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# **CONSTITUTIONAL ASSEMBLY**

## **THEME COMMITTEE 2 STRUCTURE OF GOVERNMENT**

**TRANSCRIPTION:**

***IN-HOUSE WORKSHOP ON:***

### **CHECKS AND BALANCES**

**Between organs of government, in particular  
the executive and legislature  
held on 27 March 1995**

**"EDITED VERSION"**

# CONSTITUTIONAL ASSEMBLY

## THEME COMMITTEE 2

### **INHOUSE WORKSHOP :**

### **CHECKS AND BALANCES BETWEEN ORGANS OF GOVERNMENT, IN PARTICULAR THE EXECUTIVE AND LEGISLATURE (NATIONAL LEVEL)**

DATE : 27 March 1995  
TIME : 09H00 - 13H00  
VENUE : M46

### **PROGRAMME**

CHAIRPERSON : The meeting was chaired by a Chairperson from Theme Committee 2 :- Mr M J Mahlangu

1. Introduction to a system of checks and balances  
*Prof. D. Van Wyk*
2. The Judiciary as an important institution in a system of checks and balances  
*Adv. M. Motimele*
3. Legislature as a check on the executive and the judiciary  
*Prof. N. Steytler*
4. The checks and balances by the executive  
*Prof. V. Dlova (Prof. D. van Wyk)*
5. General Discussion

## ATTENDANCE

Ackerman C  
Badenhorst M J  
Bhengu G  
Beyers A S  
Diale N  
Foster J A  
Hendrickse P A C  
Lebona H P J  
Ligege M G  
Mahlangu J L  
Mahlangu M J  
Mars I  
Mashile N L  
Mlangeni A  
Mohlamonyane G M  
Mushwana G M  
Mutsila I  
Ndlovu V B  
Nxumalo S D W  
Olifant D A A  
Pahad E G H  
Phakati N E  
Rabie J A  
Ramusi M C  
Sekgobela P S  
Sethema B E E  
Shabangu S  
Sizani R K  
Steenkamp P J

### TECHNICAL COMMITTEE

Motimele M  
Steytler N  
Van Wyk D

### ADDITIONAL

Ranchod B G  
van der Merwe J  
Lategan B  
Wessels L

### APOLOGIES

Doidge G Q	Mabudaghasi R T
Eglin C W	Msomi M
Groenewald P H	Mwedamutsu M

Marshoff Ms

## WELCOME, APOLOGIES AND ADOPTION OF AGENDA

**CHAIRPERSON:** Are there apologies? Apology from Ms Mwedamutsu. Mr Msomi and I think Mr Ndlovu as well, he will come a little bit late today because he was supposed to be chairing this meeting. There is an apology also from Ms Marshoff, and from Ms Sethema. Mrs Shabangu, Mr Doidge and Mr Pahad will also arrive a little bit late. Mr Eglin as well as General Groenewald have also apologise

### **Agenda:**

Items 1 to 3 will remain unchanged

Item 4 - Checks and balances by the executive, the speaker was supposed to be Professor Dlova, but I understand Professor Dlova cannot make it for today, therefore we will request that Professor van Wyk deals with that aspect.

We may not expect a paper from him today because I don't think he prepared a paper on that.

The procedure would be that we will listen to each professor delivering his paper and then thereafter the members questions for clarification, not really debates or discussion, but questions for clarification. After all the people have presented their papers we will set out a panel and then we can start a discussion on the issues that they have deliberated.

Members will remember that when we dealt with block one of our theme, that was the question of the separation of powers, we said we would deal with the checks and balances when we deal with block 2 and 3. There were a catalogue of those checks and balances. So we are introducing this subject to look at what checks and balances could then be built into the structures of government and their functioning so that members could know exactly what they are talking about. This will be impossible to do without revisiting the executive and the legislature which we have already about in the judiciary in block 1. So if there is a bit of a repetition here and there we shouldn't be surprised by that, because you need to touch those things in order to build up your checks and balances.

I welcome all the people from the Press; SABC as well, Mr Lategan from the CPG and the deputy speaker of the legislative assembly, he is a member of our theme, thank you Doctor, thank you very much.

### **1. INTRODUCTION TO A SYSTEM OF CHECKS AND BALANCES : Prof. D. van Wyk**

I have a short introduction of nine points. You mentioned the word repetition, members of the theme committee may even find that in the introduction not much is new but I think, or we thought in our planning of the workshop that it would be necessary to give an introductory broad framework in which the system of checks and balances operate or can operate.

