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Tape One

CC Subcommittee

12 February 1996

Chairperson This National Assembly ... National Executive, Courts and Administration of Justice and Finance. There is a proposal that we should deal with courts and administration of justice last and that we should deal with finance at eleven. I'm sure we could start with National Assembly now and defer the National Executive to slightly after Finance. Is that agreed? Thank you very much, no objections. Mr Moosa.

Mr Moosa Chairperson I don't know unless there ... I will personally refrain from ... this afternoon

Chairperson You prefer Finance comes this afternoon. Won't you then Mr Moosa have a consultation with some members on

Mr Moosa I will do so

Chairperson Some members on your side who are on that subcommittee that's been meeting.

Mr Moosa I will do so

Chairperson I think you may. Are you able to tell us why you want to deal with it after lunch. Firstly matters of state. Okay, you'll let us know after you've consulted. Ladies and Gentlemen we have now then on the National Assembly. Mr Hofmeyer.

Mr Hofmeyer Chairperson, we have just received the draft now of the Judiciary Chapter that tried to take account of maybe points raised in our consultations and this suggestion we wanted to make in conjunction in meeting with discussing it here this afternoon is that we should the party representative should withdraw now and just have a thorough look at that re-draft so that we can see if there are problems areas and so on.

Chairperson This is on the course

Mr Hofmeyer That's correct

Chairperson

There's a proposal that the representatives should withdraw so that they go through this and come back here then withdraw so that they don't make fools of themselves before all of us. Very good. Mr Eglin.

Mr Eglin

Chairperson, just for the sake of time... is it possible for us to get dealing with chapters for us to get them the revised form that is now been agreed to up to date. If it was we're still dealing with old documents with minutes and notes and all the rest of that we've got to consolidate this say on Parliament or the others. It will be very useful if we had an update of them and have it in front of us when..

Chairperson

Ja that's right in the chapter form. Ja all right. I think that that should be fairly easy and straight forward. Is that possible? ...Okay I think that can be done. Mr Hofmeyer and the others you may withdraw. We now with the National Assembly and thereafter we had thought we would do Finance but Mr Moosa wants to have a consultation. It could then be after Assembly then the Executive. Now Mr Moosa is going to to have a consultation with the Finance people of his side first to find out why we cannot deal with Finance at eleven. As suggested. Mr Moosa you'll consult? You're in the process. So Mr Meyer lets start with Assembly and then we'll see whether we'll move to the other one later.

Okay the Assembly we're still dealing with the pink draft. Ja this this this pink. (laugh) no I'm not color blind. (laugh) Don't you know that as a regulation we've decide what color we've (laugh). The National Assembly on the orange draft Ladies and Gentlemen. Now there are a few matters that are outstanding. As I recall the one thing outstanding is the how we deal with the Electoral System and as I recall I haven't gone through the minutes Mr Ebrahim will help me here. The question of ... to bills. And then in terror autonomy there was a draft. But lets just go through with form one, National Assembly consists with we've already dealt with that. How do we want to deal with the question of the Electoral System. We have left that ... Mr Moosa, yes thank you.

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Chairperson we had at the last meeting promised that bilaterals will take place and that we'd have some results... there has been bilateral discussions a unfortunately we

don't have a proposal to put forward today. We can record that there is progress going on. It does appear we've had for example discussions of the lateral party and its quite clear that there isn't a very big difference in in what we really want out of the Electoral System. Ja I just said that the National Party agreed with everything the ANC wants. (laugh) No Chairperson we think that we'll need a few more days because we would like to to take on more the the concerns raised the last time. The one from the Democratic Party that we should say will result in achieved proportional a proportional result and from the National Party that they should be some less vagueness about what the the electoral system would be all about. Without spelling out the de the detail we should take out the the largest extent of vagueness that ex..expressedly so we're looking for common ground. I think we're coming closer towards each other in hope that perhaps by Thursday or early next week we could report progress on it. But I don't think it's an issue that we should be to concerned about Chairperson.

Chairperson

Okay, there's a Mr Moosa. Does anyone else want to make an intervention on this one? Nothing to add Senate Van Bredaar? Nothing... Dr Muller, no. Okay. All right then we you said in a few days does few days mean 2 days, 3 days, what does that mean Mr Moosa?

Mr Moosa

Chairperson to be safe I'd rather say one week.

Chairperson

In one week okay. Now then there's the question of the seat on the National Assembly. Why is it here? 45. That's right. The seat of the National Assembly can we agree, it was agreed that a clause would be deleted. The side bar would however indicate the issue they need to be revisited that the DP supported. Cape Town. So we have agreed then that the clause should be deleted. That is 45 (3). Good. Sorry Mr ..

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Its a possibility that

Chairperson

Ja precisely. Ja but you see I don't want things to hang on for to long. We need to have some progress in terms of the revisitation of the the DP has clarified its position. The other parties would need to. The ACDP, now hold on, hold on please, ACDP has clarified its position, the ANC has, the National Party was still to clarify its position. And the issue

they were still to clarify was whether it should be constitutionalised or not. So we can revisit it, but just remember we can't revisit beyond the 9th of May. So its got to be done earlier. Okay. As long as we remember that. The internal autonomy there was a draft. Has anybody looked at the draft?

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Can you just give us a reference of where the draft is chairperson. In which document?

Chairperson

Mr Mahlangu it was distributed

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Chairperson we we we have agreed that the there will be a session for subsection two of 50 of section 50 and that subsection 62 will incorporate principal 14. And we agreed to that the last committee meeting that we leave it as that because that was such a (inaudible) that was such a ?? question ?? yes we adhere to that. We agreed on that. We included subsection 2 as principal 14. Ja that was the only addition we have. Ja and that sub 2 the present sub 2 will become sub 3?

Chairperson

Ja sub 2 that was included the rules and orders must provide for the participation of minority parties in the legislative process in a manner consistent with democracy. That that's how it was agreed to. Okay. So that that seems to deal with that as well, I think Mr Eglins point about having redrafted the chapters is relevant here because it will help us a great deal. That we don't just rely on our hand written notes. That then takes us to section 54. Referral to bills to the Constitutional Court. Mr Eglin first.

Mr Eglin

We still have left over of 53 and I don't think we should forget it. It does require some freshing up, it might be repeated on whether there is ?? or not. I'm just wondering whether to take a further we couldn't ask some technical ?? to draw up such clauses as would be necessary to give effect to the Constitutional Principals so at least we've got that as a draft. And then there's the other issue which will have to be dealt with in due course as to whether there should be some element of the Constitution which cannot be amended at all. And that's been held over in the ?? but it hasn't noted for further consideration. I think those elements would just have to be flagged for the moment.

Chairperson

Okay Mr Eglin correctly reminds us that we still have 53 and the proposal he makes is that shouldn't we ask the panel, the refinement team, the refinement team that they should start preparing a draft put together a draft which will take into account what is set out in the Constitutional Principals as well. Then he raises another matter which we'll need to look at about whether there should be certain clauses that should not be amenable. Now clearly on this one I think we need to have a discussion. Ja inputs from the parties. Can we agree that we we should look at inputs first. What are proposals that parties have made. Parties should be able to inform us whether they have any thoughts any views any proposals on the amendments to the Constitution. Particularly with regards to whether there should be certain clauses that either should not be amended at all or if they are to be amended they should be amended say with a much higher majority or whatever type of majority. Can we ask parties to to look into this matter and prepare submissions. I hope you are all taking this down. Please take notes and can we then get submissions within, how long do you want? Four months? Mr ?? Five months? (laugh) Mr ?? prefers five months. Can we allow parties say 10 days? Is it to long?

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Next week Monday

Chairperson

It also depends on when we are going to deal with this again.

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Don't be such a terrible task master

Chairperson

It takes time to circulate the documents. Okay a week. We have exactly a week, seven days. (laugh) Yes seven days for the submissions to be launched and that they will then be circulated and then we'll have a debate. I'm sure you agree to. Good thanks Ladies and Gentlemen. That then brings us to section 54. And with regard to section 54 we're agreed that we need to to allow the consultation amongst the judges to take place first but I see Mr Hofmeyer is back. I don't know if the other judicial people are back. Are you able to help us deal with this matter? A set to bills. Mr Meyer

Mr Meyer

Chairperson, this matter was referred before for bilateral discussions and so we can there is a proposal that I believe

how the consultation took place and after we got some further expert advice that we would like to put forward. Unfortunately it has not been submitted yet to Mr Ebrahim. I can bring it out and then we can submit it to Mr Ebrahim for conclusion and ???. This is a proposal flowing from the discussion that we've so far had.

Chairperson

Is it in writing?

Mr Meyer

It is in writing.

Chairperson

Okay we can

Mr Meyer

Would you like me to read it out?

Chairperson

Okay maybe you should read it out and then it will be printed out and then distributed.

Mr Meyer

I can read it out and then I can submit it.

Chairperson

Ja

Mr Meyer

The basic proposal chairperson which flows from the discussions is that division should be made for the right of minorities to refer matters to the Constitutional Court

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Mr Meyer I think

??

Turn on the volume

Mr Meyer

The proposal that flows from the bilateral discussions provides for a referral procedure for bills once they've been ass... assented to but before recommendation to the Constitutional Court and ?? would read as follows an act of parliament once assented to by the president may be referred to the Constitutional Court by at least one third of the members of the National Assembly if they have good reason to believe that the act is unconstitutional. But then of course we also took consideration of the fact that there is a possibility of frivolous approaches and attitudes and actions and so forth. So we then included in this bilateral discussion the following proposal in addition to say when an act is referred to the Constitutional Court for a declaration of its constitutionality in terms of this provision the Constitutional Court shall consider whether a ??? case

exists and further may consider if requested to do so whether a stay in the implementation or operation of the act should be all depending a final decision. The court then has to apply its mind and then further further if not prema ? case exists the Constitutional Court shall reject the referral and all the individual parties sponsoring the ordeal to pay the costs of the application. That would be the proposal that we forward, could be considered.

Chairperson

I think we will need to give people an opportunity of going through it. I think Mr Eglin is looking completely perplexed and I I don't understand what you are also reading out. So Mr Sizani?? lost like me and everybody else is a bit confused. Mr Eglin

Mr Eglin

First I take it we're not going to plunge into a discussion of it now because this was actually going to be dealt with by the other group of the Justice and Administration group. But I just, let me like have a good look at this and I mean one of the things that one notices is that I gather that this will be referred after its been assented to in other words its not a referring a bill, its referring an act. I'm not a lawyer but I think anybody at that stage would have the right to challenge an act. You don't have to have a third of the members of parliament because it is an act its not a bill. So I can't quite see what the what this is about. Because once its an act it can be challenged. What you're now saying that once its an act it can be challenged by members of parliament, is the same the public can't challenge it. It also doesn't say that the fact the court can suspend the alteration of the act if there's a ????. So we will have to look at this and quite frankly refer to people with expert legal advice.

Chairperson

Okay we will have the copy in a little while. So I I don't think that it constitutes such a major major problem. What we have decided was that this matter would also be taken up in the consultation with the judges and the question that I would ask Mr Meyer, ????? as whether that this matter was indeed taken up in the consultation with the judges? I pose a question. Mr De Lange says yes. Senator.

Senator

Yes chairperson the matter was taken up.

Chairperson

And what did the judges think or say or suggest or propose?

?? There was no unanimity on the question

Chairperson So the judges disagreed

?? The judges disagreed

Chairperson Just as well

?? Like all lawyers

Chairperson Just as well there were no press there (laugh) Just imagine the report. Chief Justice disagrees with the president of the Constitutional Court. (laugh) Headline news. (laugh)

?? No I'm saying chairperson there was no unanimity on the matter. They expressed, some of them expressed themselves in favor of, others expressed themselves against the intrusion of such a a clause in the constitution. But the point was made quite correctly so I believe that it is difficult sometimes for a court to make a ruling on matters of this nature because a deal may well end up getting known as unintended consequences. And that the court normally like to deal with a factual situation. I think that is the point which came out quite strongly from basically all the judges. That they will be wary of of looking at at clauses and speculating what would be the consequences of a particular clause and so forth. But none the less they were various views on the issue.

Chairperson Okay, all right, Dr Pahad

Dr Pahad Chairperson I think that we could say that the ANC as you may recall started with the position which was not favorable to what minority having this privilege or right. Subsequent to that the panel of experts were asked to produce something for us. Which they did in terms of an abstract review. I'm saying this because Mr Eglin is not so new for him if he actually read the document produced by the panel of experts, so we shouldn't say its something totally new. No no just let me finish. It was presented to us. The draft that Mr Meyer read is based on the view that was given to us by the by the panel of of experts so I agree you must see the draft before you comment. But I want to make a point. That hasn't been sucked out of anybody's thumbs. That the ANC

in so far as its shifted its position. Shifted it. To accommodate what was given to us by the panel of experts who then pointed out to us that it does exist in other constitutions. There is such a thing as an abstract review. On that basis the ANC have moved somewhat to to accommodate the the concerns of of parties like the Democratic Party. I'm stating it because I think its important that that we have made a move in order to address the concerns of some of the parties on this question. I agree that it should now be put on paper so that we can actually look and see how it reads on on paper, but I think we should note that its not something totally ??

Chairperson

Okay the consultation that judges does not help up very much from what I can conclude. This other little discussion maybe doesn't help us very much because we don't have the draft in front of us and what may help us very much now is that the printer is about to go and we will have the draft. I thought Mr Eglin wanted to say something. Did you want to raise your hand? No. I always make right predictions

Mr Eglin

I don't think, we're not going to debate until we get the draft.

Chairperson

Ja indeed we're going to to have the draft now. Mr Meyer, Mr Moosa have made consulted with your financial people to see what we can debate this matter? Right Ladies and Gentlemen can we settle down once again. Ladies and Gentlemen we now have the proposal in front of us first clause is is titled the NP proposal. I think there's something wrong there.

Mr Meyer

Absolutely it says its Monday morning Chairperson, not the NP proposal that was the proposal that was dis.. considered bilaterally

Chairperson

Yes

Mr Meyer

After we have considered certain technical advice

Chairperson

That's right

Mr Meyer

So its the result of bilateral discussions

Chairperson

Thank you Mr Meyer, you're very much awake this morning, like me. Its a special target of secretary generals to be

aware (laugh) of Monday morning. Okay an act of parliament, once assented to by the president, may be referred to the Constitutional Court by at least one third of the members of the National Assembly if they are in good standing. No sorry if they have good reason to believe that the act is unconstitutional. When an act is referred to the Constitutional Court for a declaration of its constitutionality in terms of this provision the court shall consider whether a prima-facie case exists and further may consider if requested to do so whether a stay in the incrementation or operation of the act should be order pending a final decision. If no prima-facie case exists, the court shall reject the referral and order the individual parties sponsoring the review to pay the costs of the application. That is the proposal. Mr Eglin I thought you may want to be the first speaker on this one.

Mr Eglin

Chairperson we don't want to survey matters, equally we would ask without reopening the whole debate on this consu., we would like to look at it from a technical point of view. Apart from other things, if you still leave the other clause about the president having the right to go to the Constitutional Court. You've got two panel two members in fact you can have abstract review of bills via the president. So the consume that you shouldn't have abstract before its assented to is still contained in the present clause. That the president can in fact before he's assented ask for abstract review. This one says after he's assented. What happens if if the after is followed the original procedure and the Constitutional Court is ready for a declaration, we don't think that you can just end this to the upper and presume its going to work. I mean there's another alternative and that is that a third of the members can be faxed ask the president to follow his prerogative to send it to the Constitutional Court as he could in any case. So we are not, we're actually very pleased that the ANC has come round to our view that there should be abstract review. And we also believe that in fact it should not be used as a way of forting the implementation of acts but equally what is concerned, that you might implement implement a implement act then have to undo it as a result of a court judgment. And that is why the president can also ask for abstract review to prevent that from taking place. All we would like to say is we welcome the advance but we would like to look at this as a formal document to be incorporated in the constitution in the

context of the abstract view of bills which is implicit as the original clause as is 54 as it stands. All we ask is next Monday we can take a decision. We would like to have a look at it in terms of the actual application of the law.

Chairperson

Okay, Mr Sizani

Mr Sizani

Thank you Mr Chairperson. I would like to ask from the ANC and the NP who have come with the proposal, what is it that they are giving to the minority parties by ?? proposal which probably the parties do not have by other people, by other ?? . ?? this is given the parties advance ??

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Chairperson if I could

Chairperson

There's a question to you Mr ANC

Mr Moosa

Well you know that I'm not a constitutional and legal expert. So if you could ask the panel of experts to tell us whether this has any meaning or not because it is being contended. It is being argued here that this is meaningless, ?? they could also tell us whether on the face of the ??

