Jack Rabie, Pieter Hendrikse and ?, in that order.

Rabie: Mr Chairman, it appears that in South Africa we've developed a convention that parties don't ask Ministers that belong to their party questions in Parliament? But of late we've seen members of the majority party criticising the government in public meetings and in newspapers and what have you. How can we change or improve that situation so that dissatisfied members can at least ask those questions that they criticise the government about, outside of Parliament. Where the benefit to other parties is not to react to that criticism, to ask the questions in Parliament so that it can be debated there instead of making a noise outside of Parliament.

Hendrikse: Mr Chairperson, just some clarification. In terms of the existing Constitution, can the President veto legislation and if he does, what happens. As you said in the States it gets referred back to Congress and they need a increased majority or a special majority to then pass it or to override his veto. Secondly, can the President call a election before the time on his or her own other than as a result of a no confidence motion or rejection of a financial bill. The third question I have Mr Chairperson, is for a comment or an opinion by the Professor, is that how does he see the USA type situation compared to the West Minister where you have opposing parties controlling the Presidency and the Congress. Why I ask

this because I see this as a cause of frustration. A party having gone to the electorate seeking a mandate to carry out a specific program is then frustrated in carrying out that program because the other half of government is controlled by its opposition party. For example, in the United States now, where the Republicans went to their electorate. They are now not able to carry it out in the sense that the President can veto it, and the President having been popularly elected cannot carry out his program because he's being vetoed by the new Congress.

?: Thank you. My question relates to the Auditor General. Presently I think we are busy privatising the duties of the Auditor General. Someone indicated that the Auditor General is in a better position to check the Executive as well as the Legislature. Which is the best form, to have the Auditor General privatised or to have him as a member of the Executive? And secondly, the question of expertise within Parliament itself. When we discussed earlier on we looked into the question of co-opting people who were actually not elected into Parliament. Was this not a form of bringing in expertise that could be ? in Parliament by getting an expert from outside to serve in the example of our Minister of Finance who doesn't belong to any political party but he is a complete outsider but inside the Executive to bring in expertise.

Chairperson: The last question in this round and then I'll allow the professor to answer. Mr ?.

?: Thank you Chairman. On discussing the Executive I hear emphasis on the elected Executive not the appointed Executive. We have an instance at the moment whereby we have the appointed Executive, of course they have limited powers but extreme powers because in the present South Africa they are the people with the necessary time and personal power to play the ball of course, of initiating ?. Politicians can talk but without that apart. I want to find out really isn't it the best way to practice the American way of doing this. When you have the party coming in especially the top echelon, it comes with its people. So as not to have frustrations on the way because there's a general mistrust. We are human beings, we can put that on the paper but the practice especially when there are hiccups you start reverting of course to mistrust which is as far as I'm concerned justifiably so.

Van Wyk: Thank you Chairperson. The first question about the members of a political party especially the majority party who don't want to ask embarrassing questions in parliament which means in public to their Ministers, I think is a purely human phenomenon of course. But apart from the fact that it's a human phenomenon I think it's also a part of the system. It results from a fairly strong caucus