In its classical form, the notion of checks and balances is American and closely related to the separation of powers. You have referred to the fact that separation of powers came up in the discussion on, checks and

balances came up in the discussion of separation of powers. At this point I may pause to say that I have gone through the submissions received from the public so far to see whether there were any specific or even general comments, suggestions, reflections on checks and balances. It was interesting that a number of members of the public and other organisations endorsed first the principle of separation of powers which is also a constitutional principle, but the second linked, I must say in more general terms than specific ones, checks and balances to the separation of powers. I may have missed one or two submissions, I am not sure that I had everything, but I didn't find specific suggestions apart from expressions such as the executive should be controlled by the courts, or the executive should be controlled by Parliament, or we should have a Parliamentary system of government, not many specific references in public submissions to how checks and balances should be implemented.

I have said that it's American in form and closely related to the separation of powers. Checks and balances were to qualify the strict application of the separation of legislature, executive and judiciary, which would have left each of these powers to its own designs and in effect only subject to internal or self control if there were no checks and balances. Checks and balances allowed the three powers in the state a degree of influence on and control over one another's affairs.

The 'checks and balances' of the American system are well known: The bicameral Congress, with equal powers to both houses, where one cannot move without the other, (a typical internal check according to the commentators).

The next one, the President's power to initiate legislation and to exercise a kind of veto over legislation; the Congress' power of impeachment over the President, his executive colleagues and judges of the Supreme Court; the power of the Senate in the appointment of judges of the Supreme Court and other key personnel. The Senate's power of treaty ratification, the power of the Supreme Court to review and invalidate legislation and executive action. The reliance of the courts on the executive to give effect to their decisions. In some minor way, in other words, the legislature performs executive and judicial functions. The executive on the other hand, has an influence on the legislative process and the judiciary through its review powers has an effect on legislation and on policy. As such checks and balances have become an integral and important and explicit part of American constitutionalism.

By contrast, checks and balances in the Westminster system which traditionally formed the basis of the South African constitutional system, checks and balances in the Westminster system do not enjoy the same prominence as in the American. Partly perhaps because the separation of powers has never been the same major issue in the United Kingdom as in the United States. This however, does not mean that features comparable to checks and balances are absent from the British system. Two notable ones inherited by previous South African constitutions and by the present one, are ministerial responsibility and the power of the head of state - effectively the executive - to dissolve Parliament especially after motions of no confidence.

The final South African constitutional text will have to provide for checks and balances. This is required by the Constitutional Principles in schedule 4 of the interim constitution. Constitutional principle VI prescribes in so many words,

"A separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness".

This principle is supported, in my view at least by Principle IV, (the Constitution is the supreme law of the land, binding all the organs of state at all levels); Principle VII (giving the judiciary the power to enforce and safeguard the Constitution); Principle IX on freedom of information to ensure accountable administration; and Principle XIV (on the participation of minority political parties in the legislative process). It can further be argued that all the principles on the provinces and Principle XXIX on the Public Service Commission, the Reserve Bank and the Auditor-General, also reinforce the idea of checks and balances.

The Constitutional Principles positions the final South African constitution, to my mind, closer to the American model of intentional checks and balances, than the Westminster one of incidental checks and balances. In fact, the Constitutional Principles are very explicit in the objectives to be pursued by checks and balances on the separation and exercise of powers, and these objectives are, as I have already said, accountability, responsiveness and openness.

In designing its system of checks and balances the Constitutional Assembly will constantly have to ask itself whether these aims of accountability, responsiveness and openness are met. In its deliberations the Theme Committee will have to keep this foremost in its mind as well. In other words no checks and balances for the mere sake of checks and balances; Checks and balances with a view to, (this is my own little acronym), AcResOp, (accountability, responsibility and openness).

The task can be quite daunting, even by mere dictionary meanings of the three terms, accountability, responsiveness and openness. 'Accountable', according to the Collins Concise English dictionary, means "Responsible to someone, or for some action ..." and interesting "...able to be explained". Accountable also means "able to be explained". The latter meaning suggests reasoned and reasonable action.

'Responsive', in the words of the same dictionary, is to "React or reply quickly or favourably, as to a suggestion, initiative, etc" - clearly more than just 'respond' or 'react'.

'Openness', as one can imagine, has many shades of meaning. An interesting one is the following: "Ready to entertain new ideas not biased or prejudiced". That all goes with openness.

This brief exposition leads to a preliminary conclusion in respect of checks and balances in the final Constitution: they cannot be mere mechanisms. On the contrary they are part and parcel of the whole system of values imbuing and informing the Constitution. This is a critical point: some commentators claim that in the ordinary course of political events in both the American and British systems certain of the classical checks and balances have lost their significance. Impeachment in the United States, for example, is virtually dead. While ministerial responsibility and the power to dissolve in the United Kingdom has become fairly weak. The point I am making here is simply to say the following check list offers useful checks and balances and we should have all of them without critically at the meaning and especially the ability of a certain check and balance to achieve accountability, responsiveness and openness, wouldn't make much sense.