Chairperson

So because you are not a constitutional law expert, you'd like, but we all know you're not Mr Moosa, so but I thought because you're deputy Minister of the Constitution you would have a view on this matter. Oh you do. (laugh) Lets see Mr De Lange first. I asked Mr Meyer and Mr Moosa there there that to give me the page number and the section numbers of in the Atrium Constitution where references made to referral of bills to the Constitutional Court. They couldn't tell me the page number and the section number.

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What was remarkable was that the Chairperson of the CA didn't know

Chairperson

(laugh) No I'm not required to know the interim constitution. I'm required to know the working draft of the present constitution. (laugh) Mr De Lange and then maybe we can get a view from the experts. Mr De Lange.

Mr De Lange

Chair, just to say to Mr Eglin that he's incorrect to say the ANC has only now come around to abstract review. We have always agreed to abstract review and its in the constitutional draft. What was in dispute was the

mechanism or one of the mechanisms where by members of parliament could use that abstract review. That's all that was in dispute and that's all that we've come around to discussing a bit further. But I think Chair what I would like to know from particularly the person that put this forward, and our experts. Is what are we going to say on the effects of such a bill being referred to the constitution and then either ruled constitutional or unconstitutional. Unconstitutional not such a problem you change the bill but are we saying that once the Constitutional Court on abstract review had actually ruled that it is constitutional, does that mean that no-one there after can take it to the Constitutional Court when real situations and real life arise. I think we need to spell that out because at least we're in the constitution or we say that once there's been such a ruling that at a later stage someone in the public when something concrete arises they again take it to the Constitutional Court. I haven't heard anyone's answers. I asked the same question to the judges that wanted abstract review what that would entail. And I think that's something that we need to sort out because if we don't and we leave that question open I think there's going to be big problems down the line the constitution. Ja I wanted to respond to Mr Sizani but I'll first hear what the experts say ??

Chairperson

Yes, Mr Meyer

Mr Meyer

Chairperson may I ..

Tape Two

CC Subcommittee

12 February 1996

Mr Meyer

Chairperson may I raise a view also before the panel comes in because it might be of interest to hear their response also to this particular view. I believe what we've tried to achieve was to address the two concerns. On the one hand those of the minority parties that would like a mechanism to be introduced in addition to what other rights they might have to opposed legislation where the believe is that the a particular

pact might be against the constitution and therefore the provision that one is looking for here is to give an additional mechanism to to allow minority parties to go to the Constitutional Court. The other question was of cause the question of costs in regard to that. Who's going to pay the costs if such a procedure is to be instituted by the minority parties. On the other hand the concern was quite clearly that one should not allow a mechanism to be used on a frivolous basis by opposition parties and that they should be allowed to go with every single piece of legislation to the Constitutional Court on this basis. And I think therefore the key is actually to my mind in this regard in response therefore to Mr Sizanis question and this is the view that I would hold about this is that the key is actually in paragraph two. Where the matter is to be considered by the Constitutional Court and it will have to give a ruling immediately whether there is a prima-facia case. And in which case the the opposition parties or minority parties will be able to rely on the cost been paid by parliament in such a case but of cause they could as the Constitutional Court that the matter, that the ruling be made that the matter be stayed before implementation. And I think that is the that is the crux of the issue.

Chairperson

That's how I read it to. But that's how I also read it. Mr Sizani ask what is in this for minority parties. I thought, I don't think Mr Sizani is worried so much about the costs. The money is not really a problem. I'm not saying this because Mr Zen is PAC but I'm saying it more generally. (laugh) Not, we'll leave that to the stay in implementation. Is that not what is in this for minority parties? Which differs slightly from just any other citizen who may take up the government on the constitutionality of any act in the Constitutional Court. They may not be able to to get a stay in implementation but in this case the minority party, as I understand this would be able to have a stay of some sort if there's a prima prima-facia case in implementation. So that's what's in it for minority parties. Prof van der Westhuizen.

Prof van der Westhuizen

Yes Chairperson I think the other panelists can add as well its also the first time we see this draft now but it is I think the questions have to a certain extent been answered. The I think the direct answer to Mr Sizanis question is under normal circumstances without this kind of clause if one

doesn't have this kind of abstract review at all then litigants would have to wait for some or other controversy a specific individual or a group of people with a particular interest may then have to take it to court. In this case if the if the feeling does exist amongst a certain number of politicians that the it is very likely that this act is unconstitutional. They can take you to court in the abstract. It is not necessary to wait for a specific controversy to arise. That is actually one of the main arguments pro or against this kind of thing. Secondly Mr De Langes question. Yes that is a very legitimate question. If the court then rules that the act is const..constitutional. What is its future effect. I think the answer to that lie in and how the question is phrased, obviously the one third will have take it on very specific points. I don't think they could go to court simply saying give us an answer and tell us whether this act as a whole is constitutional or unconstitutional. We will have to be very specific in their request. And the court ruling will only then apply to those very particular points and other issues that may later arise could certainly still be taken to the court and I don't want to go further but perhaps even if if other factual situations later arise with regard to the same points perhaps its also not entirely excluded. I think this draft may, one may have to look a slight refinement of the language and it won't certainly not happen without the without the consent of the politicians involved. But one may have to look at the use of the concept prima-facia ecetera which is normally used with regard to factual situations and proof and evidence and so on. But I think the idea is quite clear. It does cater for the principal of abstract review, it does give minority parties a certain right that they wouldn't have otherwise have had but built into this it seems to me is the idea that implementation can only be delayed when the court decides that it can. In other words it cannot be, the implementation cannot be delayed simply because a small minority want it.

Chairperson

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Thank you chairperson. Just to elaborate the answer to Mr De Langes. Question no finding of a court is ever that a particular piece of legislation is constitutional. The finding already is whether it is or not constitutional on the basis of the fact and problems raised in that case. So for example you could have a an application in a real sense for an act to be declared unconstitutional may perhaps a hundred times

in two years on a hundred different grounds. And each time each of those grounds can be rejected. So that that that problem is simply a notional one. The the second thing which I think I want to mention is this, the the concept of the prima-facia case has to be substituted by some other concept because no evidence is been led here, not a question of whether there are facts sufficient to justify anything that the conclusions of law which have required and what occurs at the moment and the parties may think about it immediately is whether the concept of a reasonable prospect of succeed which ever concept usually used on appeal can be built in to this instead of the prima-facia case concept. Might be fairly, might in fact be more useful.

Chairperson

Thank you Advocate ?. Mr Sizani just before you can may get Mr Derek Powell.

Mr Powell

Thanks chairperson. Just to perhaps elaborate a bit further on the on the the point that Advocate Yacoob made. I think what a critical distinction to make between abstract review and this other form of review, concrete review where the facts of the case are really the core consideration. Is that abstract review generally speaking is designed to remove immediately apparent unconstitutionality in either bills or acts. And that overseas in in international jurisdiction seems to be the justification for that kind of a procedure. So as in principal there is no necessary conflict between abstract review and form of review based on the facts of the case as is as is usually referred to as concrete review.

Chairperson

Thank you Mr Powell. Mr Sizani

Mr Sizani

I hear what is being said here but my understanding earlier after of an after review as we had in the interim constitution was that it was referral of appeal before it is assented to by the president to the Constitutional Court where the the dispute is between, there is already even an abstract review in dispute in the sense that probably the minority parties are contending that a certain portion of that deal is unconstitutional. These will be the existing Constitutional Provision. That's my understanding. So I do see even in abstract review a question of a dispute. So I I saw that the benefit therefore as one where parties argue strongly on the basis of of what is royal in a constitution that a particular provision of the present deal is unconstitutional. And then

before it becomes an act of parliament in the sense that it is assented to by the president it is referred to the Constitutional Court for consideration of that matter. That's where I saw the benefit. If it is already an act of parliament, I assume therefore that even individuals themselves can take or individual parties can do that and I don't see the requirements then of of of this one third ??? if its one third and there's a prima-facia case then parliament will pay rather than the individual parties. But I don't see that as much more of a benefit than what it is and coming to the point Mr Chairperson, my understanding is of course that if the issues the stay of implementation I do understand that individuals themselves have a right to ask for a constitutional interdict which will allow them to stay implementation of a bill if they are they feel that a particular thing is unconstitutional they can interdict the government on that. So even even individuals will have that separately. And the third point I am not really sure about that question about the prima-facia notion. What is the standard tests that are required there? So that and the linkage of that prima-facia case to the question of costs. I'm not sure why they were not being given with the left hand and this is is being taken with the right hand. So I will really like to get what is attached there because my understanding was that these would be a serious situation where there understanding the process of how a constitutional matter reaches this stage in in the past dispensation or in the present dispensation was that we would argue from the standing committee and contend about certain sections up to parliament and then we would probably even seek legal opinions the standing committees have done that and so on and when there's really reasonable doubt even in terms of arguments and then when ?? and the Constitutional Court also but is required as in the Education bill for instance to present legal arguments in the sections that they are fully contending for. I never saw it as purely a serious question of of vocal differences. Sections are mentioned and interpretations are asked and debates go through and recommendations are made. Now this is this whole punishment of costs now for actually conditional basis actually is taken ?? right through fully argue and matter either from a vocal level or afterwards. And there's always going to be likely a a minor distinction between what is political and what is constitutional in any matter. So I don't know what is really required but that requirement of prima-facia. All what I want

what I want basically is the same provision that was there in the interim constitution we're submitted that.

Chairperson

Thank you Mr Sizani. Dr Pahad

Dr Pahad

First of all I must thank the panel of experts because I thought that the issued raised by Mr De Lange was a very correct one and then secondly in relation to prima-facia and so perhaps when they look at this thing and making a draft for us a more ?? draft it could then be changed reasonable prospect of success. Let me say I don't know whether Mr Sizani was in some of these earlier discussions. My own understanding was that one of the critical parts of the request for for this kind of abstract review from the minority parties whilst that there was a fear that parliament could pass a bill that the person could ascend with and and and then it starts getting implemented and then the Constitutional Court makes a ruling which says that some parts are ?? aren't constitutional it will then be very difficult to undo their actual implementation of of that part of the act. And so what does this do if Mr Sizani would read it careful. Is it actually prevents the actual prorogation of the act until such time that the Constitutional Court has declared a whether its constitutional or unconstitutional and so that this very important part of not implementing an act which some parts of which maybe unconstitutional will will then not not happen and I thought that was one of the strong arguments which made the ANC to re-examine its earlier position with regard to this issue because obviously it made sense to say that maybe well be very difficult to undo what you have already implemented for six months. The second element is that my own impression it might be wrong. My own impression never-the-less also was that members of parliament were asking for something's was additional its true that individuals have a right and then parties outside have a right to take it to the Constitutional Court. But I thought they were also saying that as part of the legislative process making at that there are involved in this legislative process making therefore it may possibly it may not but have a a stronger bearing on on the view of of the Constitutional Court if one third of members of parliament were had the privilege indeed of of taking the thing to the Constitutional Court it may possibly be stronger case than an individual just taking the matter to the Constitutional Court and this is to what the ANC had to take into account. And this is what it

did do. Thirdly let me say that from the point of view from the ANC that our experience with the Education program made us extremely wary of of proceeding with the present arrangements in the interim constitution. Because right now as we sit now that that Education bill has not been implemented. And the Constitutional Court has a great deal of things to do and it cannot on every matter say this becomes a priority and we're sitting here with with a situation in which the Education Bill is not yet an act and so it could not therefore in the view of the ANC be a situation in which we can give one third. Now with two thirds you can actually change the constitution. And therefore give one third the right to stop the thing in its tracks by by re.. referring the matter to to the Constitutional Court. So I want to say that the ANC has made some moves. The ANC has moved in order to accommodate the fundamental concerns, it might not accommodate all of the concerns of all of the minority parties, it might not be possible. But it certainly has moved to accommodate the fundamental concerns of the other parties with regard to to ascend to to bills and I do think that perhaps Mr Sizani when he has tea, when you break up for tea, should give serious consideration to this point of view.

Chairperson

Are you suggesting that you want to have tea with Mr Sizani Dr Pahad?

Dr Pahad

Its a bilateral ..

Chairperson

Okay have a bilateral. Mr Hofmeyer

Mr Hofmeyer

Chairperson I've been largely covered but I just wanted to to say that I think we have at the moment a situation where there's no real incentive for parties to weigh carefully whether they're referable or not. And I think one of the issues that came out of our consultation ten days ago is that there are all ready five cases before the Constitutional Court. And the volume they invasive that the volume of those cases would increase rapidly and that there needs to be some incentives to ensure that only serious cases are debated before the court and I think the two mechanisms that are suggested here is the one that there should at least be a case to be made out and I think the second one is the possibility of a cost order against the members who sign the petition. I think that costs in any legal system play a very

important role because it does hit people in their pockets and the idea therefore that those people consider carefully whether they themselves think that there's a serious case to be made. I think at the moment the situation is that even if there is no case at all that members can go argue or have the case argued in the court at the expense of parliament. And there's therefore no incentive for for people to look carefully about whether there is a real need or a real dispute in fact and I think that the proposal as it stands is trying to balance out those two factors and I think it is getting to a a sort of solution that we can live with.

Chairperson

Just one second, Prof van der Westhuizen.

Prof van der Westhuizen

Chairperson just if you'll allow me one short explanation especially with regard to the reference to the interim constitution. Basically there are three stages at which one could refer something like this if you want abstract review. The earliest possible stages before its even passed. But that is highly undesirable I think according to my own opinion and I think other panel members. Because that really means that you draw the court right into the middle of the political process. You actually short circuit a debate in parliament and you actually cut out the possibility that parties and politicians may convince each other during the debate. The second possibly stage is after passing but before ascend and being signed by by the president. The third possible stages after but before were the possibility of delaying implementation. One of possible disadvantages of abstract review in general is the concern of cause that they don't want to drawn right into the middle of the political process. And by delaying it one leaves the political process to complete its course and then the court comes in but under certain circumstances implementation can still be delayed. That is the what this one is based on I think.

Chairperson

Good. Mr Andrew

Mr Andrew

May I through you chair ask Mr Hofmeyer if whether by implicating of what he was saying that to assure that members of parliament apply their minds as to where the bills before them are constitutional or not. That if in fact the Constitutional Court rules in favor of the third, that petition whether those who voted in favor of the bills should bear the costs.

Chairperson Mr De Lange do you want to share those secrets with us? No you don't. Okay. Mr Eglin had said that the DP would like to take this under advisement and they will come back. Mr Sizani is not particularly pleased with this and this comes from bilateral. Can we agree that whilst Mr Sizani and Dr Pahad have tea and Mr Eglin comes back to us the following Monday that we record this, thank you, record this as a replacement for 54 because it is actually an advance on what we have. It is leaving it for that. And then we have the side bar note which will say parties will need to discuss this further. Dr Mulder would you agree with that?

Dr Mulder Yes chairperson I would. I just want to ask one thing. There was a suggestion from the experts that they would also like to play around with the drafting itself.

Chairperson Okay.

Dr Mulder When can we expect that, to consider that as well?

Chairperson Ja that's fine. The experts would like to have a look at it with a view to see whether it can be drafted a bit differently. Very well. I think on the side bar note we should also say that and when can we expect the expert experts to draft something new? By this afternoon. Well can you really? Or who was saying? Was it Dr Pahad? No come on you are not entitled to say things like that. We, Prof Erasmus did you want to say something?

Prof Erasmus No, Chairperson in terms of the things that have been referred to us. The prima-facia bit and the blending of this proposal into the remainder of 54 because some of that will apparently have to remain there.

Chairperson Yes

Prof Erasmus I think we'll need a little bit more time than this afternoon.

Chairperson Okay you'll need a little bit more time. Can we agree then that when it comes back as a redrafted formulation it will come back having gone through the TRT sausage machine. So you'll give us a new formulation taking into account these three clauses and you'll also insert what needs to remain

here. Okay. So we will get that the side bar note will say the DP would like to come back. Mr Sizani and Dr Pahad will see how that goes over tea. Ja those are the issues that we'll put in the side bar note and it will say this is a draft formulation arising from the insertion of these three clauses with what we had in 54 or replacing certain provisions and we will soon need to come back. We've moved a little further. Dr Mr Eglin.

Mr Eglin

Chairperson, what if the panel couldn't simultaneously look at the deal with practical issues for instance an act of parliament once assented there is no time limit as to when in fact that partition has to be based so that its left open ended. It should be within so or such a period. One wants to limit the, lets presume this goes through as suggested. One wants to limit the damage that could it done that an act is implemented and subsequently struck down. So you've got the prima-ficia. It shouldn't, there's no injunction that this should be a given priority or that it should be considered as a matter of urgency. In other words if its nearly got to take the court role which might be a years time the court role will then, something that would indicate that even with the court applying this thing has got to give it some priority. The third one it was mentioned I think one of the panelist misused the word the question of promulgation that it could be done before promulgation. Now there's a phase there's a passing by parliament, there's a assent phase there's a promulgation phase. In fact acts don't become don't become on put into effect until they're promulgated. One wanders whether this concept of trying to what I would have just say sympathetic to this, sympathetic to the proposal as what is to see what mechanism we should introduce to try to limit any damage which could be done if in fact implemented prior to being struck down. I think that should be looked at to see if it can be tightened up.