system that we have in South Africa and I think we've inherited also from Great Britain. There's another dimension and that is that members of parliament belonging to the majority party would probably all like to become a Minister or a Deputy Minister or something at some stage, so there is a political career at stake and I don't think any person can afford to be seen to be too critical in public. But all these things stand in the West Minister books on constitutional law as well, that these factors influence the behaviour of political parties. So the question is how does one change this system? I don't think the parliamentary system as we have it with Ministers in Parliament can really be changed effectively to make members of the majority party or in this case the members of parties belonging to the government of national unity asking critical questions in parliament unless of course the caucus system or the party discipline system is abolished and members of parliament are allowed without any kind of suggestion that it will be held against them to operate on a completely free mandate system. In other words they can say and they can vote according to their conscience. They don't have to follow the party line. I think what I'm saying that this phenomena is inherent to the kind of political system that we have and the parliamentary system. And a new thing that Mr Rabie mentioned is the fact that members are critical outside parliament. But I think it also relates to the question or the observation that was made during one of the earlier discussions that the majority party has developed a certain culture of self criticism and self evaluation and maybe it's a manifestation of that that members feel themselves more free to be critical outside parliament. It may have positive political impact on the way they behave inside parliament but I think that remains to be seen. The next question on the President's veto and whether it doesn't leave to a frustration of the popular will because Congress has one mandate and the President has his mandate or I think as it was mentioned his contract. That's perhaps the operative secret of the American system that both the President and Congress are popularly elected. Both can fall back although in terms of time on mandates given at different moments of time, that President Clinton can still say I am bound by my election promises three years ago and I have to see to what extent I can get them through. The Republican Congress can say we are bound by our mandate or promises of six months ago and we have to see to what extent we can get them through. The one can't tell the other you are dependant on me, they can both tell each other we are responsible and accountable to the people who elected us and therefore we will have to find some way of accommodating each other and that's why I suggested that. It becomes a very good example of compromise politics. With a final vote when it comes to legislation to the Congress who can with a certain majority finally override the resistance of the President. I don't

think I'm really qualified to answer the question about the privatised or public Auditor General except for saying that I think the important point is that the Auditor General should have in terms of law and ideally in terms of the Constitution full powers of investigation. If the office is so called privatised, it should not be used at any stage as an excuse or autonomous. By his or her very nature the Auditor General should be completely autonomous. In other words should be in a position to look into all aspects or matters of public finance. In other words not be excluded from any form of scrutiny and also not subject to any form of intimidation. I think that's where the notion of autonomy comes from. Expertise from outside? That's an interesting question. Those schooled in the tradition of the parliamentary system and with a certain bias in favour of the parliamentary system always feel a bit uncomfortable about this idea that you can have a minister who is not a member of parliament, who has not been elected to parliament. This real or imagined notion that the minister is responsible to parliament and ultimately to ? parliament to the electorate still operates strongly in our minds at least if not in practice. So one feels a bit uneasy about it. On the other hand, the question is why not? If for some reason and that is the opponency of outside expertise normally used, if the party lists or the political parties can't succeed in getting the necessary expertise on their party lists, then it's better to get outside expertise than having no or little expertise at all. And I think in a system as we have at the moment in South Africa where it's mixed, where one leg stands in a kind of Executive President system and still on the other hand in parliament, in principle I don't think one can really object against a Minister being appointed as an expert from outside especially since there is also at the moment still a provision which says even that minister who has not been elected, is responsible individually and collectively with his colleagues to Parliament and to the President. So he is bound by the Constitution at least to be accountable. And there was a final question about the elected Executive or the appointed Executive. My response to that is completely subjective. I think that we have in South Africa essentially a parliamentary system of government has become so much part of the political fibre of South Africa that it will be rather difficult to implant a completely elected Executive almost ? the United States system in South Africa. Even if one did that, I would predict and my predictions are normally wrong, but I would predict that one will still find traces of parliamentarian government in that whole system. In other words what I'm saying is that I don't see much chance that a system like the United States one would transplant onto South African soil and if the Namibian example is anything to go by, where the President is directly elected at the moment, the same kind of tradition, the same kind of history, it essentially operates still as a mix between

parliamentary and so called executive system. But that's a purely subjective viewpoint. Thanks.

Chairperson: Thank you Professor Steytler. Pieter.

Hendrikse: My first two questions had to do with the existing system we have in South Africa. Can the President veto legislation in terms of this Constitution and what happens if he does. Is there a way that we can override it? Secondly, the calling of an election. Can the President on his own at any time call an election for parliament.