While one would not argue for these so-called weaker checks to be omitted from the South African constitution both examples, that is the power of impeachment, we don't call it impeachment, but in effect dismissal of the President for instance is impeachment, impeachment and ministerial responsibility both are found in our constitution. While one would not argue for them to be omitted the question about efficacy should be on the agenda. This already suggests that there is nothing inherently weak in the notion of impeachment or of responsibility, ministerial responsibility, the question is merely whether such checks and balances or a specific check and balance is effectively supported by the values underlying the supreme constitution.

Which brings me to the final point of this introduction: to be effective, checks and balances have to be designed systematically. It is not sufficient to look at check lists. Common and conventional wisdom in this field will clearly be important, but the Constitutional Assembly will have to go beyond that. Three questions will have to be asked every step of the way in the creation of the new legislature, the new executive and the new judiciary (at all levels) of government.

The first question is, can all the powers given to the body concerned be exercised in an accountable, responsive and an open way. The second question, what constitutional mechanisms can be employed to ensure that that power is exercised in such a way. In other words in an accountable, responsive and open way.

Finally would such mechanisms, and here I refer then to the checks and balances, respect the notion of separation of powers. With that one completes the circle, checks and balances and separation of powers, and checks and balances. Thank you.

#### **QUESTIONS / CLARIFICATION :**

**DR RANCHOD:**

In your presentation you made no reference to questions put to ministers and to the President as a form of democratic control. My own experience has been that in the new parliament question time is not being effectively used in order to get the executive to account for what is happening in government. This I think is a criticism directed at all members of parliament and not at any particular political party. There is also some debate at present, and I know being an advisor it may be difficult for you to comment on the issue of whether the head of government namely the President, should also be accountable to parliament. He is not a member of parliament, but we do have section 200 which permits questions without notice to be addressed to the head of government, and there is a discussion under way as to whether this is necessary or not.

Now my personal view is that question time does offer a unique opportunity for members of parliament to put questions of topical interest, matters of concern, directly to ministers and that they ought to reply to these questions. Unfortunately we have developed a convention in South Africa which has come from the Westminster system where the presiding officer or the speaker may not require the minister to actually answer a question. If a minister decides either to absent himself from the

house, or to give a simple yes or no and not motivate his reply, there is very little that the presiding officer can do in order to elicit a proper reply from a minister.

So I would like you to comment briefly on the whole issue of question time, because I think that's a very important check that one could have on what is happening in the executive.

CHAIRPERSON: Let's take a few questions and then I will allow the Professor to reply.

QUESTION: Thank you Mr Chairman. Professor in your input I did not quite get how these checks and balances as you have introduced them. Are they being influenced by whether the state is unitary or federal? Also, how do they affect the three tier level. It is not clear whether you refer to the central outside the regional and the local. Can you expatiate on that?

MR RABIE: The Professor mentioned the bicameral system in the United States where both houses have equal legislative powers. Now is that example applicable to South Africa in the sense that a bicameral system will assist us to introduce some checks and balances as far as the legislature is concerned?

CHAIRPERSON: Any other questions, the last one I can take if members would like to ask, or should we carry on with this. Okay fine. If you look at the agenda, some of the issues will be dealt with as we go by. For example there are questions that already creeps in about the checks and balances regarding the executive and all the like, which we are going to deal with in item four. If it concerns judiciary whatever the case may be, we go into the legislature like Mr Rabie is asking, we are going to deal with that in item three. Professor van Wyk was merely discussing the whole introduction of checks and balances on item one. But anyway I am not going to prevent him to try to answer the questions which have been posed to him.

RESPONSE :

PROF VAN WYK: Chairperson thank you for coming to my assistance. It also leaves the door wide open to be nice and vague about this. Dr Ranchod, the question about questions. I think details we can discuss when we talk about the legislature and the executive, but again as a matter of principle I would suggest that, and that's what I tried to say, simply to say that questions in parliament to ministers for instance are a good example of checks and balances, it is true. But the next question is, is it effective or is it not effective. I think you suggested that it is as it's being done at the moment, and I believe that in a way as it had been done in the past, it is not that effective. My suggestion would be, if one says questions in parliament should be there as a check and balance, the next question would be how do we ensure that that check and balance ensures



accountability, responsiveness and openness? If it can't be written into the constitution, then one can or will have to look at the rules of parliament. For instance what you have suggested, that rule that the speaker or the presiding officer can decide that the minister does not need to answer. In other words my principle suggestion is that each check and balance will have to be assessed in the view of how it can be made as effective as possible, and that one should maybe cast aside, in this kind of deliberation, a historical or conventional wisdom. But I think it's a good question and maybe we need to flesh it out in more technical detail when we get to the legislature and the executive.