Chairperson

Ja that's right. I think that that is agreed to the ?? will need to look at that as well. Ladies and Gentlemen that means that we are at the end of this chapter, 3 we've made quite a lot of progress today. The electoral system we will deal with. The capital issue we will come back to, amendments we'll get submissions, I sent to bills will come back today. So in the end I think this chapter is nearing completion and I'm absolutely nec..sure in my mind that we're going to have finished with it by the time we discuss it again. We're now

able to move on to Finance. General financial matters a draft is being circulated now and we can welcome in our midst the chairperson of the finance and fiscal commission, Mr Murphy Morobe. I've seen him somewhere here because I've seen his bald head. There he is sitting at the back. We welcome him as we discuss this most important chapter and I'm told that tea is ready and the PAC and ANC can have their little bilateral and those of us who haven't had an opportunity of meeting the chairperson of the finance and fiscal commission may do so over the tea break. I certainly would like to do so and be introduced to him. No I'll think you'll see him. He's got a ?? (laugh). Tea break we will continue quarter to. 15 minutes. Right Ladies and Gentlemen could we move on to the finance section. The document has been circulated. Attentive draft for consideration by the Adhoc committee on finance. That's the title of the document. Dr Davies has agreed that he'll give a a brief overview report on this. Dr Davies

Dr Davies

Thank you Chairperson. In fact the title has not been changed and retitled that went on just now, that was the title which was used when we got it this morning. I think I should just say that the document here is the product of four party discussions which took place in an Adhoc committee convened by the CA. We look at issues concerned with financial matters barring to which I must draw to your attention which we did not handle and they are local government. There are in the draft chapter 10 there's some financial provisions there we did not discuss these because we felt that the whole concept of local government needs to be defined before the financial aspects could we dealt with. And the second thing is is there ?? constitution certain provisions on assets of money bills particularly that matter related to the old issue of the second chamber we felt that would need a greater clarity in that regard. That apart this document deals with all other provisions and working draft on financial matters. I need to say that we had discussions quite lengthily discussions which dealt with all of these matters and made certain proposals for their refinement and the we then had a finalization meeting this morning which we did not manage to complete. And so I need to just say that the question of the Auditor General and the Reserve Bank that the draft that's presented here did not go through the Adhoc committee this morning so we this is as the draft is interpreted our discussion from the other day but we did

not have a chance to go through that. I some of the footnoting I need to just say and particularly the reservations expressed by political parties are not also reflected in the document which you have before you. But that's apart here person the document is now available for the consideration of this subcommittee. And I don't quite know how you want to handle it. If you want to go through clause by clause or how you want to do it. I leave that in your hands.

Chairperson

Thank you Dr Davies. Even Mr Ebrahim agrees here that we should take it clause by clause. So we've got sufficient consensus. (laugh) Clause by clause. Yes please. Right now 188 (1) looks like 188, I need glasses then. 186 (1) National Revenue Fund.

DR Davies

Chairperson I need to indicate that some

Chairperson

Yes please

Dr Davies

The matter that the item in square brackets in the first line it should have included loans as defined in National Legislation. We decided this morning that the whether the term revenue included loans and whether there was a necessity for the as defined National Legislation we would leave that for further refinement rather than necessary political debate but there should be the the addition of those two words then.

Chairperson

So it should be there is a National Revenue Fund into which all revenue and loans

Dr Davies

Add loans in the in the square bracket

Chairperson

Now this one says words in brackets seem unnecessary. Do we delete those or what? What? Yes Mr Eglin.

Mr Eglin

Could I make a suggestion I think it may be sensible to have two square brackets. The second square bracket that may be unnecessary loans they've got to look at whether revenue includes loans or not.

Chairperson

So we should have two square brackets

Mr Eglin

Ja there are different reasons for why both of them may be unnecessary

Chairperson Okay now by when would this have been done

?? Chairperson our understanding that this is a refinement issue that the legal people should look at. Does the definition of revenue include loans or not?

Chairperson Now the legal people what would legal people know about all these things? I can bet you your last dollar they know very little about it. No they won't know, please. No but more realistically I think we need to have people on the Finance Adhoc committee doing this for us. Rather than just saying the people on the legal the legal act, party. Prof Murray you seem to have a very keen interest in this. Do you know anything about it?

Prof Murray No I know very little about these things but we I mean our discussions have been quite detailed and quite intense up to know and we've had conversations both with Dr ? and ?? on the Financial Fiscal position and I I do think that part of this issue at least is a legal issue. Because one of the questions that was raised to what extent National Legislation could provide for the exclusion of types of revenue so it would be possible for us to have at least the first go not entirely in this one.

Chairperson So I'm wrong. Okay then we have two paragraphs. Okay

?? Chairperson we could re-appoint that we also check from financial experts what's this.

Chairperson Also they'll also check. Dr Aland I thought I saw you're hand?

Dr Aland No I'm satisfied

Chairperson Oh you're satisfied

Dr Aland It's a matter that can be cleared up to one or two phone calls

Chairperson Okay. All right. Can it be put on the side bar on the side, we've now become accustomed to the side and not the bottom. So bottoms up to the side. Number two, no problem? No money may be withdrawn from the NRF except in terms of an appropriation act. But a provinces

equitable share of revenue collected is a direct charge against them the NRF. So that's clear. National and Provincial budgets. The Freedom Front reserved it's position on that. National legislation must prescribe the format of National and Provincial budgets when they must be introduced in parliament and the provincial legislation. Seems to be straight forward. And the second one as well seems to be straight. Why are those words highlighted? They're just highlighted for yourselves?

??

These are the insertions.

Chairperson

They are new insertions. So we can ignore that as we are now dealing with it, because we don't know the background. Okay.

??

The insertions habitude to the working draft.

Chairperson

Okay. ?? Three the Provincial budgets must be accompanied by and it sets out what it should be accompanied by. Financing proposals statements of borrowing and tendered and so forth. No problem. Treasury control. 188. National Legislation must set out what it must do prescribe effective measures. Establish a national treasury confer on the national treasury powers and so on. 2 (a), a decision by the national treasury to stop the transfer of funds to a province lapses unless it is approved by parliament in 30 days. To be considered on the role of the second house is finalized. I think we will need to say that on the side bar. Okay. (b) before parliament may approve the decision the ? General must report to a parliamentary committee. Parliamentary committee must give the province an opportunity to state its case the committee must compile a report and submit to parliament. (c) seems to be a problem, to considered on the second house is also finalized so that's straight forward. Con yes Dr Davies.

Dr Davies

Can I just explain that. This was an insertion by the by the drafters which is not proposed by the members of the committee. And basically we said that if there are any special they must be considered on the second house is agreed to. The DP's position which I think is noted in a note down here, ja the DP wants there to be a subset clause and the sense that they feel that there must be a a only a period

of time in this kind of provision applies and secondly they want to make it clear that there should be special majority. But most of us I think is happy to wait until the clar... until there's clarity on the issue of the houses in the second chambers.

Chairperson

Okay you want to add something Mr Erwin?

Mr Erwin

Just as the DP considers its position we'd just like to urge we see this as a fundamental necessity for good governments that in any economy, that's a common economy, it should be possible to know what's happening to finance. And it must be controlled effectively throughout the system. So we did we're not putting this in just because we believe that in the transition the provinces are badly managed or anything like this. We're saying this is a feature that any well managed modern economy should have. We'd just like you to think that through when they consider that.

Chairperson

And this is the view of the ANC? Good lets here what the view of the Democratic Party is on this.

??

Don't forget the ?? to think about chairperson. He's well aware the number that larger local authorities who will have budgets very much bigger than some of the smaller provinces. And there's no equivalent provision of cutting off their funds because this is what it is. This is the National government in certain circumstances the right to cut off the funds of a province. Because of the revenue sharing final formula that has been decided upon as the most practical in respect of massive local authority, much bigger than some of the provinces in terms budgets and numbers of people. You don't have the equivalent power because they have their own tax base, so that's in terms of overall national thing, it its is simply not so that you having it coordinated from top to bottom.

Chairperson

Mr Erwin

Mr Erwin

Chairperson just two points for the house we should clarify to. This doesn't deal at all with the constitutional or legislative right you may have to money. I just want to stress that it could be easily confused. This deals only with the treasury function, i.e. the disbursements of money and the accounting for that money. Now we would support the

view which it seems to add its supports to that precisely because certain big local authorities will be receiving funds that the logic of the argument I put earlier will apply to local government, but as as Dr Davies indicated we have not yet addressed local government financing. At the time we come to that we would certainly discuss a similar provision and the reason why we have to discuss that is that we are subject as an open economy to far greater scrutiny by everybody now and we want to be exemplary in this manner. We want our financial system to be absolutely transparent and well controlled. As state of the art what is our objective in this issue. But let's address that when we come to local government, it would be necessary then to.

Chairperson

Okay.

Mr Andrew

I think it can be a even bigger problem because what Mr Erwin is saying by implication is that the rates and taxes collected by local government can be seized by national government who protects the financial administration

Chairperson

But he's not saying that Mr Andrew. He's not saying that, he's saying let us look how we can deal with this. Also when we come to local government.

Mr Andrew

Certainly that's the equivalent would be just that

Chairperson

No no no, why don't we wait until he comes to that point before before we come to this conclusion.

Mr Andrew

Well yes we can wait, but being with the point of information because otherwise the DP will be considering an issue which is not necessary. This deals with the relationships between different levels of the treasury. Moneys collected, own revenue by the province, or own revenue by the local government, will be subject to their own treasury acts. They'll be responsible for applying those funds. And what this constitution says is that we must have common standard set right through the country on treasury control. So they would be expected as a province as we now have in fact and is local government to have treasury provisions that control there expenditure. What we're trying to correct here is the tremendous mess we've found ourselves in now and that was when local government transferred, sorry when national government transferred to a TBVC it's treasury

responsibilities ended. And that is costing us R1.5 Billion. And we don't want that to ever happen again. So we need this to be clear. This relates to the relationship between treasury and the national level to provincial or provincial to local. Those treasury's still have responsibility for their own revenue. The national treasury can't come along and stop something that's been used from their own revenue. Its when the transfers take place that the treasury must look at it.

Chairperson

I think we have the Mr Andrew, and I'd like I'll make a note secret note somewhere to remind Mr Andrew that he must interrogate this issue when we come to how you will have suggested that we deal with local government. I think we agree to that. Now we were on (c) to be reconsidered when a sunset clause and all that. Do you still want it to be reflected in that way? Okay no problem. So we will reflect (c) in that way. I don't see the need for the brackets. I just see the need for a side bar note. Can we agree that we remove the brackets and we have a side bar note. Dr Davies

Dr Davies

Chair the thing is it says majority members of parliament must be present. It doesn't just say to be passed by majority of parliament.

Chairperson

Yes

Dr Davies

I basically says that you need to have a it reflect quorum issues and

Chairperson

You want the real thing is that

Dr Davies

is to say that that whether there is any kind of decision of a special nature of the passage to parliament will at least depend on some consideration of the powers of the second chamber and then maybe want some particular role for the second chamber in this regard rather than a special requirement about a quorum in parliament. So I think we wanted to save the whole matter of anything special about the passage of such of such a decision it would have to be left then

Chairperson

Okay

?? Chairperson may it may also require a certain majority Volkstaat

Chairperson Precisely yes, yes. Okay we will leave it. If you desire that the bracket should be left there I'm easy. Okay. I see you can ?? , do you want to say something sir? You know we've such freedom of speech here. (laugh) but even when you sit in that side you're entitled to speak. No, no , no I'm just to eager for everyone to have a say on all these matters.

?? ?????

Chairperson Very good even though I didn't hear what you were saying its all right (laugh) Okay 189 (1), there's no organs of contracts and good and services. Organs of state must contract the goods and services in accordance with national information legislation or independent tender boards and a fair public and competitive in this system. That's straight forward. No person and no organ of state may interfere with the function of a tender board. No problem. Decisions of a tender board must be recorded...

Tape Three

CC Subcommittee

12 February 1996

Chairperson ...acted only after any recommendation of the FC has has been considered. Each year the cabinet member responsible must table in parliament a list of all outstanding guarantees issued by the national government. 5 - to be redrafted to extend to every level of government. That's fair enough. It needs to. Okay. So that will need to be redrafted. The drafters will deal with it. Section 191 is deleted. Dr Davies.

Dr Davies This was a a general provision about a any enterprises receiving public funds should be accountable and ? to be redundant in view of various other provisions.

Chairperson Okay. ??? of persons holding office. I thinks its, we should just approve that. Undesirable for us to be talking about remuneration for ourselves. Any salaries, allowances and

benefits of holders must be as determined in terms of legislation. Sorts it all out. Why is the public protector an auditor general singled out or, yes please

??

That chapter has a series of commissions and then those two offices that's all it is. Unless you want to say any structure is mentioned in chapter 7 or whatever it is

Chairperson

That's right, then I see there, oh okay due to the protector and it is with auditor general and it gives human rights commission the electoral commission gender and all that. Okay. It explains it. Number 2, National Legislation must provide for an independent and impartial commission to make recommendations. Why is it partial in brackets? Dr Davies?

Dr Davies

I think it was largely the DP felt the word needed to go in. I think that some people, many people argued that, the legal people argued it wasn't necessary to shove it past you.

Chairperson

Can we sort this one out quickly

??

Well chairperson almost everywhere else in the constitution where people is supposed to be independent and impartial its worded that way. And I think the idea of putting brackets are if the panel which is going to look at it. The theme turns a consistency or whether there's a particular feature of this panel that meant it shouldn't be impartial whereas the others should. So so its a legal technical point.

Chairperson

Okay. All right so it will be checked by the panel for and the TRT for consistency and all that. Okay. Now I see there's note 7. Traditional Authorities and members of any councils of Traditional Leaders. DP wants a sunset clause for (b) (c) and (f). Why, what is the sunset clause about? I should ask the DP. Okay DP I now ask you what is the sunset clause?

??

Well as Mr Eglin has mentioned on a lot of things that in essence even when this constitution comes into being many aspects of our society is still in a very early stage of transition. And therefore there are certain provisions that we would accept are necessary in the short but in the general construction of our society and our constitutional structure should not be there permanently. So for example we do not think national legislation in other words

parliament, should be determining the salaries, allowances and benefits of local governments for example. We accept in the short term until one gets a stabilized situation and the short term may be five to ten years, that it is appropriate that there is that kind of intervention. But in the medium and long term we believe that local governments and provincial governments and legislatures are responsible essentially to their electorates and are not responsible to parliament in the first instance. Thank you

Chairperson

Mr Erwin I don't know if you need a long debate on this, but lets here you, ja.

Mr Erwin

Chairman I don't seek a long debate but this has come up quite often and it might be the appropriate time for us to put forward a difference of possible principal we have here.

Chairperson

Okay

Mr Erwin

The the constitution provides for a re.. essentially what is a revenue sharing formula. Its quite complicated with regard to loans and other things, but that means that revenue transfers take place from those provinces that who's economic activity levels might be much higher than others. And our approach accordingly is that in those, in such circumstances with regard to the elected members of people, there should be a uniform system. Because you can't just argue justifiably that through your own revenue you pay your NP's better, that's your business. The only reason you can do that is 'cos you're getting revenue from elsewhere. So this is not you know, its unacceptable situation for some legislatures who may be managing their provinces excellently, or the national may be doing it well, to be making transfers across for another legislature to pay a much higher salaries. That obviously is gonna be a cause of considerable tension between people. So we don't see this as a an interim problem again. We see this as a str... structural choice that we should be making. That in God to these persons forever they should pay the same because this is the nature of our sheering arrangement. We don't have to have a long argument, we just wanted to articulate. And I think we have agreement with other parties on that.

Chairperson

Okay. Dr Alant

Dr Alant Chairperson we support the ANC's deal and its not necessary to state it in the constitution, but obviously that any province for example, any local authority, must have the freedom to pay their local elected people less than what is said nationally. They must be able to to get it in other, the elections for example, where up to a state pays and for examples up to only 50% of what a ?? state may pay its parliamentarians. But not more than a certain ceilings

Chairperson Okay. You persist in your view on this one Mr Andrew

Mr Andrew If we were to say they were ceilings we would be probably have greater room to look at at this issue.

Chairperson Okay. Is there way of inserting some ceiling of some sorts? If you, I mean you want to consider that?