Van Wyk: My apologies Mr Hendrikse. I have noted the questions but I have missed them and I hope my colleagues will assist me here. I seem to remember that the current Constitution provides as has become a strong convention in South African and in line once again with the Parliamentary System, that legislation regularly passed by Parliament has to be approved by the President. The President now has the constitutional power that if there are procedural irregularities, the legislation may be referred back to parliament to be corrected but if parliament has put its seal of approval on legislation, the President does not have a discretion. In other words unlike the American President he can't say I don't like the idea that we are going to impose heavier taxes and therefore I send it back. That's parliament's decision. If they said it and there wasn't a quorum for instance. The President can say I heard there wasn't a quorum, I send it back, pass it again. But it's simply procedural detail if it's a veto at all. And I think also that the Interim Constitution provides and that's also part of the Constitutional Principles that except for the circumstances provided for in Section whatever and that has to deal with no confidence, there may not be an election before 1999. In other words the President is constitutionally debarred at the moment from calling an election for political or strategic reasons.

Chairperson: Can I just do this whilst we're now discussing this last paper delivered by Professor Van Wyk? Ask the other two technical experts maybe to take these front seats here so that we can begin to ask questions all over, and if you want to comment you can do so. If you want to ask a question, let them participate and they can also answer questions as they come from the floor. And then the next one is Dr ?.

?: I would like to comment on what Professor Steytler said in terms of how I understood him that what we really want to do is try to ensure minority parties have some say in appointments of parliamentary committees as well as select committees and so forth, and that opposition in parliament is an effective check meaning that as long as your opposition party is inside parliament,

therefore a multi party system is important. The problem with this discussion is not the fault of the experts, it's very institutionalised as if the only things that matter is what happens in this particular institution. There hasn't been a relationship between the parliamentary and the extra parliamentary forces and so the question about how minority parties play an important role in the political process isn't limited to whether or not they have a say in who may or may not sit on committees. It's also dependant on their capacity to be able to organise and immobilise forces outside parliament in order to give way to their positions and I think that's very important. So I don't think we should reduce this to ?. I have a problem and as one who negotiated on all of these things. That sometimes you appoint people because you have to compromise and you find you appoint the least offensive person. So if you get 75% you must look for somebody who is the least offensive and he may not necessarily be the best person for the job. So it's not necessarily a good thing in my view that if you have this kind of checks you will land up with the best person. I think you might land up with the worst person because you have to negotiate now with the National Party or the IFP or whatever it is, and we each have our own people and then we find that this one person is really not objectionable to any of us and I'm not saying this has happened, but I'm saying that you cannot overrule that possibility taking place. And therefore I thought what was important to some extent but what both Mr ? and Jack Rabie raised, although they are not matters for the Constitution frankly. I think what Mr ? raised are really basically matters for the Rules Committee to look at and what Mr Rabie raised is similar. You can't put that in a Constitution because it's a given fact that every MP has a right to ask a question whether they ask a question or not is a separate matter. But we ourselves have been giving a lot of thought to the question about how our own MP's could ask questions of Ministers whether there's a government of national unity or not. Because it becomes an important part of the democratic process that members of parliament should ask questions to ministers. Part of the problem I find now both in interpolations and questions, is that partly we haven't asked many and that's wrong. The fact that the other parties have asked, I'm never convinced in my own mind that those parties who are posing the questions to illicit information, to get information, to enhance the debate, but is basically used as a political football for party political propoganda purposes. And so we need to look at it in itself. There might be a problem. So you can open the doors, but it can be abused, and I think in my own personal view, I don't want to mention any specific names, I think it has been abused by parliamentarians of what we call minority parties. The second thing perhaps you would want to look at it. Again it's not a constitutional matter, to say that there are too many questions being posed. So you sit there as a deputy