The question about the effect of the unitary, federal or the different levels of government, same kind of answer. I don't see it that the fact that a state is a unitary state is inherently a weaker model for checks and balances than a federal state. One can perhaps argue that the more levels of government, and I have seen suggestions in commentaries on this, that the more levels of government, the greater the possibility for checks and balances at a vertical and checks and balances at a horizontal level, but I don't think one can again necessarily say that one is inherently better than the other. The one may offer better possibilities if it's dealt with effectively, but on the other hand I think you can just as well in a unitary system, design very effective checks and balances if it is done intentionally and has in terms of our Constitutional Principles, with a view to achieve accountability, responsiveness and openness.

Now I haven't referred to the different levels of government. I assumed that because the constitutional principles normally refer to mechanisms and the expression is, at all levels of government, so I assume that at all levels of government there will have to be checks and balances.

The question from Mr Rabie about the bicameral system, and whether that's an example for South Africa, is once again to my mind, a question of whether it is decided if there is a bicameral system in South Africa that the two chambers will have equal powers. The effective check in the American system is the fact that both chambers have equal powers. That the Senate cannot move effectively on legislation and finance without the assistance of the House of Representatives and vice versa. So it will depend on the relationship between the two houses, whether it's an effective check and balance, and whether it's an example for South Africa.

CHAIRPERSON:

Thank you Professor Van Wyk. As I have indicated before there is more scope to deal with that Mr Rabie, if you would like to repeat the question under item 3, Dr Ranchod as well under item 4. Those questions could be revisited then, be fleshed out a little bit more than that. Any other questions for clarification? Alright.

At this stage I would like to welcome the Deputy Chairperson

of the CA, Mr Leon Wessels, you are most welcome and your participation is also most welcome.

## **2. THE JUDICIARY AS AN IMPORTANT INSTITUTION IN A SYSTEM OF CHECKS AND BALANCES - Advocate M. Motimele**

### **2.1 INTRODUCTION**

Thank you Mr Chairman, ladies and gentlemen I suggest we go back to fundamentals. That is the only way to deal with issues. If we understand them, then we know why we need them. I always put it classically as follows: What is the mischief we intend to prevent? Or what is the good we hope to achieve? To me that is key, it is basics.

The history of checks and balances emanates from the inherent nature of man. Power corrupts and absolute power corrupts absolutely. However power must vest in some people or some institution. Therefore, historically and jurisprudentially the science developed, that you use fellow men or institutions to check on each other or one another. Hence the science of checks and balances. It is in this context that I will deal with the judiciary as an important institution of checks and balances.

Separation of powers is no more than one of the elements of checks and balances. Why is it necessary to separate the powers? Because it is safer; If power vests in three or four institutions than if it vests in one individual, the risk is higher. So separation of power is one form of checks and balances.

I now propose to deal with separation of powers. It's traditionally said that there are three state organs, the executive, the legislature and the judiciary. There is constitutional debate whether this is true. There are other functions which are difficult to classify as purely executive functions, or as the judicial function, and people use phrases such as quasi-judicial, which means semi-judicial, and quasi-administrative, semi-executive. In certain jurisdiction to solve this problem you have the system of, and I think Germany is one of those jurisdiction, you have administrative courts. If you don't have administrative courts, certain quasi-judicial function would be dealt with by the organs of the executive. I know there are institutions to which I am at difficult to classify like the Tax Court, Water Court. There is argument whether they fall in the stricter sense under the judiciary or the executive or whether it's one of those hybrid creatures between the two, the executive and the judiciary.

So when I refer to the judiciary I would refer to the judiciary in the classical sense. The administrative organs or the judiciary use certain criteria and guidelines as checks and balances.

### **2.2 RULES OF NATURAL JUSTICE**

There are principles which evolved over the years and are called rules of natural justice. For example, in any dispute each party must be afforded the opportunity to be heard, audi alteram principle and the rule against partiality, and bias, etc. In other words, if an executive machinery or institution takes

a decision, and that decision affects or prejudices the rights of an individual, the quasi-judicial institution or the courts in reviewing that action would look at the action, and before it looks at the content of the deliberations, it will look at the format of the deliberations, the procedure. The question would be whether the rules of natural justice were followed? The way the enquiry was conducted, does it have any inherent built-in mechanism to come to a fair conclusion? If the answer is answered in the negative, it is irrelevant whether the conclusion is fair or not. It cannot be seen to be fair conducted in that manner, and therefore the matter will be remitted back to that institution or overturned. Now that's a system of checks and balances.