Mr Andrew From our side we agreed that a province when they should be entitled to pay less. We may want the draft just to look at that. Because one of the intentions here is to ensure that there's some comparability and and integrity to the overall payment system. So you may reduce the level but it shouldn't go interfering with the overall payment system. But I don't think there will be a problem on any other parties side if we can get a wording that assists the DP on that.

Chairperson Okay. So some wording will be found to to deal with that and that addressed 7. We now move on to allocations.

?? Chairperson can I just explain here

Chairperson Yes please

?? 19, the old 193 in the working draft concerned the question of people holding more than one office of profit in the state and we've decided that there was some major problems with that provision as it stood. Some of them were invention in the margin on page 64 and the basic we went through clause 42 concerning members of parliament. So there may be some issues there that need to be addressed. But we feel that that would be the way to address this issue rather than through clause of this nature. So we withdrawn the only 193 and then there was a feeling that the question of allocation to the provinces which was dealt with under 149 in the working draft. That this should be puled into this

chapter. So that it makes clearer the process of revenue sharing and then the rail or rather the provinces is dealt with in that chapter. So what's here now is a refined version of the old 149 and the old 193 falls away.

Chairperson All right. That seems to be a need for ?? doing it. Dr Alant

Dr Alant Chairperson we we support the 1 ITC, the new one, its just that I don't know if I'll have another opportunity to draw your attention to the provision in 41(2) in in the working draft, if you care to look at page 16 of the working draft in this document. So..

Chairperson 41 (2) yes

Dr Alant 42(1) sorry 42(1)

Chairperson 42(1)

Dr Alant on page 16. If I can continue Chairperson?

Chairperson Yes please

Dr Alant Chairperson 42(1) (a), every citizen is qualified to vote ecetera, anyone whose supported by or in the service of the state, and receives remuneration other than president, deputy ministers and so on. That is where our concern lies. The other words; and any other office bearers whose functions have been declared by national legislation to be compatible with the functions of the member of parliament. Now we don't, no party has as I understood any reservation about a member of parliament for example serving under government commission and earning a daily sitting allowance in the sense that it is for subsistence on transport. Also people serving on the audit commission and and being paid in the same way, but we have a problem with people earning double salaries. I'm not talking about small amounts of money. People serving and there are examples in the country as chairman of a regional services councils. In fact earning more than members of parliament. Secondly people serving as Traditional Leaders, double salaries. Now those functions are not in conflict with the the functions of a member of Parliament. So we asked that this 42(1) (a) the wording here be reviewed and on that condition we withdraw our other our other section.

Chairperson Dr ?? I don't think you even need to make a long speech on this so we are all in agreement with you. No one should be allowed to earn two salaries. Please, so I would say, I mean what wording would you suggest? Dr Davies

Dr Davies Chairperson I think the we were all in agreement that we needed to deal with the issue, the question is where it was dealt with and how. That was all it was and I think that we agreed that that through the route of section 42 was the appropriate route but as the financial people we didn't go into the detail there may be a even further refinement. But we felt that there was some problems with the kind of omnibus clause as the original 193 had because it it there were to many exceptions. For example we didn't want to to exclude the possibility that teachers can also be councilors which would on the face of it be excluded by 193 as it stood originally. So we felt that the route of 42 was the route to go rather than this route. But I think Dr Alant you know feels that there may be some need for some further consideration of that point.

Chairperson Okay so shall we flag that one then? 142(1)(A) that's important. Now 193 then also re.. incorporates 149, is it 149

?? 149 falls away

Chairperson 149 falls away all together. Very good. Okay 193 (1), National Legislation must provide for the determination of the provinces equitable share of revenue collected nationally. Wording to be reconsidered. Okay. By whom? By the technical refinement team or by yourselves? Should we say by, okay Dr, Mr Andrew

Mr Andrew I think it's by the either the panel or the technical refinement team. The issue that arose is that the provinces were not all going to get the same share of the revenue and it was looking at getting the appropriate wording that on the one hand made it clear that that possibility existed but also that all the revenue collected nationally wasn't going to go to the provinces and it was try to find the appropriate wording.

Chairperson Okay, Dr Davies

Dr Davies

Chairperson I think there's an agreement and this I think we need to make it absolutely clear that the term equitable share of revenue collected nationally is a specific concept. It is a portion of the tax revenue which is collected nationally which actually belongs to the province and then is a direct charge on the national revenue fund. There is then another concept which is in the next chapter called national revenue. That is revenue that belongs to national government and which it can then assign a portion of, or allocate a portion after the provinces. So those are the two concepts. What needs refinement is a point that was drawn to our attention by the the panel this morning and which we didn't have a chance to resolve here, is that this refers to the total block of revenue which belongs to all of the provinces together and the question of what belongs to the each individuals province is not being adequately catered for in that formulation. So they quit. So the issue now is is to refine that in some way. Various things was suggested like provinces equitable shares and so on and so forth. But it was felt that it was not enough to consider that and the legal advisors asked for some time to to try to capture that distinction which is an important.

Chairperson

Okay, so is the technical refinement team that will do this one for us. Dr Mr Erwin

Mr Erwin

Chairperson if we could also just at this stage indicate that we would certainly need to harmonize this with the provincial powers section. There's gonna be a need for final harmonization of these issues. So we just noting that for the stage now. I think we

Chairperson

Which issues? All of them? Particularly this one?

Mr Erwin

Its more to do with 193(1) in its entirety for the reasons that Robs just outlined. So we can note that we harmonize that. Because the interpretation of this particular specific concept equitable shares need needs to clarified in that context and the DP have raised a issue there as well. And I think it might be easier resolved when we harmonize it with the provincial powers issue plus some re-wording to capture this concept here, we may get greater clarity.

Chairperson

Very well. I note ? Then Legislation referred to subsection may be enacted only after provisional government have

been consulted and any recommendations the FFC have been considered and with due regard to national interest re..national debt and objective criteria and so forth. The DP has a reservation. It would, it believes recommendations from the FFC should be required. Dr Davies

Dr Davies

It concerns the word any, at any recommendations of the FFC have been considered. Basically the debate was that the FFC be required to give recommendations each time Legislation is passed and then basically a feeling of a number of others of us was that if the FFC had made a recommendation the previous year didn't feel they wanted to made a recommendation that should not in itself prevent national Legislation. So the question of whether the word any is needed was was the critical issue there.

Chairperson

Is it such a major major problem Mr Andrew?

Mr Andrew

Yes it is because the FFC is a in this system is a fundamental element in the process and therefore in our view it is not sufficient that if they make a recommendation it must be considered. They in fact have the primary responsibility to make recommendations in respect of these matters. Otherwise as far as we're concerned this system unravels. Now it does obviously the wording used here and the wording in the Financial and Fiscal commission section which is on the next page one has to react the two, connect the two. And we will be looking at this again although I must say for me personally we've got conflicting legal opinions. Although they both thought any could stay, they were for entirely opposite reasons.

Chairperson

Who has conflicting legal opinions?

Mr Andrew

My interpretation of the legal opinions given in the Adhoc committee were my interpretation of was that they in in conflict with each other. But that doesn't really matter. We're going to look at it again. We want to be sure that the FFC does make recommendations. That's the long and the short of it.

Chairperson

Okay.

Mr Andrew

And while I'm talking Chairperson may I just say in terms of this Mr Erwin eluded to it in a sense, in terms of 193 as a

whole we did not this morning get an opportunity to discuss every aspect and in particular whether there are elements that need to be added so as compared with most of the rest of the document which we did discuss and any reservations we at this stage would think that there are going to be some additional sub paragraphs or sub sections that are going to be needed to cover this matter.

Chairperson

I think there are good and clever ideas that anybody can put forward they can put them forward. We consider them. So its inherent right that everyone has. Dr Davies

Dr Davies

Chairperson could I just point out there was something which another point which was agreed this morning which doesn't seem to be covered here. Point (d), 2 (d) there was a feeling that this was a little bit that's a drafting point, a little bit clumsily formulated and there was a was an agreement that the drafters would break that into more than one thing. And that then there is a it says there that one of the things that must be considered is the the needs and economic disparities of the provinces and then there is developmental needs again. And so what we're looking for since most of us didn't want to drop developmental as we're looking for another terms for the second needs. The first needs and then the developmental needs. So there's that little matter there its just a drafting matter.

Chairperson

Okay so can we then put a side bar note on 2 that it, just for the refinement team is to look at it again. All right, Mr Andrew feels that we should require that the FFC should make recommendations. I think we assert that on the side bar note. (3) Allocation of revenue by the National government. Now I see (b) is bracketed, why. 10 to be considered on the chapter ?, that's fair enough. So that one will be considered later. That then takes us to the fiscal

??

Chairperson sorry may I just confirm with you so there's no misunderstanding that 193 as a whole, the DP would like this clause. Not because of the, we've raised our problem in respect of what is here at present in that are in the in the notes. But there are things that are not here at all

Chairperson

Ja I did say that ..ja that in any event is something that we all have, I mean if we feel that there are new ideas, new proposals, we can always bring them forward. So I'm, but

I'm not saying we should need to have a special note, you will bring that when you bring them forward.

??

Chairperson I've got them here now if you want me to but I would think that its better handled in a in a smaller group

Chairperson

Yes, yes by all means yes. I think, I think I would agree that it should be handled in that group. But lets just hear what else do you want to introduce?

??

First of all and this most of this tak..well part of it this part is taken from the FFC report to this body. That the the shares and allocations of revenue should be made or must be made on a rational, predictable and transparent basis. Which in fact we're putting up a frame work on it. Then secondly and to put it I mean I can read actual words but I think easy if I just explain what we are getting at. Secondly there are two sorts of sharing that takes place between national and provinces, well I'm ignoring local government for the time being, they would also come into it. Between national and provinces as a vertical division and then as between provinces and we think that the National Legislation referred to in this clause, section, should have a not unfettered because the Constitution in a sense would in a sense approximately limit it. So it should have a discretion as to the divisions between National and provinces as a whole. In other words the vertical division. But we believe the recommendations of the FFC should in fact be adhered to in terms of the horizon...horizontal division. The next point is that one wants these the Legislation in essence to supply formulae to be used. In other words have a formula in the Legislation which should be reviewed annually and be applicable for the following four years. That is to allow again an FFC recommendation that you have predictable and certain sources of revenue or over a period of time. So the concept would be that each year this could be reviewed if the National Legislature wish to do so. But it would then only its a rolling ?? that's four years. Ja. Am the final thing is that to limit the proportion of the transfers to provinces that can be conditional allocations. Because you can defeat the purpose of allot of the revenue sharing and any kind of independence or discretion of the provinces in terms of their functions if two high a proportion of their revenue is on a conditional basis. Now in a very brief discussion over tea and not even looking over at these words Mr Erwin indicated

that he felt that he felt that some of the provisions here already do cater for that. But we haven't had a further chance since seeing this tentative draft because we didn't, we ran out of time this morning. We haven't had a chance to explore these things further.

Chairperson

Before you even answer I mean these seem to me to be things that need to be considered in the subcommittee. Yes about how we proceed.

??

No Chairperson we can always rely on Mr Andrew to have a long list of additional proposals and words and so on, I think that he's right we didn't we didn't quite finish this this chapter, we didn't hear those proposals because of the time constraint. I would suggest that we basically decide to do it just now with Mr Erwin, that this clause needs to be looked at in the context also of of of the legislative powers of provinces and what I would suggest is that at that moment we also consider Mr Andrews proposals. I don't think we should have a special meeting of the of the of the small group to discuss those proposals in the absence of the others. So I think that a small group meeting but at a later stage is what's needed at this point.

Chairperson

Okay, that I think is fair enough, thank you. That then takes us to the FFC itself. Establishment, there is an FFC no person who can interfere with the functioning of the commission. Pardon?

??

There's a spelling mistake, organ of state not sate

Chairperson

Oh yes, yes.

??

Just in case you thought it was Japanese legislation (laugh)

Chairperson

?? Legislation may regulate a functioning, functions are set out in 195(1), Financial and Fiscal policies, criteria for allocation, equitable allocations, any taxes, levies, ??, surcharges that a provincial or local government ?? upholds...

??

Chairperson can I ...

Chairperson

... to be confirmed with revenue office but the meaning of terms is comprehensive of the lists is complete. Dr Davies

Dr Davies Ja I think the local is like everything above ??

Chairperson Yes that's right.

Dr Davies but the thing is that this definition which I think comes out of the interim Constitution it seems like nobody knows what an impost is

Chairperson I wanted to ask but I didn't want to display my

Dr Davies There's is the, there is a, it seems like there's a more elegant phrase that's doing the rounds and that's what has to be checked out. So the drafters will find...

Chairperson maybe the

Dr Davies if, it will cover all forms of taxes that's basically what it is

Chairperson I think the panel knows this what impost is, so we'll leave it ... Okay, so we'll leave that note. I didn't want to display, I actually didn't want to embarrass the Deputy Finance Minister by showing that I know better than he. (Laugh) All right 2, in performing its functions a commission must consider all the different factors and so on, appointment of members. Now, now where does that hang? Oh that 196 is appointment of members. Ja, that's why I always feel that a heading should always be on the next page. It's terrible. Commission consists of the person, the Chairperson, a Deputy appointed by the President who are full time. Like the one we have now is present here. Two members of the commission must have appropriate expertise and may not hold office in any particular organization or party. To be considered in relation in judiciary in chapter 7. Mr Erwin

Mr Erwin Chairperson I was not in the discussion this morning but I would like to point out what I 1(b) that I think this differs from what we had in the in the interim Constitution and I think there was some logic to that. And that is that the persons are nominated by the provinces but appointed by the President. And for a wide range of practical reasons the ?? you see for yourself is also experience. I think that's an important formulation. I would urge this doesn't conflict with the Constitutional principal that it says it must be a representative of the province which the person would be.

But I think for the commission to be seen as not just a a lobby but as an authoritative independent commission. It should all be appointed by the President. So I I would propose that the draft is looked through to re-word that closer to what we had in the interim Constitution.

Chairperson

Okay so 1, 1(b) will be re-worded

??

That's only nominated instead of appointed. They're all appointed by the State President, ja.

Chairperson

Nominated by the Executive Council. And I think it requires re-wording. Doesn't it, so let it be reworded. Okay. Reports,

??

...line 2

Chairperson

Yes

??

there was quite a discussion again this was a proposal to Mr Andrew about may not hold office in any political organizational party, and I think we agreed although it doesn't seem to be reflected here, we agreed to insert something similar about the Auditor General. But then the point was made by Advocate Yacoob that this is not included in the public protector everything else is and so on and so forth but had he turned independent would be assumed by the Constitutional Court to be violated if you were to shove someone in who was a political party office holder and that by putting it in in some and not in others, you may then imply then that it's not necessary in the case of the public protector and so on and so forth. So there was in issue there about whether to shove in this, but I think we all agree that the people should not hold this office but the question is simply whether it should be shoved in these particular offices in the Constitution and not in others.

Chairperson

Okay, yes Mr Andrew

Mr Andrew

I mean I agree with Mr Dr Davies that these people should not be, I think there is a difference having further chance to think of it since our meeting this morning. In that the Auditor General, the public protector, the judiciary, people like that, all go through a kind of sifting process whereby they there is some or other judicial service commission or a special

committee of Parliament that considers them and then its confirmed by Parliament and so on. So they go through that kind of process during which that sort of matter can be handled. These people are essentially well they're appointed by the President but half of them are in fact nominated by the Executive Council of the provinces so I mean in the normal course event the President unless there's some very serious objection will simply appoint the person and so I think there is some logic in having it mentioned here even if it were not to mentioned elsewhere. And secondly one also in the concept of the FFC wanted to make it clear that it is not intended to be a political body and the people nominated by the Executive Councils or the Provinces are not intended to be political people. They are actually meant to be ex...experts.

Chairperson

Well I think there's a note that needs to be considered in relation to the ???, so I'm quite happy that we leave it and ask the TRT to look how we should deal with this one. Is that okay, okay. 197 reports, and then we go to the Central Bank

??

Chairperson

Chairperson

Yes please

??

I should point out as I indicated earlier on that this and the Auditor General we did not discuss in the small group this morning but I'm quite happy that we can discuss any issues that arise at the moment. I think there was very little discussion in the bigger group, the bigger meeting about the Central Bank.

Chairperson

Okay let me just have a sense of how we differ on this one and then see how we take it forward. I see there is a big DP reservation. It just reserved its position. You don't want it to be called Central Bank. What do you want it to be called?

??

Ja, that reservation should be in respect of section 198 not is respect of all the other words were are perfectly happy with. And not necessarily arguing about the precise words and sequence. But we would want to read the ?? and reserve bank as the Central Bank of Republic and as is regulated by National legislation and is independent. For two reasons. First of all we actually believe that functional

independence as provided for in 199 (2) is insufficient without institutional indigence and secondly it is our view, principal that covers this matter which is principal number, look it up quickly if you don't mind, principal number 29 says the independent and impartiality of a Reserve Bank shall be provided for and safe guarded in the Constitution. It is our view that simply safe guarding that it functions independently is in fact does not meet that requirement and so on. Both those scores, I mean we want it anyway and would actually be the Constitutional principal requires it. Thank you.