speaker and you have to tell somebody that time is up. So you need to examine the entire way it operates and maybe questions should come through political parties properly for the sake of getting information and more time given for answers. But I think we need to look at it but it's not a matter for the Constitution. It really is a matter for the Parliamentary Rules Committees to look at. Lastly, there is no such thing as a pure democracy, there is no such thing as a pure checks and balances. It doesn't exist anywhere. I'm sure that the one's which describe democracy has the capacity of the people to change the government. That was his definition of democracy. So I think what we need to do in South Africa is ask ourselves what will be the most effective form of Government which would enable people to feel that the representative they've sent to parliament are doing their task. I think that is critical and whether you borrow some from America or borrow some from Germany or somewhere else, it's another matter. And lastly you see the multi party system is written into the Constitution and it should be. But there are elements of a one party system which are not necessarily bad. In Tanzania the one party system was a pretty effective democratic system for quite a period of time in terms of the discussions that were held, yes, some of the fiercest debates were held in the Tanzanian parliament and not the Ivory Coast parliament which was a multi party system. The question is what are the kind of traditions that are held. So I'm saying we can learn from other systems. We don't always have to be duty bound to look at the United States of American or to look at Britain in order to try to find some kind of answers which are relevant to South Africa itself and I'm saying that when we're examining possibilities that of what should go into the Constitution, we need to have a bit of a greater breath in terms of looking at other countries which might have something to offer. They might not have something to offer, but I'm saying that we need to look into it and sometimes our own discussions are narrowly focused as if there is always a permanent dispute between the presidential system and a parliamentary system.

Chairperson: Thank you Dr ?. Can I take one question or one comment and then I'll give over to the technical experts. Dr ?, your hand was up.

?: Thank you. I agree with Dr ? that our Rules Committee will have to discuss the manner in which we conduct question time, the role of the speaker etc. Broadly speaking I think we were looking at the Legislature as a check on the Executive and the point that I was trying to get across was that it is weighted in favour of the Executive at the present time. And that's just the point I want to register. A minister could not appear in the House or he could give a simple single syllable reply to a question and sit down and there's nothing that the Legislature can do under our present

setup. I would just like to raise another matter and that is that at present we are all on a learning curve, but there is a sense of frustration that we stop start, stop start with parliament and there is no doubt in my own mind that the parliamentary programme is being determined by the Executive. The Executive will determine the amount of legislation that comes through and if there's no legislation then parliament's prime business is extremely limited. I think this is a source of frustration which will have to be addressed. The fact that we are not getting legislation through the system and it's the Executive that would have to take that responsibility, not Parliament. But I would like some discussion on that particular aspect. The other point which has not been touched on is the situation where ministers get involved or comment on matters which fall outside the portfolio to which they are entrusted to. This has been debated in parliament. I don't have any strong views on this but if one goes back to judicial and you talk about the minister being responsible for what happens in his department. Where we do have a sort of cross-pollination occurring could one not then have a situation where a minister could get out of his responsibility for the running of his department. With the strengthening of the Committee System where ministers are referring matters to committees, would this in time also dilute the minister's responsibility for what goes on in his department because committees are playing a much more assertive role in the New Parliament. They want to get involved with the restructuring of departments, they want to have a say in policy formulation and they want to be able to summon ministers to appear before them, senior officials etc., and this could impact on the classical situation of a minister being responsible for what happens in his department. I wonder if the panel can comment on this?

Chairperson: Thank you. Those are the two comments. I will take other comments after this. Mr ? I recognise you. Can I give the panel of experts, any one of them who would like to comment or maybe respond to the questions and comments made by the members.

Steytler: Just a few responses to Dr ?. Clearly any Constitution shouldn't just be seen as a piece of paper and this is reality. The power that is wielded by any party is not how many people there are in parliament but also clearly linked to extra parliamentary ability to mobilise its forces. But unfortunately we are writing a written document and what one tries to do is to, and what my colleague once said is that you thinking of the worst possible scenario and you're writing for a worst possible case. If you are in opposition and your worst enemy is in power, what would you see the Constitution look like and so one is mindful of the context in which politics operate, but it's difficult to sometimes put it down on paper. And the same comment goes for the appointment of the officers of parliament. Clearly it is possible that you appoint the least