For those who are in power when they execute decisions the executive level, there are then restraints by these practices and they are forced to do things which in the light of ordinary human experience. We then agree that if done in that manner fair results will then be accomplished. That applies, in particular to the executive and their administrative functions.

### 2.3 RULE OF LAW

There is another instance, a much more important and well publicised one in which the judiciary, as an institution of checks and balances plays an important role: the Constitutional Court in this country and in other countries, whatever court deal with the constitution. In the United States is the Supreme Court of the United States, and in India is the Supreme Court of India. Now there are two approaches to that. There are those countries which I referred to as constitutional countries, which means they have a constitution with a Bill of Rights. The Constitutional Court or the Supreme Court in that country would use the Bill of Rights as a basis of its decision to check if there has been any abuse of power.

In those countries which don't have a constitution, or unqualified constitution like the United Kingdom there is a very wonderful phrase developed or evolved, called the "Rule of Law". And that "Rule of Law" is the basis upon which a court tests an administrative decision. I now propose to deal with the constitutional countries since we never had a "rule of law" in this country, the only hope we have is to be a constitutional country, and I therefore deal with a constitutional country.

Dealing in a constitutional country, I would like to read to you a quotation from a book entitled "A Constitution for a Democratic South Africa", the foreword to that book was written by Justice Bakati the former Chief Justice of the Supreme Court of India, and I think it's instructive what is said there. I now deal with India in section 32 of the Indian constitution on the issue of judicial review. Justice Bakati says:

"I am of the view that the power of judicial review conferred on the Constitutional Court should be granted in the widest terms, so that the Constitutional Court can effectively prevent violation of the citizen's right and also affirmatively direct the State to take action for realisation of rights by the citizen".

I pause. Now people think of checks and balances as a negative institution to stop other institutions from doing what they are not supposed to do. But there is the reciprocal of that. The checks and balances are also there to make sure that other institutions do what they are supposed to do and it's

also a vital form of checks and balances. If you fail to do what you are supposed to do - checks and balances - you will be forced to do what you are supposed to do.

I continue with the quotation:

"The power of judicial review must itself be made a basic fundamental right so that it cannot be abrogated, tinkered with by parliamentary majority".

In fact the constitution of India in article 32 confers the power of judicial review in the widest possible terms, and the Supreme Court of India has held that the power of judicial review is a basic feature of the constitution, and cannot be taken away by any amendment made by parliament, because this is important. If judicial review means the judiciary. Very well, if checks and balances and the function of the Constitutional Court is to check on the legislature and make sure the legislature tows the line, if you don't entrench that, all what the legislature needs to do is to go and amend by an ordinary majority that article which gives the court the power, and therefore that court has lost it's power to check on the legislature. So it can't serve as a useful check and balance unless it's entrenched so that even the legislature, with any majority cannot take that power of the Constitutional Court away.

## 2.4 JUDICIAL REVIEW

Mr Chairman, the system of judicial review, the judiciary checking the legislation it's in line with the Bill of Rights. Be it primary or secondary legislation or even at the third tier of government, it sounds very wonderful after what I have said. Model of civilisation and democracy. People cannot do what they are not supposed to do. But it's not as simple as all that.

Now I deal with the situation in the United States and the problems that were occasioned by the system of judicial review. It is said that there are times when democracy, it's very undemocratic, and the line is very fine, and therefore democracy remains a very nebulous concept which men continuously aspire to refine. This depicts and illustrates what I have just said. In the US the Congress, both the House of Representatives and the Senate, it is elected by the people and therefore reflects the will of the people, how the governed would like to be governed, and that is basic democracy. The institutions must support that.

The Supreme Court of the United States of America is made up of nine individuals, eight men and one woman. I think of those eight men one is black, one African. That is the Supreme Court, nine men appointed by the President, confirmed by the Senate for life. Now people are arguing, but that's undemocratic. The institution of judicial review is undemocratic because the representative in the House of Representatives, the Congressman and the Senators in the Senate, have the mandate of the people who elected them. Both initiate legislation and it goes across to each, depending where it was initiated and it's past, therefore the people, once Congress passes legislation the people have spoken, and that's the will of the people. But those nine persons can overturn the will of the people. They can tell Congress that that's unconstitutional, and that law cannot be law in the United States of America. It doesn't matter the entire United States of America, including the two branches of the state, the legislature

and the executive may want that law, if those nine persons say no, that law can't be law. Then it introduces another dimension. Can that be said to be democratic?