Chairperson

Okay that's the extent of the DP's reservation. Dr Davies

Dr Davies

Chairperson this was exactly where the debate was in the end of last year and then we were asked to back and reconsider the matter. Which is what we did. I think that would make two points. One of them I think that the Central Bank plays a role which is different from a number of independent institutions is that its essential task is not just monitoring but its central task is also concerned with the formulation and execution of policy, namely monetary policy. And in that respect its independence is therefore qualified by the requirement of consultation which is in in in clause number 2 and I think that there's agreement as far as the functional issues are concerned. Mr Andrew wants to add in another clause about independence or refer to independence again in a way which would undermine potentially what I just described, the delicate balance between the independent operation and the council and the consultation. And I believe that the objections that he has or the reservations that he has basically refer to the question of whether or not appointments could be manipulated or something of that sort. And I think that most of us are convinced that in fact any attempt to manipulate if appointments in in in the sort of way that he's concerned about would actually undercut its function independence without fear on favor or prejudice and therefore would be struck down on those grounds. And therefore that another clause on in..independence would (a) not be necessary and (b) could detract from the functional independence which is to be read together with the ?? consultation. So I think most of us are I think in fact I can say that everybody in group except Mr Andrew was happy with formulation as it stood.

Chairperson

Dr Yacoob

Dr Yacoob

Mr Chairman our point of view is very similar to what has just been expressed now. We of course also very strong on the independence of the South African, of the South African Reserve Bank, but after giving legal advice on this and also listening to discussions which we've had with Mr Mr Erwin, we're quite convinced that the the question of independence is officially catered for in this. Of course we put another point to is that is you look at the primary object of the Reserve Bank, it is not so completely independent because the objectives have already been laid down, the there cannot move outside there. The only, the only, the only ro... room for maneuver is really in the way in which it applies its policies ?? now.

Chairperson

Find it that convincing. I mean I was not convinced Dr Davies about your argument. I am now convinced. (Laugh)

Dr Davies

I'm glad that Mr Yacoob seems to have such influence with you Chairperson.

Chairperson

(laugh) Mr Erwin and the Dr Alant

Mr Erwin

Chairperson I do think this is a matter that's been ????? extensively now and I think that we can say without having to speak for the Reserve Bank Governor this is a formulation we all agree upon and we don't have to go through the many detailed discussions held in the subgroup but what's interesting about this formulation, it makes our our constitution interesting. Is that we Constitutionally protected the Reserve Bank's independence on its prime function which is the protection of the value of the currency. That's the whole basis of our Economic Policy. That that's the prime function. To insert independent above actually creates uncertainty not certainty because now its not clear whether that means with regard to every other single function the Reserve Bank does. And there's no one that would argue that on everything is does. Its our agent for exchange control. It manages cash. Its going to bring in a new cash management system. All technical things that have got nothing to do with needing to be independent. We probably and I tried to argue in the small group just to create uncertainty not certainty. Whereas this is a well understood formulation for which we've received considerable

congratulation world wide for putting something like this in and I think to interfere with it at this stage is unnecessary and would create confusion.

Chairperson

You say congratulations world wide.

Mr Erwin

Chairperson it is. Its interesting for ...

Chairperson

Ja I was being serious because that to me is an important

Mr Erwin

We we receive allot of congratulations on things and this is one of them

Chairperson

And this is one of them. Dr Alant

Dr Alant

Mr final argument to convince you Mr Chairman is the fact that the Reserve Banks Governor himself. He's very satisfied with this formulation.

Chairperson

Okay if the Reserve Bank Governor is also satisfied then I'm even more than convinced. (Laugh) I do not have the power however to take a discussion on your behalf but I thought it is quite convincing. I don't know the DP is quite a tenacious type of party they want to hold on to their positions and do we want to record anything on your behalf Mr..

??

How legal advice has been different from ...

Chairperson

Ja I accept that

??

and I think I will go back to my party and ask them to look at it again. I might say some of the arguments being used of course are completely contradictory to the conclusion because they keep saying look at the thing as a whole and then if I say put ??? 198 they then say but then don't look at it as a whole. So I mean its quite clearly for example the requirement for consultation is not effected at all by putting independent. It also has to be regulated by National legislation. The only object I'm mean it hasn't got a whole range of functions here, the only object that it is required that it sort of has executive authority is the primary object. None of the other matters that the Mr Erwin has referred to. Is is the legislation of provo...obliged to provide the the Reserve Bank with those powers or those functions to

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perform. But we will go back and look at it again and and have our legal advice looked at again. Please don't ? in 198 that we have a query on respect of the whole thing.

Chairperson

Well I think what we should then do, I think the Democratic Party wants to go back to their lawyers, their principals and check this. There seems to be consensus. Really more than consensus on this I would say on this one. And if the DP would like to come back with a view that will convince other parties they're free to do so. And we we are now moving towards finalizing some of the things. I don't think there's allot of controversy so I would draw up the side bar note and allow the DP to come back. Now that concludes the Central Bank. There are two things that we can do now. Its this provincial and fiscal and financial matters 148. We can do that one or we can break for lunch. For a sit down lunch next to the main dining room in the old assembly. Old assembly that-er-way and this is a sit down lunch. They're are not saying whether its a sandwiches or proper meal or we just needs sit down. We'll be sitting down to eat samoosas and sandwiches and stuff. Its a proper lunch I'm told by Dr Davies.

??

Chairperson I think that that we indicated when the playing of this was going on, both Mr Erwin and I will have great difficulty being here after lunch. So I think that if you don't mind carrying on. That will probably be the best thing that we can do.

Chairperson

So you have difficulties in carrying on after lunch.

??

Ja. Or you or you can reschedule this for another day if you want to but I mean ?? I think

Chairperson

Why don't we then, because I think, I don't know what the other financial people think. Then we should all be there. I would feel that if anyone of the financial people was not there when we debated this it would be a bit of a disjuncture. But if he said that can't we agree that certain things that are still in your footnotes can be attended to between now and the time we have a meeting again? Is it possible?

Dr Davies

Chairperson there's one big thing that I think it may if we were

Tape Four

Constitutional Committee Subcommittee

12 February 1996

- Chairperson A bit of a disjuncture. But if he said that can't we agree that certain things that are still in your footnotes can be attended to between now and the time we have a meeting again? Is it possible?
- Dr Davies Chairperson there's one big thing that I think it may if we were say postponed this discussion 'til Friday or something like that it would give us a chance to look through the Auditor General. Which we didn't manage to and I think there were a lot of problems.
- Chairperson Will we be able to do it on Friday?
- Dr Davies Otherwise Chairperson ..
- Chairperson No no we're just looking at dates. We could look at it on Monday. On Monday. That will then give you sufficient time, but I would say this would be on condition you clean up all these other footnotes. Because it still looks very messy Dr Davies.
- Dr Davies We could roar through this next one if you want because I think that the footnotes are very very minor.
- Chairperson No no we're allowing
- Dr Davies You could leave it 'til Monday. Monday we do the provincial financial fiscal matters and the Auditor General. That's fine
- Chairperson Yes
- Dr Davies The Auditor General needs quite alot of cleaning up.
- Chairperson Yes. If that's agreed then we do the financial and fiscal matters and the Auditor General on Monday. And then you will then meet in between? Okay
- ?? Ja 10 o'clock on Monday morning

Chairperson

Okay thanks. ??? everybody's invited

??

May I just ask what time will we reconvening and what subject matter we're dealing with when we reconvene?

Chairperson

Okay we're reconvening at 2 o'clock and we're dealing with the National Assembly. National Assembly. Okay 2 o'clock we'll reconvene.

(LUNCH)

Chairperson

...Pardon, ja that's what I thought we needed to deal with quickly but the one other person is not here and I've been requested to to devour that one to slightly later because this one other person is not here. Pardon, oh, (laugh) the one other person has now arrived. Okay. Comrades we're now, I apologize Ladies and Gentlemen, we're now required to deal with the National Executive. That is on page 26, chapter 5 for those who don't know where to find it. Now the Executive Authority of the Republic. The Executive of Authority of the Republic is vested in the president. Now generally all these clauses are agreed. The only one is really clause 85. As well as 93. 83 and 93. 93 is still being debated and so on and so on. Now how do you all propose that we should deal with this one? Mr Moosa

Mr Moosa

Chairperson we did have bilaterals as you asked us to have since the last time and I think there has been some degree of progress in this matter. So as I understand it that option 3 as it stands in clause 85 is an option that is not being necessarily advanced by any party in that form. And that none the less both option 1 and option 2 may not necessarily satisfy everybody but I I think that if we now remove from section 85 option 2 and options 3 and taking into account because the discussions in the bilateral level are not complete that if we note then in the side bar that I think in particular the National Party they want to add add further provisions as option 1 stands. So that within the conference that option 1 we will add additional mechanisms. I think that's what came up in the bilaterals as far as I understand. The National Party exclude that itself. I know that the Democratic Party was quite impressed with the option 2,???. But I think that within option 1 we can even accommodate the concerns that were articulate in the about

the DP. So perhaps somewhere along this line we may be able to take this stand further.

Chairperson

Right so we looking then at three options. Three options. Option 1, option 2 and option 3. Mr Moosa says nobody is really strongly advancing option 3. Three. So if that is the case I don't know if Mr Moosa always tells the truth but I take it that he is this time. We scrap option 3. Is that, ah you see Mr Moosa not always on target with the truth. Mr Meyer

Mr Meyer

Chairperson I believe Mr Moosa referred to a tacky. He's probably correct in some sense and I have to qualify in another sense. I think what Mr Moosas saying is that no party that we are aware of is necessarily of the view that the government of National Unity as it is now being addressed or prescribed for that interim Constitution should be continued with in that way beyond this Constitution or period that it is entrenched in the interim Constitution which is the 30 of April 1999. I think that point has been made clear as far as I know on many occasions. 1999, the government of National Unity therefore as it is now prescribed or provided for would not be the favorable ? of the in party beyond that period. There is however from the point of view from the National Party Chairperson a desire that we should look into how Multi-Party participation in the affairs of government in one way or the other can be ensured because we believe sincerely that in a country like South Africa and taking all the circumstances into account that that would be a natural desire that on should look into. An one tends to think that there is proof for that point of view

Chairperson

There's been a survey

Mr Meyer

also, there's been a survey, (laugh) I can see that the Chairperson has taken no (laugh) what is remarkable Chairperson while you are referring to it, I must observe the point that you first referee to the survey just now (laugh) that one, if one looks at the survey, (laugh) ??? (laugh) Now the interesting part is not to look at the so called opinion leaders according to survey but actually what the public says in terms of the survey ???. Because I would agree to those that observe that the that the survey in terms of the pub.. opinion leaders was probably misconstrued as a result it didn't reflect ??? the opinions of the majority of of

those that could have been surveyed. But I think the survey as far as the public is concerned is a bit of a different. Now I'm not basing this from argument on this but just as a matter of interest I think its important to make note of this. Because I think it appeared from this that ANC supporters are second to the DP most probably in favor of the continuation of the government of National Unity. (Laugh)

Chairperson The DP's supports it even stronger (laugh)

Mr Meyer According to this the ANC supports says 66.4% yes, the principal of the government of National Unity should be included in the final constitution and the DP 81% (laugh) and the National Party supporters runs only third. (Laugh)

Chairperson No I think we should ask Mr Eglin to speak

?? That's a good question, why don't we.

Mr Meyer Its only the Freedom Front that's ?? 40% only of their supporters say ??

Chairperson Only 40%?

Mr Meyer Only 40%. But what is further more of interest Chairperson is the is the results province by province. Because in the case of the provinces only 58% of the people in the Western Cape ??? In Northern Cape its 67%. In Eastern Cape its 72%. In the Northern Province where the ANC supported if I remember correctly as the strongest is 72%. So if they really feel a need ?? in that province that something like the government of National Unity should come their way as well. Chairperson I want to know what do surveys mean because this was a survey that was done by on the national basis they surveyed more than 2 000 people around the country in each province.

Chairperson Is this the Prof Somebody.

?? No that is not the Professors

?? That's not Prof Kotzee.... its another one done by Maart ??

Chairperson Who commissioned it?

??

??

Chairperson

Well I think that's something to take note of. I think you'll all agree.

Mr Meyer

I was, I was not going to argue the point but I'm glad you also see it that way Chairperson (laugh). The point is Chairperson that I think the view that the National Party always held about this issue ?? Provisions should be made on how in the country like South Africa in the affairs government at least an input also be made by those parties that might not be necessarily majority parties. And that not necessarily be conducted through the concept of National Unity as it stands now. And that I want to make very clear. But we believe there are avenues other than that that one should look at and that again I would be in agreement with what Mr Moosa is saying that then the further discussions are taking place and that particular possibility and that we therefore should not conclude our business in the Subcommittee yet on this issue and that further getting rid of our deals can still be ?? in order to give further direction to this debate. I think that is more or less where we stand at the moment so ??????

Chairperson

Okay so you are essentially confirming what Mr Moosa said that option 3 would be discounted but in the further bilaterals that you are having you may be looking at whatever options you may be able to come up with. So 3 falls away. That's real progress you know in this regard. This is really good progress. We're now reduced to two options. Dr Pahad I'm not going to allow you to speak yet

Dr Pahad

I would be understanding???

Chairperson

Without

Dr Pahad

???

Chairperson

Yes further discussions amongst the parties are

Dr Pahad

Might result in new options

Chairperson

Which might resolve in new options. So you think you might have other options other than 1, 2 and 3. (Laugh) I'm trying to narrow them just to one option. Okay Mr Moosa, Mr

Meyer. Mr Dr Pahad I'm not going to allow you to speak now if you don't mind. I'd like Mr Eglin to say something because he is one of the other option although today we now know that he should be advocating the other option more strongly. Mr Eglin

Mr Eglin

...? option three. Just like to say we were also surprised at the result of the research which was done on behalf of the National Party I assume (laugh)...why did those Democratic Party people vote for a government of National Unity. We found of cause the longer the National Party stayed in the government of National Unity the more we will win votes from the National Party (laugh) subjective point of view rather than an objective point of view (laugh)

Mr Eglin

Chairperson I would ask very seriously that option 1 and 2 will stay on concurrently with further bilateral. Look at them one other than the use of the word Prime Minister Deputy President is identical. Two other than the use the Prime Minister Deputy President identical. Three other than Deputy President Prime Minister identical. So if we in change those words or change what you wish. The only one that option 2 does, it says that as far as Chief person to assist the president whether he is the vise President, you can call him that or whether he's the Prime Minister, each should have some specific theme defined constitutional function for. And we would believe that one could explore this still further to see whether in fact it can be carried on the vise President or whether it should have a vise President or a Prime Minister. And I think the suspicions of elaborate between those two proposals. The first three one panel. Four add some Constitutional functions to the person. Those are essential. We would argue is it ?? to have those Constitutional functions required and we would hope that some bilaterals one can reach agreement on the terminology to describe these functionary's and the exact function in terms of the Constitution.

Chairperson

Okay. There's Mr Eglins proposal that you leave option 1 and 2 as they are. Okay Mr Dr Pahad

Dr Pahad

Chairperson I would have thought that coming back to what Mr ?? said is that basically you have one, option 1, what he then said was that some of the provisions of option 2 which are not the same as option 1 except as Mr Eglin was saying

is that indicate deputy President or Prime Minister would be considered but but its in a bilateral with both the Democratic Party and the National Party because its quite possible that some of the provisions would be incorporated into option 1. There is the position still remains the same with whom that that would help the Deputy President and ?? that matter of words. It can be solved fairly easily. So I I would suggest that now that option 3 has fallen away, we have made advances. We think that we can incorporate some ?? the Democratic Party ?? bilateral discussions with the National Party and if we were to wait to the end of the month, ???? will leave ?? behind and actually produce some ?? proposals with regard what is raised. The the then we can have a discussion. So on our side we are still very willing to to see what proposals the National Party can come up with in connection with what Mr Meyer had said. But I think you should be able to decide when we've got enough and everybody in this room agrees except ?? but dream on that the government of National Unity refer to the Constitution is out and no longer forms part of the discussions we have about ?????

Chairperson

All right. You know okay let me let me hear. I want to hear what Mr ??? would say first.

??

??????

Chairperson

But please,

??

but the involvement of Dr Pahad in this debate compelled you to do so. The fact that we will agree that option 3 fall away must be understood in the light of Mr Meyers explanation as the Secretary General rightfully pointed out. (Laugh) What we do not abolish is the principal of multi-party inputs on one with out the way as far as the Executive is concerned. And the National Party will consider proposals as far as this is concerned. So the impression that that the system of government on National Unity just falls away is not representative of what is said. The the principal of multi-party involvement in one of the other way as far as the governmental process is concerned doesn't fall away.