offensive person if you have a weighted majority. Equally it is possible if you have absolute majority for appointment of such a person that you get a lame duck which are there for reward for a particular time just to ... So, you know there's no perfect system and what one tries to argue here is the notion of parliament acting as parliament as a body not as a competing party. How do you achieve that? You get officers and Auditor Generals, a Public Protector and getting some autonomy from political parties and being responsible to parliament as a whole and feeling owned by the whole parliament rather than owned by the ruling party. The question of questions in parliament and being used as a political football, I think that's the essence of competitive parliament, it's precisely to embarrass the ruling party to get information, to advance their cause. It's not simply let us try to work for the good, it is to advance their own positions as well. So clearly, parties are going to use it as ammunition if they get embarrassing answers or bad reports from the Auditor General that this department is not well run, it's unaccounted for monies. Any minority party is going to say this minister is not good. It hasn't performed its task. Clearly the government is not fit to govern. So in that way the politics are conducted. Just in terms of the last piece, I will answer for my colleague here is the importance of the President signing the final law as the third part of parliament because in that sense the legislation is passed and then the President becomes part of parliament as the final signature. Is it in fact simple tradition, is there value in checking procedural requirements or is it something one can actually do away with and linked to that the notion of bringing into operation a legislation whether there is or even the signing, say the President delays in signing, is that a type of informal control if the President says he's a bit busy, I'm not signing, and therefore the Act doesn't go into operation, is that constitutionally to protect him or is it just simply tradition which says that he actually does so and that the operation of bringing into operation a piece of legislation is left to the Executive.

Chairperson: Thank you Professor Steytler. Any other comment from the experts. Advocate ?.

?: I would like to comment on a very narrow point from the deputy speaker about the involvement of the parliamentary committees to such an extent that it might even delegate from the responsibility of the minister or give him deniability. I think that interference, or if one may call it, or involvement, should not only continue but should be encouraged. One should understand the system. And this is the problem of the debate that we bring in too much into the pot without keeping to what I earlier referred to as fundamentals. If one bears in mind that in the country the elected is the party. The electorate go and elect a party and its the party which has the

mandate. And that party goes and forms both the Legislature and the Executive. Now that's important to bear in mind because you then realise that both the Legislature and the Executive have a single mandate from a single source and therefore the ultimate ? whether they carry that mandate or not is the source that puts them in government. Now, I know why the question may arise, there are instances where the source that put the Executive in power if the Executive is the popular elected person, might be a different mandate which put Congress or the Legislature in power. So there is a distinction there. And I think in the particular instance and especially in South Africa, if the mandate for the Executive and Legislature comes from the same source you therefore cannot afford to split hairs. That's all.

(Tape 5)

Chairperson: Thankyou Advocate ?. Any comment from the experts now.
Professor van Wyk.

Van Wyk: The question as I understood it Chairperson is whether we really need today as things stand, because the President cannot really veto legislation whether we still need his or her assent to legislation. Ofcourse this comes from once again the West Minister System where the queen or the monarch is indeed part of parliament and until 1983 the President in South Africa was also part of parliament. Under the present Constitution he or she isn't part of parliament, but as a result of the link between the President and ministers in parliament, all legislation that goes to parliament will have been in principle checked in the cabinet meeting for instance and the President will be aware of it, and when it goes to parliament the possibility that it will be changed by the governing party or parties in a way which will not meet the approval of the President is very limited. So technically on paper, we don't need the approval of the President. But it's nice to have it. It's customary and having said that, I agree with Dr ? that we shouldn't in terms of our models look only at the traditional ones. I would go one step further and say that our system can be linked to these historical models but our aim should not be so much to either align ourselves with what has happened in other countries. I think the aim should be to design a system that works for South Africa. And in that sense the experience gained in this process of transition which started effectively and formally on 27th April last year should to my mind be effectively used and implemented in the writing of the final Constitution. I think the members of this Committee will have first hand knowledge and expertise and experience of the things that are good and the things that are not so good in the system and I think that one should maybe within what my colleague calls here "the broad principles of fundamentals", one should look at what's happening in South Africa at the moment. And if we can learn from other systems, learn from other systems

wherever they may be, but essentially it must be for South Africa.

Chairperson: Advocate ?.

?: Mr Chairman, I just wanted to add what I said earlier applies to what my colleague, Professor Van Wyk, said. You see, we need to internalise this and understand it in context. If the President has no different mandate from the Legislature. You see the President would have a veto to veto legislation from the Legislature if he has a separate mandate from the Legislature. Because then he will say, that's not my mandate, but if the mandate comes from the same source, both the Legislature and the Executive, why would the President have a veto over the Legislature.