Isn't the judiciary also, by the system of judicial review, also legislating? You can legislate by making laws and some people much more brighter than I am, argue that you can legislate by blocking laws. You decide which legislation becomes legislation. Therefore they argue that the system of judicial review is undemocratic, because a constitution is a very dynamic document, it changes with the time. Those nine persons, 30-40 years later, they might be overtaken by the events and the thought process and the mood of the country and it might be very important that the country should go in a certain direction, and you can't lobby them, they are not politicians.

## 2.5 CONCLUSION

Therefore as we talk of these checks and balances let's go back to what I said is our fundamentals, what is the good we wish to achieve and what is the mischief we hope to prevent? All these beautiful systems, gimmicks, schemes, institutions are all intended to serve the ultimate goal and the larger good. But that ultimate goal and the larger good is for the country itself to determine, and on this aspect I intend reading something to you, I quote from the same book from what the speaker has written and I can't find much more appropriate terms this morning to depart from what I wrote a few years ago and I want to be consistent and read that.

"The constitution of a country is an organic instrument which defines the power of relationship between the different organs of the State and lays down the basic principles and values which must inspire and guide the governance of the country. It is a document which is intended to endure for a reasonable period of time, unlike a restricted railroad ticket which is good only for the particular day and for the particular train. The constitution reflects the hopes and aspiration of the people, and lays down the direction in which the country must proceed. It has a tremendous impact on the future of the country and the well-being of its people, and it is therefore required to be drafted with great care and concern. The people who draft it must be statesmen with a sense of history, incisive mind, massive intellect and profound political vision. But it is not enough to have outstanding men to draft a constitution of a country because however deep and profound they may be intellectually, however learned and erudite in law and political science and however well vested they may be in the constitutions of other countries, they may not understand the problems and difficulties which cry for solution through structures and institutions which are to be set up under the constitution and they may not therefore reflect the genuine needs and requirements of the people".

I want to conclude on that note because for me that is paramount, it's key as we sit here and debate checks and balances against what? In aid of what? For what purpose? He therefore then calls upon us that we have a

vision. And there is a goal we hope to achieve, and in achieving that goal we therefore want to prevent certain things or allow certain things to happen and that will then begin to inform us what types of checks and balances we need and in what form, because we then know what we want to achieve.

Mr Chairman I have concluded.

### QUESTIONS / CLARIFICATION

CHAIRPERSON: Thank you Advocate Motimele for your inspiring address. The time is now question time for clarity. I will also give you 15 minutes to ask questions then we move to the next item. Mr Lebona and then Mr Hendrickse.

MR LEBONA: Thank you Chairperson. Professor on my mind I have never understood the judiciary in the checks and balances, as an impartial or independent body, when there is, as you have already from your quotation indicated the element of political supremacy, even within the process of appointing judges, political influences stay, and political authority is there. Therefore to my simple mind it's been difficult really to see how that body can be that impartial, that somebody can serve without trial to satisfy the master no matter how good a constitution is, the element of political supremacy, as it is always stated.

MR HENDRICKSE: Are there any checks on the judiciary itself in the sense that you mentioned. An example, that if the whole country, and both houses wanted a particular law the judiciary could turn it down, Do all nine have to concur, or is it a simple majority of five of the nine?

MR SIZANE: I am still thinking, thank you Mr Chairperson, still thinking of how I should phrase this question. You know Advocate the problem I am having is that we usually talk about these concepts of checks and balances, judiciary, checking the executive and so on, well I don't know how effective that system is, and secondly I don't know why should we choose the judiciary to do that function? I am saying this against a background that we have had courts in this country, in South Africa, we have had laws and so on, but I don't know how effective the judiciary was in checking the system of apartheid or the executive in this system, and therefore when we talk about these concepts of checks and balances and talk about the judiciary being an instrument of dealing with that situation, what makes the judiciary tick? Why do we choose a judiciary and how can we ensure that the judiciary is going to be effective? Is there anything that assisted to make it effective or what? So I would really like to get the context of this institution and its role.

**RESPONSE :**

**ADV MOTIMELE:** I proposed to reply to the three questions in the following manner, the first and the last question tie with one another, I will deal with that as one, and the middle question it's independent, and I will start with that because it's the simple answer. The question is whether you need a consensus or a simple majority, it's a simple majority. But in matters of national importance the Supreme Court of the United States has always tried to give a united decision because if you have a dissenting judgement the politicians will then take the dissenting judgement of your brothers or your sisters and you see they are not even ad idem on this point, and we think we like this judgement and the majority has misdirected itself.