Chairperson

Mr Moosa

Mr Moosa Chairperson just to be in points in which Mr Eglin made and Mr Pahad and Dr Pahad, sorry (laugh) from the university of ??? (laugh)

Chairperson Come on you didn't have to add that (laugh)

Mr Moosa Chairperson I want to see whether we can we can do away with the two options because neither option 1 and 2 and Mr Eglin said bilateral. I would just test whether we can do it right here now because there's not no rule against us actually for us to have a serious discussion here. Not always mean you have it in bilateral.

Chairperson You're removing the secrecy out of all these bilaterals that you're having

Mr Moosa No I don't know Mr Eglin is strongly about the term Prime Minister. If he does then I would say we put in something like that the President stroke Prime Minister to show the differences about the term that is used. But I don't know whether he's if not we can drop the term Prime Minister if he doesn't feel to strongly about that the only place where there's a difference in option 2(4), know I would say that even from even the experience which we've had already, if you take 4(d) in the absence of the President must decide the meetings of the Cabinet. Now that is the sort of thing which which would happen in any case if there's a Deputy President or a Prime Minister in absence of the President, its so unlikely that that you know some somebody else is going to chair the recital of the meetings. And the the so so that I would say need need not be there. All see one has a some concern about about whether we want to say must co-ordinate the work of the cabinet. Its al... almost like saying that the President should not co-ordinate the work of present of Cabinet. You want this sort of task to be a kind of delegated task that the President delegates it to the Prime Minister or the the Deputy President as such because it gives the impression of to the exclusion of the President. As far as (a) and (b) is concerned, that we could take on board in our option 1 and say you know Deputy President or Deputy President stroke Prime Minister must assist the President is the leader of government. Those two we think can be taken on board. That's the basis for us making it one option we have been through it right now. Chairperson.

Chairperson

How do you respond to that Mr Eglin

Mr Eglin

Chairperson I was going to suggest a formula by which we could still have something's in brackets but only have one option. And that is you ?? a Deputy President occurs in 2, 1, 2 and 3, you could put in brackets Prime Minister. You can put the whole of 4 in brackets for the moment. I think we should explore it. If we say our our point of view because I think this needs to be watched perhaps, all along but sometimes ??? your the practical position is the President is to be well actually 3 if he's also a leader of a party. In the constitution is the head of the state all the functions lay on the tables, is also the head of the government and all the functions of those in turn are it seems the general view is that for practical reasons he's got to designate somebody to carry some of the functions of the Executive, not necessary with state. Now the problem about as soon as you have a Deputy President is either the Deputy President for the Executive purpose or is the Deputy President to shadow the President as head of state. There are two functions. In other words if he is in that function or is he doing what I call the Executive function. We would actually prefer a Deputy President head of state and somebody else, the Senior Minister, to be running the Executive side of things. So we're not opposed to having that. All we want to say is that I think its going to be necessary to see is given the work load that one has experienced in this country of ours to see there's a systematic way which the two functions of the President be assisted in a formal way excluding those functions. So we would be quite happy to have a Deputy President and Prime Minister or a Deputy President who is effect the Prime Minister. I would prob., the problem is he would be off today whilst he'll be off to somewhere else to do what I call the head of state functions not the Prime Ministerial functions. And we've not sucked this out of our thumb. This came originally from the French concept where you have ??? but you also have ?? who's then the Prime Minister of ??, ??????. And it can be specific clause for to take from the ??? Constitution. ??????.. we also have the Deputy President ??? with him, so remember they will President the Deputy had what I call head of state function and there's a Prime Minister in executing to the Executive function. And we would just ask that we're not going to die the last edge of things. I think there's a more practical way of giving

expressions to the needs than it is at the moment. And we would ask ??? fuse it into one complete brackets because ?????? of the draft and just concentrate on the remaining ????

Chairperson

Thank you Mr Eglin. You know I I thought Mr Moosa raised specific questions and started moving towards a you on point 4(a) and 4(b) and essential is you do not need a (d) because what the deciding Cabinet is to who should reside is there business. And ordinarily I mean it could be the Deputy President it could be another Minister. I don't know what happens there but I'm sure they obviously know what they do there. I don't know whether we want to prescribe for that. So that's what he raised. The other one is that if you say 4(c) essentially saying the President has more business in coordinating the work of Cabinet and what if he wants to. So I didn't here your response on that, unless you made, you gave the response when the other person was standing here and disturbing my hearing. That's Mr Meyer. I didn't hear your specific response on on those two. Because I thought what Mr Moosa was saying is that we could look at 4(a) and (b) and see how closer we can move to you. In the end we could then have one option only. That's how I'm just being very objective on this whole matter as you would have noticed.

Mr Eglin

Chairperson I moved towards ??? to say you could have one option with some brackets for the moment...

Chairperson

Yes

Mr Eglin

... and that's all I'm saying. You won't have it so as two competing options ????? to discuss to see how we can resolve or remove the a, b, c, d, out of form

Chairperson

No no but he was also saying lets deal with it now, here in the open and not in the secrecy of your office. I mean the Deputy President has always told stood for openness and transparency. Now you're allowing the ANC to take a lead on on you on this. They're a very secret organization, the ANC lot.

Mr Eglin

Houses being on the table the last four months with the motivation which is contained in our document that we pro....we've got no problems about about the motivation.

When the ANC is fine if it suites them we should do it in open, if it doesn't suit them it ???? rules are more effective. I don't know what goes on. I they could do it there the National Party will then lets go do it behind closed doors. If they think its better that way the discussion lets have an open discussion. I say lets have them both (laugh) I will say this though when there's a Prime Minister or the Deputy President 4 could be that in the absence of the President he does preside the meetings of the Cabinet. But that that is it should be a practical reality of that. I seek no reason why one shouldn't say it. The wording must co-ordinate that is actually incorrect it should be must assist because all of these functions are to assist the President. He cannot take over from the President and to see to co-ordinate. So the rigidly by say from the Namibian constitution was must assist (a) the President Execution of functions, (b) must assist as the leader of government business in parliament, must assist in the co-ordination of the work. In other words what it did was to define somebody in the Constitutional terms you would have the responsibility of assisting the President and because of the importance of the Executive function we still believe that its desirable.

??

But Chairperson it will be useful sorry just to know exactly what in the meeting the Constitutional says about Mr Eglin bases. ??? must assist in the co-ordination of the Cabinet work or must perform the co-ordination. That's different from what you've got here. I think that that makes all the difference.

???

What do you mean makes all the difference.

??

Come on come on, that makes all the difference and if got if you want to put in the word assist I think that we can it it makes its really the same as ...

???

What's the difference

????

First we should do is this

????

What's the difference if (a) says must assist the President in execution of the functions government and (c) says must assist in coordinating work of cabinet. What's the difference. All right I just want to know. If there's no difference then we then we shouldn't have it.

Chairperson

To those of you who wanted to know how these discussions takes place behind the scenes, this is how they get on. Even worse than this. Prof Du Toit I've seen you. I've also seen you Dr Pahad, I've seen you Mr Andrew, Mr Meyer. I'm allowing one person one party type of intervention now. Mr Meyer

Mr Meyer

Thank you Chairperson I'm not about to interfere in the bilateral between Mr Moosa and Mr Elgin but I was I was really under the impression that the original proposal by Mr Moosa entailed that this matter be for the moment be left open regarding section 85. With the thought that we can come back to it with possibly some new suggestions that might have ??? back on more supposed options as they stand now and I was just wondering whether it would serve them any purpose to try and have take the discussion now any further as far as that is concerned. In fact new suggestions than come up might have even an impact on other clauses that of the same chapter that we have been discussing before and for that reason I thought that the appropriate way would be to to leave it there with the understanding that that option 4 at least option 3 lapses on the particular proposal regarding the existing preference to the Interim Constitution.

Chairperson

Okay we're back to the original proposal made by Mr Moosa. Mr Andrew

Mr Andrew

Chairperson not looking at specific words but in terms of what one tries to achieve in option 2 part 4, is that two things, one is having somebody who is actually responsible for the day to day hands on functioning of the Executive and given the responsibility of a President in this country and head of state and international kinds of responsibilities. At present they may be abnormally because the person that fills that position, but I have no doubt in the future, certainly compared to the past, that's still going to remain very considerable. So that's the one thing ones trying to achieve. Secondly there is the accountability of the Executives to Parliament. Not just in an abstract sense and in terms of no competence motion, but in terms of master ability to what the government is is up to and is the leader of government business in Parliament is not necessarily sufficient because the person, that can be a technical kind of leader as

opposed the answerable for the performance of the government on a sort of day to day basis as opposed to sort of big deal no competence type motion for which the President is clearly overall responsible. And I think those are the things that one is trying to achieve. And I I think eliminating (c) and not putting anything in its place still need a void in that regard.

Chairperson

Okay. All right then Mr Prof Du Toit.

Prof Du Toit

Mr Chairman, why its a very interesting position being standed by Democratic Party here. The problem is that this French type of model to bring it equal, is that you're, the problem is then your cabinet does not consist of the President. The President is then not part of the Cabinet. Now if if if you bring in the a Prime Minister a vice President is not only as head of state functions different from a Prime Minister system. It its more than that. The the Prime Minister's function in 4 as stated there, 2 is already its normal house leader that's the function there. Not necessarily something extra. The problem is that you must either have the vice President or a or a Prime Minister if you have both you're going to restrict the vice President to to functions which is is only connected to the chief of state. But the ?? is that if you go through with it a Deputy President as well as a Prime Minister then you must think of the composition of the Cabinet in the sub 1 clause as well. Because you can't name the Deputy President of France.

Chairperson

Dr Pahad

Dr Pahad

Chairperson there is a bit of a problem. When we began this process we set up three things and one of the ideas in the Theme Committee was that political parties would present views would also test to what extends some of these views have had a support and and as the process went on now in the ???? that some parties may have had but ???? parties then no longer for the light of day until we come to this draft and and I'm not saying that the ??? parties has raised some of these issues many months ago and didn't get any support from it. And it cannot be now when you're then looking at option 2 all of a sudden a whole then the ?? thing takes place. Because other wise you'll run into problems with every single clause people will parties will go back to their original decisions. So I I think that posses for me a

problem in the way Mr Eglin raises ??? its really something the Theme Committee and note then whether that one particular part is entitled to make a distinction as in functions of head of state, functions of head of government, and what the Deputy President is supposed to do. Even ask him question whether he thought from our own experiences that the that the Deputy President conclude that and then answer in the ??? that I thought that from our own experiences that would be done. Secondly we then get confusion reigning in the rest of the Democratic Party, I'm not surprised they supporters of ????. You cannot say Mr Eglin that proceeding from the basis of the separation of powers and accountability to Parliament that (c) must ??? its nothing with ?????. In fact we, I thought Mr ??? was saying that (a) and (b) was acceptable to us because it does define a little bit more to function and that (d) is a legal government business in Parliament would then constitutionalise that its possibility that that particular office holder could be accountable to Parliament on behalf of the government. And if you think that ????? of them. It will then make the deed of the Deputy President accountable to Parliament as a whole on behalf of the government because the testing doesn't sit in Parliament but ?????. So that particular issue about accountability in my view is catered for. ??????? can ?????? more free language to to persists this with regard to this. I don't think what we should not do is then try to smother the things. What I thought Mr ?? said in the beginning what I basically was to have one option and in that one option a principal element of the Democratic Party ?????? and that was 4 and that there you put 4(a) and 4(b) because if you are saying must assist in the work of ????? cabinets you say there's ??????? one of the principals part to government ????????? does what it does. And so my own feeling is that if we could get that to what Deputy Minister ?????? proposed which is this to have one option and we then take into account the element of 4, but certainly on our side (a) and (b) that we could come to a ????? of this difference ?????? but if the Democratic Party ??????? insist that they want this ?????????? except that from the Deputy President then there's no way you're going to reach an agreement with that and you are not going to spend another six months discussing this particular issue. We've been through that stuff all ready. So I think it should be said that what is the direction that that they want to move to. The direction ?????? is to say there must be a ??? som..??????

but the power must be clear from the ANC's side we cannot accept these the powers of assisting the President with regard to ?????? and assisting the President with regard to a ??????

Chairperson

You know, thank you Dr Pahad. Mr Moosa you, you know this is not taking us anywhere. When we started to an open this with a report you were being all given an opportunity of making your political speeches. Sort of ?????? political speeches on an important question like this. Instead you're now turning this session into a bilateral. And I have difficult.....

Tape Five

Constitutional Committee Subcommittee

12 February 1996

Dr Pahad

...it would then make the leader of the Deputy President accountable to to Parliament as a whole on behalf of the the government because the President doesn't sit in Parliament but attends from time to time so that that particular issue about accountability in my view is catered for by the ???. If you think its not catered for then we can perhaps look for more plainer language to to assist Mr Edward's with regard to this. I don't think what we should not do is then try to smuggle in things what I thought Mr Moosa said in ??? what I basically you you have one option and in that one option the principal elements of the Democratic Party proposals could be considered for inclusion and that was 4 and that clearly if you put 4(a) and 4(b) because if you are saying must assist in the work according to Cabinet the same as assisting the President to execution of functions of government because one of the principal functions of government is is is to have a Cabinet to does what it does. And so my own feeling is that if we can get that to what Deputy Minister Moosa proposed which ??? one option and we then take into account that as elements of of 4 but certainly on our side (a) and (b) that we could come to a resolution of the ??????. Of this difference ??? to reach. But if the Democratic Party is going to insist that they want this Prime Minister who's going to be or she's going to be

separate from the Deputy President then there's no way you're going to reach an agreement with us and we're not going to spend another six months on discussing this particular issue. We've been through that all ready. So I think it should be cleared that what is the direction that that we want to move in. And the direction we want to move in is to say there must be a President somebody that's okay we can put ??? Prime Minister until we resolve that that terminology but the powers must be cleared from the ANC's side if we cannot separate the powers of assisting the President with regard to head of state functions and assisting the President with regard to to government functions.

Chairperson

You know, thank you Dr Pahad. Mr Moosa you, you know this is not taking us anywhere. When we started to an open this with I thought you were being all given an opportunity of making your political speeches. Sort of ????? political speeches on an important question like this. Instead you're now turning this session into a bilateral and I have difficulty following some of the things that you are even saying on. Shouldn't we then give you an opportunity of preparing your political speeches on this one. And grasp the nettle I mean we need to grasp the nettle on this one and not skirt around the issue. And finalize it. This was one of those issues that was finalized last in the interim constitution negotiations and when we do things at the last minute I'm told that you come up with the half baked type of solution. So let us make sure that we grasp the nettle area now and have this one resolved. How soon can we expect a reply from a resolution of this one? Mr Moosa you came up with a proposal. How soon can we expect your party and the other parties to have bilaterals?

Mr Moosa

Well Chairperson after the last input from Dr Pahad I heard Mr Eglin saying that he agrees with Dr Pahad so I (laugh) so its sooner than what you think. So lets hear from him first I would suggest. That's what he whispered to us over here.

Mr Eglin

Chairperson there are two elements to this that have the differences. One is whether you have a Deputy President or a Prime Minister or the third is whether you have them both. If we believe that the Deputy President can function as the Deputy President as conferred of state and also accept a slightly more formal responsibility in the executive field, we

are quite happy whether you call him a Deputy President or a Prime Minister. So that's not a problem from our point of view. But what we do feel if we look at 4, we would, I mean what go back refiners we will say that yes (a) and (c) are in fact a coincident to assist the President in execution of functions of government is in fact the same or could include must co-ordinate the work of the Cabinet. So that those (a) and (c) could be conflated. But if we think that the concept that there's a specific person designated to assist the President executive functions. There's a specific person to be the leader in Parliament is it necessary? And we think its also appropriate that it should also mention that in the absence of a President he has actual presides at the meetings of the Cabinet. So we would see that (a) and (c) can either be rolled into one or we can just leave (a). We would believe that (a) (b) and (d) could be left for further refinement by way of bilaterals.

??

Chairperson I think we're we are now in agreement from if I listen to Mr Eglin because we now say the following; we remove option 1 and option 2, its now no options its just one formulation. Cabinet consists of President, Deputy President and Ministers because Mr Eglin says he doesn't mind the term Deputy President so we put 1, 2, and 3 as in option 1 then we put 4 from option 2 and then we say the Deputy President (a), (b) leave our (c) and then your (d) becomes your (c) and that's it and its settled. Chairperson.