?: Are you saying, let's say the President come from the ANC and the governing party comes from the National Party, now there are two sorts of sources, two sorts of mandates. The President has another mandate and the majority party in the House has another mandate, now are you saying therefore that he will have something to say to delay, or reject, or send back because he has that thing in his mind because there are two sources that are giving the mandate to the same House. I'm not sure I understand the question. But maybe the confusion lies in the principle and I would like to use a system of further particulars in order to make sure I understand what is the question. Who would be elected? Who would be the party elected given the mandate to run the country? Give me an example. Which party would that be? Let's say it's the National Party and the National Party has the majority in the House and it's that House which is going to appoint the President? And the National Party uses majority to appoint a counter President, an ANC President. And what is the question, whether that President, the ANC President, should not have a veto or not? OK, you see, the person who has the mandate from the people is the National Party. So the National Party uses that mandate in its wisdom to appoint an ANC President. That ANC President is not accountable. He didn't go and look for the mandate. It's the National Party who went to look for the mandate. So the primary source of the mandate is still the National Party. You can make the President accountable to the National Party, but in terms of the mandate the people haven't given the President the mandate. Don't say that I'm confusing myself. Because maybe you are most confused than me. If the National Party has a mandate for a certain program or an election manifesto and the National Party get an ANC President who then execute the ANC manifesto, then the National Party's ? of duty to the electorate, but then I don't understand.

Chairperson: Mr ?, do you want to follow up that? You want to pursue that?

You have another three minutes. I'm giving you time. I just want you to be simple so that they understand you for the benefit of other members as well. Just be simple, straightforward.

?: I'm trying to say, if the source that would not prevent the President to give the mandate is coming from different sources. In other words, the President now, the bill is in front of him for his signature, and he's got two sources that are conflicting for him to sign this bill and he's one of those sources that make him to go against this bill, in front of him, but now when it comes to the signature, the authorisation of the bill, there are two sources that have given him the mandate to give on this bill and one of those sources, he is a part of the source, that says "no" to this bill. Will he go ahead and sign it? Is that a simple answer.

?: Chairman, the example miss sight of reality. You can't even answer it academically. You see I don't see how that situation would arise unless the President has a different source and that source has mandated him. Let's perfect it? Let's say there is a Constitutional provision which says that the President of a country would be the leader of the opposition. Let's go into realms of fantasy? Let's have that happen? So if there's that constitutional provision, so you're saying that the President's mandate comes from his party which is the opposition, but the Legislature is then controlled by the majority party. But that's what I said. The source is different and the base is different and then you can talk of vetoes. But I can't imagine where the source is the same and then there's a conflict.

Chairperson: OK, I think we've gone a little bit far with that question. Can we close that discussion? We won't finalise it today, anyway. We have about five minutes to close this workshop today. Can I give Mr ? a chance to ask his question.

?: Mr Chairman, it's a pity Mr Rabie is not here because I wanted to make a comment on the question he raised with Professor van Wyk. And I noticed that Professor van Wyk was very careful in choosing his words in answering that question. He didn't want to commit himself. But if I understood Rabie correctly, he was probably saying "How do we prevent the Cabinet members from making statements outside the House when they did not raise these questions originally in parliament, seeking clarity or criticising whatever legislation with the other ministers." I understood him to be asking that question. How do we prevent these people from making statements outside parliament. My simple answer to that would have been, if he was here, that in political parties, political parties have structures within themselves where people have to raise whatever problems they have within

the organisation within their parties before they go to the media, before they go public, so that these problems are solved internally. Any person who goes public, is obviously a person who is looking for trouble. That person is looking for trouble. You go and discuss matters publicly. You are looking for trouble. You are asking for expulsion from the party. It happens everywhere. And such people ultimately are expelled from their parties and they find themselves forming new parties. I think that even in the Cabinet itself, they should also have rules which will guide its members and not allow people to go and make statements outside where matters could have been solved in Cabinet. But the question I want to ask is probably from Professor Steytler. If I understood him correctly when I was dealing with the Legislature as a check on the Executive and the Judiciary, I understood him to be saying that parliament should be inclusive of all opinions. Something to that effect and has the necessity for proportional representation, something to that effect. You will correct me if I'm mistaken. Now about that, I've had people outside here, public outside parliament, saying that the introduction of proportionality in our system is destroying parliamentary system. How correct is that?