Let me share with you on that question how at least the Supreme Court of the United States worked which I have had the opportunity to be part of, I don't know how the Constitutional Court of South Africa works. It's more like political lobbying. You see every judge has a clerk and a registrar. Once you have reached a conclusion, and every morning the judges call the clerks we all stay behind, after you have written, you have researched the law and given your judge the paper what you think the opinion is, and your judge takes his judgement in ...(indistinct) or his opinion, and then they go into the judge's room, it's like a boardroom and then they start knocking one another, they debate. As you are debating you can see what your bretherens think like and who are closer to you and where you differ and then you adjourn, and then you decide you like, Mr Mahlangu is not very far from you, His Lordship M Mahlangu, then you go to his chambers and then nail him and then you win him to your point, but in the meantime Mr Mahlangu has gone to His Lordship Mr Ramusi. When you come back the following day or two days, depending how long the session has adjourned, you will see a grouping develop. Certain people will move closer to others, and they will keep on debating that, and there is also barter and exchange there. If you remove that paragraph, I have no difficulty with the thinking, but the language is strong, if you can redraft the introduction or how you define the issues. At the end it will be four, five or six - three, and then the senior judge in that category will write the judgement for the dissenting judgement or for the majority. So there is a lot of bargaining and some people end up joining judgements which differ and tally from their initial view.

Now if you have strong characters, either in terms of massive intellect or just commanding presence, that judge, especially if he is the Chief Justice, will do a lot to carry everybody along with him. Whereas if you have a, I don't want to say mediocre but very soft personality, you are going to find lots of split decisions. That is the answer to that question.

The two questions are very difficult to answer. It is true that in interpreting anything a judge is not a super human being, he is an ordinary human being, so interpretation of anything, we bring in that interpretation, our own upbringing, our own bias, our own prejudice, environment where we ...(indistinct). I will give you an example. I appear frequently in the courts, and one of the things you deal with is credibility of witnesses. I lead my witness from Makotapong somewhere from the Northern Transvaal, or from Giyani, very decent respecting Shangani women, and when His Lordship asks questions she first looks down and puts her hands together and in a very soft tone says, yes or no, and she pauses before she answers. I am not a student of cognitive psychology. But the judge, because of his background, which more often than not is calvinistic background, Afrikaner, "bos uit pluk reguit", and look in the eye to show you are not lying, when he makes his finding on credibility he says the least said about this woman the better.

She lies ad nauseam, and she cannot be relied on, she has no integrity, no character, she couldn't answer any questions straight. Before she answers she fiddles around with her hand and look left, right, she can't even raise her head and look me in the eye. She is a classical example of a pure liar. And I said My Lord with respect she is classical example of a respecting and a decent and an honest woman and all what you had during her testimony was utmost respect. You are treated with ...(indistinct). With the most noblest of intentions, because His Lordship comes from a different culture he brings his bias and background into the judgement. And he adds, he finds she is lying because she doesn't look him in the eye, and she thinks he is disrespectful to look him, particularly being a man, right in the eye. That much you have. But there are certain things we can agree upon.

I guess that's why in this country you have an institution of the Constitutional Court, and I guess the mischief we try to prevent there was because the judiciary was all white, male for that matter, Afrikaner by and large, you want to infuse the Constitutional Court and make it representative so that it can be sensitive to what I just said. You would want that, to be sensitive to the feelings of others. I may just mention, I thought Mr Chairman you protected me when I think, it's Mr Beyers remarked there, I owe this house nothing else by my honesty and to the best of my ability what I think would help debate the issue. When I make a statement here it's without favour or fear. I take very strong exception to people here being intimidated to say what other people want to see. We can move out of here and we can deal with our differences.

CHAIRPERSON: Let's stay with the matter, you are protected, you are in my good hands.

ADV MOTIMELE: Mnr Voorsitter "dit maak my ook die moer in".

CHAIRPERSON: No, no, you are in good hands, you are well protected.



ADV MOTIMELE: Very well.

CHAIRPERSON: I think Mr Beyers is quiet at the moment, he will make his remark later on that statement.

MR BEYERS: To what is the Speaker reacting Mr Chairman, to what is he reacting exactly?

CHAIRPERSON: Well I think you remarked, I didn't hear what you were saying ...(intervention)

ADV MOTIMELE: No he says that ... maybe if we clear those relationships. We are going to live with each other for a long time, and we need to start with that and we deal with one another with dignity. We need to respect one another. Mr Beyers said when I referred to the Bench being majority Afrikaner males, and I used the word Afrikaner again calvinistic, he says "nou, dit maak my die moer in nou", what I keep on referring to the Afrikaner. I smiled and I thought the Chairman would ask him to keep quiet, and that's why I took up the matter.

CHAIRPERSON: Okay can I just put that straighter.

MR BEYERS: Mr Chairman I didn't use those words. I don't know which words he used, what I said is that I think you are a political activist at this point in time, and not a technician. That's what I said, and that I said that to my colleague. I didn't say it to you, but that was my - as far as I am concerned that was the position as far as that comment of yours is concerned.