Mr Manie

I will agree with that (d) I don't think it needs to be there but its fine if its there, to say the Deputy President will chair when the President is not at house. Its obvious to me but Constitutionalised neither here not there frankly Chairperson

Chairperson

Okay I hope somebody understood what Mr Manie is saying (laugh) good. If you've you've understood? Okay you shall leave to better than I do. Right so we then have one option and discussions will continue to see what other type of involvement on a multi-party basis and National Party can come with then in the executive. Having done that I think we can then move on to 79 (3). No we don't need to, so why did you say we did. Oh okay. Right now we go to 93, I really apologize. 93 - Its still being debated. A decision on a snap of mid-term election is necessary. The Parliament is also preparing an opinion.

??

Do we have such an opinion?

Chairperson

There they holding their hands. Have you managed to prepare an opinion yet? No.

??

There is no final opinion Chairperson. It is on a rather long list of assignments to the panel. It is not being forgotten. It is on our list, on our agenda.

Chairperson

Should we wait for the panel to give us an opinion? I think we will have to. We also need to look at 93(4), the Corium for vote of no confidence needs to be considered. So can we get a opinion first where after we will discuss this matter and one hopes that at that time we will also have received further proposals from the National Party on how best we can resolve this executive issue. Prof Erasmus.

Prof Erasmus

We have had a little tet a tet amongst the members of the of the panel and we remember now Chairperson that when it was originally discussed that point that issue whether mid-term snap elections would be possible or not. Its really a political decision and this is is this opinion really depends on the indication that we receive....

Chairperson

That's right yes

Prof Erasmus

....on on that particular point.

Chairperson

Well the panel has said that that they don't think they are capable of giving any advice on this matter. They just have no capacity, no ability, (laugh). I think we've heard what the panel is saying. They would like a political decision to be taken and we can then refer something back to them that they can begin to work with. Advocate Jakoob You don't agree with that

Advocate Jakoob

No Chairperson maybe as well to let you know about another aspect of the matter in regard to which the panel was unanimous when we discussed it a couple of weeks ago. And that is that in this kind of system it makes no difference, it makes no sense rather to distinguish between votes of no confidence in the President. A vote of no confidence the President and the Cabinet and a vote of no confidence in the Cabinet alone. Because it really the President who will appoint the Cabinet. They just want

entity. And therefore any solution to which you come must bear that in mind. That there's no no sense in making that distinction which has been made in in the present section 93. Thank you.

Chairperson

Thank you. I don't think we should discuss it now. Its something that you have to bear in mind as we well let me just correct myself, maybe to question to all of us do we want to discuss, debate this matter now? Now that the panel has thrown it back to us. Dr Pahad

Dr Pahad

Well I I would suggest that we don't discuss the matter now but from my own point of view we would need to take into consideration the views like depressed by the panel 'cos we have left it up to them. But I would like to ask them a question if I may through him so that we are certain ??? by it. The situation as you know is that if you don't have a provision for this and the government of the day wishes to have a straight general election for one reason or other, without an additional provision it means the government of the day would have to declare a motion of no confidence in itself. Because there's no other provision for it. Now that may possibly happen that posing the question, complicate the matters for the government of the day because there they deter motions of no confidence in itself and then then now to go to elected and say please vote for us again so I I'm saying it does create a problem I think and like you to to just ponder on that question. The the second part of that question was on the side of the Deputy President there was a suggestion that what the Constitution should do is to say that the term of Parliament is fixed for five years and that we don't alter that. That's how I understood Mr Eglin was raising his issue. Then with saying but that made it very difficult because then again you need to ????? terms and that our own understanding of other government was that there are other possibilities of of having snap on mid-term???? and and that's why the question was the panel of experts were asked to to consider this. And I wondering whether you could, I mean its not now, you could consider what I'm raising and then perhaps give us another opinion either tomorrow or something so that we could discuss it. But but that problem does not disappear by the answer given to us by the panel of experts. A problem that that I'm making, I wonder if through you Mr Chairperson the panel of experts might want to just comment on that please.

Chairperson

Prof Erasmus

Prof Erasmus

Chairperson I think Dr Pahad has correctly pointed out now the exact point of sensitivity of us on the panel at least and that is that on the one hand there is a political view that Parliament should run for the full term. On the other hand there is a political view that it should be possible for the majority then to have a more accepted way of of having mid-term elections and what we're really asking is an indication of that choice. It is also possible if one looks at other Constitutions they have all sorts of other models in terms of constructions the works ??? to be considered and that we have dealt with some time in the past. But really the the choice now as been indicated and identified there is as we think a political one.

Chairperson

That's a political ... Mr Beyers

Mr Beyers

Mr Chairman, in in the Theme Committee it was agreed anonymously among all parties that there should be a fixed terms with the inclusion of the ANC. Yes sir you can go back to the minutes. Everyone has conceded that there should be a fixed term and that there will be no room for mid-term elections. So that has been agreed upon in the in the Theme Committee 2.

Chairperson

Perhaps Dr Pahad was absent that day. Prof Du Toit then Mr Eglin

Prof Du Toit

Mr Chairman in section 93, ???, the President has no own discretion to dissolve Parliament its only on motion being initiated by Parliament of no confidence. Perhaps we could just request a just for information sake request the panel to draft a so called semi-constructive vote of no confidence. That's the one where a

Chairperson

A semi what sorry repeat that

Prof Du Toit

A semi constructive vote of no confidence. That is a just a thing where Parliament takes a motion of no confidence then the the option rests with Parliament that before its the the its not the discretion of the President immediately to dissolve but after lapse of say 10 days in which Parliament can appoint a new President in which the case the other one

resigns of cause, only then if they don't appoint a new President then can Parliament be dissolved by the President. So ...

Chairperson

Thank you

???

Its in Kwa Zulu Natal negotiations there construction rate (laugh)

Chairperson

I don't understand what this commission is all about. What's wrong with Kwa Zulu Natal? Mr Eglin

Mr Eglin

Chairperson before I just deal with the fixed term, ???? has expressed an opinion that makes nonsense to have a vote other than the President separated from the vote of the captain including the President. It may all be say or not can we please have a learned recitation on this because its the first time that we've heard this. That the panel is not expressed it in any particular terms. ??? there is a good case for having the President separate from the rest of the Cabinet. 'Cos what is voting a vote of no confidence in the head of state for instance as opposed to just the function views of just the Cabinet. But if that is the view of the panel I would ask for a ??? some document which re-enforces that particular view. So I don't want to get involved in the debate on it but its been scrubbed on us as a view of the panel which we've not seen before. Chairperson all we and the Democratic Party have a view is that given given the logistics of our country, of holding elections, we should strive to see if we can have elections at fairly regular intervals. We would actually say they should be fixed intervals of give and take we said five four years with an adjustment of a month either way as a standard. Sweden is actually on the third Sunday every forth year. They argued about that. There may be circumstances when in fact that rule has to be broken because a government has fallen and you cannot re-instate a government. There may be specific reasons. But we don't think it should be the option of political parties to spring elections on us. But what is interesting about the proposal that if it is vote of no confidence in the President whether he was not elected by the people, he was elected by Parliament that if in fact you've got a vote of no confidence in him and his Cabinet, he's now in a minority position in respect of Parliament, he should decide to have an election. We think that it is quite

wrong that a person who has lost the confidence of the very body that elected him should then have an option to dissolve the body that elected. So we believe that I don't want to cast it in stone, we think as a general rule we should have a four year term of office. And if there are exceptional circumstances where there is a break down and you can't establish a government because you might need a constructive vote of confidence in order to repair the damage. You can do that. When other countries say and if after 21 days of what in getting rid of the President or whatever it is, you cannot Parliament is unable to find a new person then you have to have an election. All I'm saying is I think we should we should try to work towards seeing whether for the sake of a sequence for the elections both ???? you can't work towards a fixed term. And only on breach of the fixed term when really severe circumstances. In other countries when you break that sequence the election is only for the rest of the term of that Parliament. Like right at the moment as of the present Constitution if by some set of freak set of circumstances the government fell, there would have to be an election. And the election would only apply until the ??? of April 1999. In other words it wouldn't be for another five years. So you can even say if you have to have an election because there's no stability in government whether they should start a new series of four years at a different date or whether it should just be for the rest of the term for that particular government. We would ask very seriously that whether the costs, the logistics, the dislocation and all the rest with having elections we should try to find a system which has elections at regular intervals but perhaps with very rare exceptions if in fact Constitution it is necessary to do the other.

Chairperson

Thank you Dr Mr Eglin. Let me just ask something. Have you all had an opportunity of ca... I mean of having bilaterals on this matter. I seem to be hearing the same inputs and debates all over again. Mr Eglin I mean he's always eloquent and I've heard him put this point across. I think 5 times. Now the question I would ask is have you had an opportunity of discussing this amongst yourselves? You haven't. Why? If not why not? Have you had an opportunity of discussing it? Now. You haven't discussed this matter? No. It is quite clear you haven't.

Mr Eglin We haven't we just thought that the ANC was thinking about it. But what they would indicate they haven't even thought about it.

Chairperson Dr Pahad

Dr Pahad Ja that's why we need the Democratic Party because we never thought before we met them. It seems to me Mr Chairperson that that we could find a a a solution to this problem. If you hear it may require that we just meet with with the Democratic Party and National Party to to quickly sort this thing out. I think its possible that if we then took section 46 under Parliament. I think its quite possible to to look for some kind of formulation there that could resolve help resolve the problem. So I would I would repeat to just then maybe give us a chance at the end of this if if Mr Eglin is not going to deal with with the matters that all come on subsequently that and Mr Beyers from the National Party that we could perhaps then just have a quick multi-lateral and resolve this problem. I think its possible to resolve this some time today.

Chairperson Okay the only reason that I'll agree to this matter being dealt with at late as that, we still need to deal with the question of the Executive. Say for those two I think we can agree that this chapter is completed. There is nothing else I would think we need to deal with. Mr Eglin

Mr Eglin Chairperson in ever studious Ken Andrew reminds that under 78(3) page 26 (d) of cause would depend upon the discussion of clause 93.

Chairperson Sorry just repeat that Mr Eglin

Mr Eglin On page 26 78(3)(g) that would be dependent under the decision you take under 93.

Chairperson In indeed. Ja I think the right view and all

Mr Eglin Seeing that there's been a view expressed I don't think its been canvassed sufficiently. That is these are powers where the President may act alone. And it is the question of a credit in foreign diplomatic representatives and then appointing ambassadors. The credit in foreign representative, we have really no control over that because

they are a nominated by the other party. Other country. But when it comes to appointing ambassadors, whether in fact it is not a function we should be taking in consultation with the minister who's in charge of the portfolio of foreign affairs. In other words we have doubt as to whether the appointing of ambassadors is a Presidential prerogative or whether it flows from his executive powers as the head of the cabinet. We would suggest that its more appropriate that it flows from his power as the head of the cabinet not as the prerogative as head of state. We would not include that in this ?? it wouldn't would it?

Chairperson

Dr Pahad

Dr Pahad

I'm saying once more we're running into problems. I I don't know. We discussed these matters, I must repeat Chairperson in the Theme Committee for months on end. You were not there Mr Andrews, Colin was there. And he raised it. And we discussed this matter and made it quite clear in that that in our view, and I thought we had agreed with the National Party on this, that its the President who where ever you put it is is another matter. We would then also appoint ambassadors. Your view was different. You wanted the President and somebody else to to, let me finish, and if if your position at the present moment, I want to understand it, is that the President still retains the power to appoint ??? then where it goes is is a matter we can resolve in in a matter of seconds because that is just a question of where you put it in in the Constitution but the front of that point about the right of the President the authority given to the President to appoint ambassadors in our view should not should be be Cabinet.

Chairperson

Can I suggest that this should be one other matter that you discuss amongst yourselves. Other than those two and this one point that Mr Eglin has raised which I think you will need to discuss amongst yourselves. I'm noting two. This chapter is is almost complete. Mr Hofmeyer.

Mr Hofmeyer

Chairperson we just wanted to raise one issue that I don't think we want to express a strong view on. But that just the panel should investigate it. There is the power of the President to distr... to declare a state of war and a state of emergency that we used to deal with explicitly under the old Constitution. It is not mentioned here at the moment. It is

its mentioned only under in the bill of rights under section 36 and I think what may be useful to to look at, is whether that section 63 (1) and (2) which deals with a declaration of a state in emergency and the need for Parliament to ??? such a declaration within 21 days. Should is not more appropriately place here than under the bill of rights. So we would just like something on that. We've not had time to canvas it fully even amongst ourselves but I think those concerns were raised.

Chairperson

Okay. You'd like to know whether its not properly dealt with under here rather than in the other one. Okay. Okay. That's two you will raise amongst yourselves. Okay that seems then to conclude our discussion on this chapter we will set a date which we should come back to it. That will then take us to the chapter on the Administration of Justice. And it is at this point that I'm able to announce happily that we can break for tea. Tea was scheduled for 3:30 its just a few minutes before 3:30. Its a tea break now. Thank you.

(Tea break)

Chairperson

It looks like a number of people who were in this meeting have left. One hopes to do work in other places but happily we've also been joined by other people who have joined us in this meeting and they're sitting on my left hand side. This is my left. Observing the proceedings. I don't know where they come from. But I can see that they're keenly interested in watching you all in action. So lets make it worth their while but please don't make it too entertaining because they may have a very dim view of what you do here in Parliament. And we do the courts and administration of justice. The there was a consultation with the courts or better still with the judges from the Supreme Court, Constitutional Court, a number of legal organizations and the consultations seemingly has produced the report that we now have. Or draft formulations that we now have. Mr or better still Senator ????? informs me that there are there has been a great deal of progress but there are still areas where we will need to to finalize a few things. Senator do you would you agree that we should just very very broadly look at the various sections. 94, yes 94 is there anything you would like to say.

?? That is so, yes sir, on 94 (1) we would like to substitute the preposition of after the word authority within as advised by the judges. This comes from the consultation that we had. I with mission.

Chairperson Judicial authority in

?? That is correct sir

Chairperson Very good. Lots of progress there.

?? We'll listen to the advice from the judges.

Chairperson Thank you

?? And then the next thing we've agreed to the inclusion that is 94(4) to the inclusion of the word access ????. That's been agreed to. And then 94 (5), again we agree to the changes that have been brought about. But we have ??? that section because we still want to think a little bit about its implications. So that's those are the changes in 94
Chairperson

Chairperson Okay. Any problem with those changes? Dr Van Heerden agreed? Mr Gibson agreed? Right 95.

?? Yes in 95 (b), you will note that the Supreme Court of appeal is placed in brackets.

Chairperson Yes

?? We want you to remove the brackets there.

Chairperson Thank you

?? All right. And then in 95 (c) we are thinking....

Chairperson Thinking

?? ...that we should probable add after the word establish the following; to hear appeals from the High Court, we've asked the experts to look into that formulation.

Chairperson Okay. Good.

?? That is all in 95

Chairperson That's agreed to then? Agreed to. 96, Constitutional Court.

?? The, I just better say 95 that the other formulation has been agreed to. That is in?????. That has been agreed to.

Chairperson Now (e) then reads any other courts established in terms of an act of Parliament including courts of a status similar to the High Court or the Magistrates Court. Reference to Traditional Courts goes.

?? In including any other.

Chairperson Ja. I mean specific reference these. Have you checked this out with the Traditional Leaders?

?? We we we Chairperson we were elected by the Traditional Leaders as well some of us so we do represent our interest too.

??? Chairperson I haven't concluded to you sorry that Senator ??? may even have blue blood. (Laugh)

Chairperson Okay. We might just need to test whether he's he has got blue blood. All right.

??? Chairperson could I just add that our experts said that we should flag the question of a transitional mechanism for the Traditional Courts. We're not quite sure of that but we're still going to get it right.

?? I I confirm that Chairperson.

Chairperson Are we now with the Constitutional Court?

?? No 96

Chairperson 96.

Senator ?? Here true issues. Section 1 contains both the question of jurisdiction as well as composition. Interpret it Chairperson. Or isn't that the way the Chairperson is left unceremoniously.

Chairperson

I didn't want to disturb you Senator

Senator ??

Thank you sir. I was saying section 1 contains both the issues of composition as well as jurisdiction. We said that we need to separate the two. So that has been agreed to. Secondly that we want to add the word on in the first line and the sentence would then read as follows; the question of court is the highest court in the all Constitutional issues. All right. And then we delete the words which are in brackets and this decisions bind all other courts, we delete those. Right. That's then the agreement.

Chairperson

Okay. Agreed. Thank you Senator ??.

Senator ??

Then on 96 (2), that has been agreed to. 96 (3) we we are thinking again here that in 96 (3) (a) we need that section to be re-formulated. Maybe we should talk about the powers and duties instead of issues because then we talk about decide disputes and Constitutional issues between ??? organs of state at National or Provisional level. Consideration has been given whether the words powers and duties will be appropriate in this section. The experts are looking into that. And then in section 96 (3) (b) we deleted the words proclamations in in in brackets. And we are also considering whether we should not remove this clause from this section. So that it becomes a separate section.