Chairperson: Mr ?, have you a question or a comment.

?: I have a problem. This government of national unity created by a Constitution is it constitutionally possible that it could really work. Seeing that the Executive is divided. We are deliberately going into a situation where we know we divided and we are quiet just like that, and war every day in the Cabinet, and we are a normal people.

Chairperson: Thank you, Mr ?. Can I give three minutes to the technical experts to respond to the members comments and questions. Professor Steytler.

Steytler: Just on the question of whether proportional representation is destructive of parliament. Have you any point. In what way is it destructive because I don't follow it. Because if one has a 1% or even a 5% threshold, it's actually better for democracy because it's rather that the people are inside parliament and being incorporated and consolidating democracy within an institution rather than standing outside and may want to destroy the democracy. So the argument for proportional representation is you actually get most significant opinions within parliament bring them in rather than let them stand outside. It's a crude way of expressing it about what you do inside the tent than doing it outside the tent. So the question is would you rather get the people inside the tent or outside. OK, you get the drift of my point.

?: As a follow up Mr Chairman. Does it destroy the constituency system? I'm raising this question because I don't know. You hear people talking about they destroy the constituency system, they destroy the parliamentary system. I don't know in what way.

?: That's a very good question but that's precisely the issue we are going to discuss when we discuss the electoral system. Now in terms of checks and balances. When we discuss the electoral system, we will have to devise a system which takes into account what Mr ? is saying which I think is very important.

Chairperson: Ladies and Gentlemen, I think we need to wrap up this discussion. Advocate ?.

?: I would prefer to wait for the electoral system to discuss that. But on Mr ? question on the government of national unity, I want to say the following. It's a coalition government and it can take various forms and the best that comes to my mind is three forms. Constitutionally prescribed where you elect the requisite numbers to form a government, then you have to get other people and offer them something to join you, and where you do it voluntarily for other reasons. Those are the three forms I can think of. But then having said that, in a nation, a nation is like an individual, it goes through stages, there are certain compelling reasons at certain stages which may not be applicable at another stage. Therefore in deciding whether you need a coalition government in whatever form the three forms have enunciated, if you look at the surrounding circumstances and the compelling reason at that particular time and than you make a wise decision.

Chairperson: Thank you ladies and gentlemen. May I thank our technical experts for making this workshop a very great success today. I think all of them have really come here today well prepared and they were ready to take every question and you could hear that. In the future we would also like to have this type of workshop. You could see the lively participation today. I think the message has been carried home. People are beginning to understand and to learn all those things. I wish to thank you, the four of you. May I also thank our members from all political parties for your contributions and your participation. I wish to say thank you very much. I wish you could do the same again in the future and thank the administration as well for preparing this and making it a success. Thank you very much. There is a request that could our technical experts maybe supply us with typed material if you had not prepared a paper today. Advocate ? has not prepared a typed paper. He would do so. I have already spoken to him. Professor van Wyk had to prepare for the last session at very short notice but I think he will also prepare something in writing. Professor

Steytler's paper will be available tomorrow. The first paper of Professor van Wyk is circulated to all members already by today. From here, I think there's a way forward. Our technical experts will then communicate amongst themselves and draft a report of this workshop which will also be presented to the Constitutional Committee. Immediately after the adjournment of this meeting, the administration will shortly meeting with the members of the Call Group and the technical experts to sort out a few things. It will be a very short meeting. In my absentia, I would like to meet with the members of the ANC group immediately after this, just in the tearoom here, for about five minutes. The meeting is adjourned.