Chairperson

All right

Senator ??

Although at the present moment it does create some confusion. There is a feeling that based on our consultation last time there was a feeling that a other courts do not have jurisdiction to look or to inquire into or pronounce on the validity of acts of Parliament, and provision acts and so forth. And therefore so we need to to clarify that matter because in terms of this draft they are now been granted that extra jurisdiction. So we need to consider because there has been given whether this section should not stand alone. So that there's clarity on this matter. And then in number 4

??

Mr Chairman may I Mr Chairman with your permission

Chairperson

You're welcome

?? Remember that I I just raised a matter whether we shouldn't pause to the advisors shouldn't also look at the possibility of what the situation with Ministers and ??? will be. I think that you can just mention that also.

Chairperson I confirm that, that matter was raised and the advisors will be looking into that as well.

?? And then on section 96 (4) we've asked the advisors and the experts to look into the question of leap frogging. Because we don't know if it is included in that section. And therefore to try come up with a formulation which will actually cater for that. Number 5 agreed to

Chairperson You are in agreement that this should be leap frogging should be possible.

?? That is correct sir

Chairperson And you just want to assure that it is written in there?

?? That's correct

Chairperson Right. Thank you.

?? Number 5. We've agreed that it must go, must be deleted.

Chairperson The whole 5?

?? The whole of 5

Chairperson Right

?? Then in 97

?? If I could just add sir your (c) reference throughout to Constitutional matter, Constitutional issue, and what we've done is to flag the definition of matter and issue just so that there's precision and not confusion eventually as to what we react to and talk about.

Chairperson Mr Gibson. I I'm sorry I missed out. Okay that is in in 69(4) you're talking about. Throughout co., you want consistency in that regard

?? You haven't for example in 96 (1), 96 (2), 96 (3) (a) and so on.

Chairperson And who will resolve that for you?

?? We're getting expert advice.

Chairperson You're getting advice. Okay.

?? I also confirm that here sir.

?? As being correct? And then we move to 97 (1). 97 (1) (b) we had it on good authority that this is not good English. Issues connected to appeals should be issues connected with appeals and maybe of cause I accepted that.

Chairperson Right.

?? And then 97 (1) (c). We've deleted the word exceptional. And the word National Legislation at the end of that sentence and we replace National Legislation by an act of Parliament. Right. So any other matter that maybe you refer to, it in circumstances define by an act of Parliament. Right.

?? You you you're doing extremely well and I don't want to be a nuisance but when one looks at at the general terms sometimes we talk about a National act of Parliament and otherwise or we refer to National legislation and sometime an act of Parliament I guess I now take it that that will be commented upon once we have the whole picture of the whole Constitution in front of us.

?? The the no the differences that legislation Chairperson includes proclamations and regulation which may be propagated in terms of an act of Parliament.

Chairperson Okay

?? In this instance we don't want that to happen. It must be an act of Parliament.

?? Okay, thank you for that explanation. Then 98 accepted. 98 (a) accepted. Sorry sorry sorry. 90 in 97 (3) sorry we delete that.

Chairperson You delete the whole (3)

?? The whole of (3)

Chairperson All right

?? Right. And then in 99. In 98 (2) right again 98 (2) is deleted. I'll come back to this later. Why we're deleting these and where we are making provisions for. Then 99, in fact in 98 (a) sorry, where is the proclamation. Delete proclamation and delete the President there. So any conduct of the President. 99 (1) (a) you delete must and substitute that with may and then at the end of that sentence you add the following; to the extent of its inconsistency. You can see that the parties are in agreement who know there's major issues Chairperson

Chairperson Ja well its wonderful

?? Doing very well

Chairperson You are

?? ?????

Chairperson No no no don't score points and disturb the peace. You are all doing very well.

?? All right then the next one Chairperson is 99 (c). In fact we have asked the experts to consider the Interim Constitution and check whether anything which is now contained in sections 104 to 107 or something....

Tape Six

Constitutional Court Subcommittee

12 February 1996

??either all those are contained in here. There was a human cry last time from the judges of the Constitutional

Court but we seem to have excluded some of the powers that they now enjoy. And they would convene you to have those powers and we didn't have problem with that. So we've asked the experts to consider whether in fact we have accommodated their demands. In in section 99(1) (a), (b), (c). Then in 4, 99(4), we are adding there National legislation and the rules of the Constitutional Court may provide for the referral of a Constitutional issue. Right. We are adding there Constitutional issue or a finding of one whatever of Unconstitutional meeting to the Constitutional Court. So we add Constitutional issue. But we that that formulation must still be looked into by the by the experts. It may not be appropriate or correct but the idea is that we want those things to be considered. 99 (a) we're not sure what this means. Not opposed with. We would like to leave it in but we are putting a big question mark next to it. We're still going to talk amongst ourselves and see if we agree with it. ???

Chairperson

99 (a) multi-lateral

??

It's multi-lateral yes

Chairperson

All right multi-lateral. The now can I just ask you sorry, Mr Abraham draws my attention to the fact that that we would appreciate some comment on 99 (2). Is there, 99 (2), is there anything you you can say that

??

99 (2) as far as ??? a delete proclamation proclamation

Chairperson

Delete proclamation proclamation and court of appeal brackets are deleted

??

Yes. All the brackets. All the brackets are out and then delete proclamation. The rest remains the same

Chairperson

Okay thank you.

??

Now the very important part Chairperson is appointment of judicial officers. This is 100.

Chairperson

Now don't, I just detect from your tone of voice that you put switching into another gear.

??

That's correct. I'm moving into top gear.

Chairperson

As long as you ...

??

This matter has been under consideration Chairperson since 94

Chairperson

94

??

That is correct. Since we arrived here, that was 94. You will recall. As another consideration since then, and we have been dead locked on this question since then. And we are still dead locked even now.

Chairperson

Now why are you...

??

Its a major major major issue.

Chairperson

Why are you guys now ruining a friendship. You were doing so well.

??

That's what I can't understand from the National Party Chairperson. Its clear, its clear in our minds that we want to continue appointing their own judges. And we can't accept that. Chairperson we remain dead locked on these issues. This is the appointment of Constitutional Court judges, there's no agreement on that. I don't know now that in question of the National Executive seems to have been resolved. Whether the National Party are withdrawing their option 2. Maybe they ought to give us an indication.

Chairperson

Will I break the momentum of this discussion if I say lets note this dead lock and move on to to the other issues. We will return to the dead lock. Okay.

??

Thank you Chairperson. Then the next section is section 101, Acting judges. We would like to flag in (3) there the program is whether Acting judges must be appointed after consultation with the judicial service commission. In discussions with the judges and the the advocated and attorneys who were here last time, all of them without exception opposed to this formulation. They said it is not practical, its not going to work, particularly Judge President Freedman. He said we must leave the present arrangement as it is. Where Acting judges are appointed by the President after consultation with the Judge President they

want that to remain. So we we are flagging this matter for further discussion at the multi-lateral level.

Chairperson

Okay

??

The second question also which we had agreed with it but we are trying to, ??? the next question is section 108. Are you back with us now?

Chairperson

I I I as you noticed I had to attend to some serious bilaterals and I am now with you. Sorry.

??

The next section is 102. I'm sorry I said but I was checking if you still with us. Is 102. The this question of 9 years was raised very very seriously. Some would like Constitutional Court judges to appointed for life. And we should fix the retirement age. Right at 70. But there seems to be agreement amongst the parties that it must be limited to 9 years. So we are leaving this matter like that. No other party has raised this question with us again. So it seem that we're not taking the advice of the honorable judges in this instance. Of cause we do.

Chairperson

How is that gonna, okay, it

??

103 agreed to. 104 agreed to.

????

Sorry I I I didn't raise that during our discussions Mr Chairman but we were very much in a hurry. As you know that we only received these documentation this morning as. I I picked up a few things that I think isn't in here. You will remember Mr Chairman the Senator was, he actually stated the issue of 104 (1) sub (h). The whole question of together we said that something there must be done. All Senators designated together and the why can't we intake of a vacancy just appoint or elect the relevant houses another one. But I think the whole issue is still bracketed concerning the fact of the Executive isn't decided yet. I think that thing depends upon the final decision of the Executive. But I just want to point out the word together. That's one issue. Then if I may Mr Chairman there is also some of the remarks that we have in the in the margin on the draft that was served on the 22nd of January concerning concerning to be qualification. Namely what we've got here claim added qualifications so the vacancy would be filled by political

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party to which the relevant Senate belong. I think that is something that unfortunately I missed and I apologize ??? during our multi-lateral discussions. But I think that I would just want to point it out here that that was something that hasn't been provided for in in number (k). Now in in in this document of ??? ????? Mr Chairman and I just want to raise this matter here.

Chairperson Okay. Senator ?? I think we must

?? Can I can I just respond and say firstly as regards (h) you'll see that matter is still in brackets.

Chairperson Ja

?? Precisely because we have not yet finalized the issue of the second houses, second chamber and so forth.

Chairperson Right

?? So yes, we can put what he said in in our side panels.

Chairperson Okay right

?? Right. Also we would like to raise this question which does not appear here. I don't know whether we should raise it now.

Chairperson Please raise it now

?? The question of the National Attorney General. The question of the National Attorney General there is as yet no agreement on that matter. But I feel fairly confident that we will we shall soon find agreement find ???. I don't think they're still opposed to to the National Attorney General. I think its just a question of finding the right formulation. Am I correct ?????

?? You are correct

Chairperson Right can I tell you how I heard you speak. I there's a matter of appointment there's a dead lock on that. 101 (3) you flagged that. 102 I have a question mark. I'm not sure what a question mark means that but is that multi-laterals?

?? 102 remains as it is.

Chairperson It remains as is. Okay agreed. And the National Attorney General multi-laterals. Is that right?

?? National Attorney General needs talking

Chairperson All right now so is there anything you want us to listen to?

?? The last part is 105 just for the experts. We would like to add, we would like to add the following; 1, second sentence including program for judicial officers, procedures for dealing with complaints about judicial prog...officers and then rules for other courts. Right. Rules for other courts. But they can look into that formulation as were. Because we're providing, we are allowing Parliament to be able to.

Chairperson Right

?? Propagate rules for the functions. That is the report
Chairperson

Chairperson Ja you have you have worked hard and long. I wonder if any of your colleagues would like to add something because I believe then we need to discuss allow you opportunity to continue your lo... multi-laterals on the relevant issues and and see what transpires from this debate on the Executives. Because it it appears to me that is the central to the dead lock. Mr Gibson would you like to add something?

Mr Gibson Chairperson thank you very much. Concerning the concerning the process that you are suggesting. Concerning the Attorney General, I want the ??? of the breaks between the National Party and the ANC. And so its not some multi-lateral aren't necessary on that subject. I'm not sure whether the ANC has persuaded the Nationals to accept DP formulation so perhaps we wont have any difficulty. And then I'd just like to note the question of ????? review. Now I understand that the meeting this morning there was quite a big discussion about that ?????? chapter ????? Constitution. ??????????

Chairperson Noted thank you Mr Gibson

?? But Chairperson I thought there was an agreement on abstract review this morning. That it was discussed this morning and then agreement was reached.

?? Ja but I wasn't present at the meeting this morning and I didn't have an opportunity of consulting my principals.

Chairperson Mr Vermeulen. Dr Vermeulen

Dr Vermeulen Chairperson I just want to put Mr Gibson at ease concerning the whole question of the National Attorney General. I think that I just repeat what I said to a certain extent yes. But lets not argue that issue now Mr Chairman. And then I just want to point out Mr Chairman I'm not sure I've got to check now with the with previous minutes, I don't know whether I am certain you're just, I don't want to confuse anything here but I I am certain here in 104 (1) (I) that designated by the President in consultation with the Cabinet. I don't want to confuse the issue I just want to check whether we put that in in a certain at a certain meeting. I have checked here on the meeting of 18 December, but I must just have a look at the at the minutes whether that's in or not. And then also number 4 there, 104 sub 4 that provided it it deals with the decision taking mechanism of commission we said here that decisions of the commission must be taken by majority of its members and then I also made a note here on 18 December provided that in respect of appointment of judges it must be fully constituted. I lets lets just give me time to go back through my documentation so I just want to reserve my decision in this regard. I'm not so sure what we did and what we didn't do Mr Chairman

Chairperson Ja now please all of you

Dr Vermeulen I don't want to argue it now

Chairperson Ja I was just going to say that. Please don't disturb the peace and tranquillity that we have at this moment. Mr Mr Advocate you're very energetic in agreement by any authority. Mr Hofmeyer

Mr Hofmeyer Chairperson just to respond to Mr Gibson. I think there was an agreement this morning on a formulation that is forming the basis for discussion elsewhere in the Constitution. So I really would oppose as putting in flags here that are totally

unnecessary. I think if the issue drops out elsewhere then it it can be considered here again. On on on Mr Van Heerdens point I just think that the second issue that he raised is really I don't think being raised at all ever so perhaps it could be raised with us first. It is

Chairperson

It will not be discussed further

Mr Hofmeyer

Okay

Chairperson

It has been raised ????? and agreed so all multi-laterals, I'm not sure

Mr Hofmeyer

And on on the sub (I) proposal I think that was raised but the advice that we got is that this is one of the matters in which the President would have the act of consultation with the Cabinet anyway so it has and would be gained by repeating those words.

Chairperson

I I am going to give Advocate ??? an opportunity and then then I think we ought to settle this, this part of our work by agreeing on a new date.

Advocate ??

Chairperson thank you but I think I'm now covered by what Mr Hofmeyer said. The it is dealt with in section 78. This is the case where the President acts in consultation with the Cabinet.

Chairperson

Right Mr Ebrahim when do you want us to return to this? Is it Friday? Monday the 26th, and I think by the way you reported progress today it will be possible really to tidy up this junk, almost. Right Ladies and Gentlemen I I can I ask you something before I adjourn this meeting. The agenda for next Monday now before I ask Mr Abraham to do so may I request all members of the Subcommittee not to learn bad habits during the course of this week when they assemble in the ??? in the chamber down for business of the National Assembly and the Senate. We've made wonderful progress. Peace and tranquillity that's prevailing is always well for the future. Mr Ebrahim

Mr Abraham

Chairperson the next meeting of the Subcommittee takes place on the 19th that is a week from now and the matters on the agenda are the Senate, Competencies, as well as Provinces and today we can produce issues relating to the

National Assembly particularly section 41, 53 and 54 of the National Assembly. So those matters will also have to be considered at the next meeting of the Subcommittee on the 19th.

Chairperson

Thank you so much. Thank you Mr Ebrahim. I wish you well. Meeting is adjourn.

SIDE BAR NOTES

The seat of the National Assembly need to be re-visited

Technical team to draw up clauses necessary to give effect to Constitutional Principles and have a draft for 53.

Bills should bear costs as a replacement of 54. Experts will see if the draft can be changed. Experts to draft something new.

Three clauses to be taken into account and the DP will come back. The draft formulation will come back arising from the insertion of these three clauses with what we had in 54 or replacing certain provisions.

National legislation could provide for the exclusion of types of revenue.

When transfers take place the treasury must look at it. Remove all brackets 149 falls away. Original 193 too many exceptions.

193(1) National legislation wording to be considered. 193(1) to be harmonized with the Provincial powers issue and re-wording.

The refinement team to review point 2(b) and (d).

The draft should be re-worded to what was in the Interim Constitution.

Re-word : Nominated by the Executive Council.

The TRT are requested to look at this and advise as to how to deal with it : "In that the Auditor General, the public protector, the judiciary, people like that all go through a kind of sifting process whereby there is some or other judicial service commission or a special committee of Parliament that considers them and then its confirmed by Parliament and so on. So they go through that kind of process during that sort of matter can be handled."

The DP has a difference of opinion regarding the Reserve Bank powers and performance of functions. DP query 198 and request consultation with their lawyers and their principals

Removal from section 85; options 2 and 3.

Survey submitted by Maart ??? which was surveyed nation-wide regarding National Unity.

Option 3 falls away.

Discussions to be held regarding the Presidential powers of appointing ambassadors.

Discussions to be held regarding the Presidential powers of declaring a state of war and a state of emergency.

96(5) must be deleted

97(3) must be deleted

98(2) must be deleted

99(a) - multi-lateral, unsure, will discuss and see if agreed

100 - Appontment of judicial officers - under discussion. This is dead locked.

101(3) - flagged

104(h) - The matter is in brackets. Finalization of the issue of second houses, second chambers, ecetera.

The question of the National Attorney General was raised, no agreement on this matter.

102 remains as is.

104(l)1 to be checked to minutes of a meeting held on the 18 December.

Considerations for meeting to be held on the 19 February 1996; issues relating to the National Assembly particularly sections 41, 53 and 54