CHAIRPERSON: Alright. For the sake of progress in this workshop could you please avoid words which would really sort of interrupt our workings this morning..... "moer in" and all those things please, and your political activities, I think we are here dealing with the work of the workshop. We are dealing with the checks and balances and can we really get into the subject of the issue and let's avoid that for the sake of progress Mr Ndlovu please. If we need time to debate about those other things we will do so, but I don't think this is a relevant time to deal with that now. Advocate you are protected.

ADV MOTIMELE: Thank you Mr Chairman. The question was asked, in the light of this country's history can the South African judiciary serve as a basis of checks and balances. I am in the process of answering that question, and I cannot avoid history and wasn't part of the - but the fact remains people, if the judiciary, it's an important institution of checks and balances, the people must have faith in that judiciary because if they don't it doesn't matter that the judiciary is doing a good job or not, that will affect the constitution, and a constitution it's as good as the people respect it. If you don't develop a constitutional culture and people don't respect that constitution, it doesn't matter how good that constitution is being phrased, the people must respect it. If they don't respect it it's a useless piece of paper.

I agree, and you will find many people to differ with you, there is an inherent problem about the judiciary in this country, and that's why the institution of the Constitutional Court to try and deal with that, but it's not the Constitutional Court only that deals with constitutional matters. The ordinary judiciary will deal with constitutional matters. The fact that judges are appointed for life and can be impeached only for certain limited conduct that relates to integrity, you are going to have them for a long time. The only consoling factor is, and some people say that man, and there is the answer whether people won't serve their political masters because they are appointed by the politicians. Some people say men can surpass their masters because once appointed and for life they then concern themselves with the second thing, and there is themselves, their integrity, their sense of destiny and they would like future generations to remember them not as the best guys who served their masters, that their living has not been in vain, and that's a redeeming factor in man that they can then outgrow their political masters and have a sense of destiny. Thank you Mr Chairman.

CHAIRPERSON: Thank you Advocate Motimele, those were the three questions. I am prepared to take another one or two questions then we close this matter. Nkosi Nxumalo any other question?

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

CHAIRPERSON: Thank you Nkosi. That was just a comment and not a question. Thank you very much for the comment. I didn't like to stop you, thank you very much for that comment. Are we raising questions Mr Ramusi and Mr Ndlovu, you are the last two.

MR RANUSI:

Mr Motimele a constitution that is constructed at a time when the whole community is completely in disarray, divided thoroughly from every angle, division which we seek to promote plus the good that is sought to be promoted and the evil that we seek to get rid of what could that be in a community of that kind? What constitution can we be expected to come up with in a divided community, pathetically tragic, what kind of constitution can a people be expected to come up with to be respected for ages?

UNIDENTIFIED  
SPEAKER:

A constitution that will unite everybody that is the one we want.

CHAIRPERSON:

Mr Ndlovu the last one on this issue, Mr Ndlovu your question.

MR NDLOVU:

Thank you Chair. I just want to pose this question. What will happen if you have a strong unitary centralistic government which leans nearly to the dictatorship, then you have to make these checks and balances and then that President of that government will be the one who will appoint a judge there. Who will check who on that system?

ADV MOTIMELE:

I am not quite sure whether it's legal or comes within my presentation but I will venture an answer. You see there is a common good. In human nature, by definition they are survivalist, that's why the human race to this date is not extinct, so when the division reaches to a stage where it destroys all of us, I think common sense will prevail and you will find the majority of people would see the light. It's ideal to carry everybody along with you, but nowhere in the history of mankind and even with homogenous societies has everybody ever been on board. So all what men and women of integrity owe themselves is the strength of their conviction, if you think you are right, and yes wisdom will prevail. I have no answer except for people to follow the dictates of their conscience and stop playing games with the future of the nation. I don't know how else a divided society would, but that's so much about your divided society.

Unitary, centralistic government which leans towards dictator or tyranny. It depends. You see if the President appoints the judges, it depends what are the other provision, are they appointed for life, their salaries fixed by another organ and he can't remove them, and if that is so it goes back to my earlier answer, that men have a sense of destiny. People, once they are in a position and they are given power, they might just enjoy it and decide to be their own men and have their own identity and they will refuse to be dictated by the President, including even the President who appointed them, because they judge differently. They don't get credits and stars from the politician that they do well, they know they are in the job and then they are being looked by their colleagues and the world is getting smaller and smaller and the international community, and they want to know that they are good judges and when

they are flying about they can make it with their colleagues, and they might depart. But if those checks are not in he can appoint and fire and reduce their salaries and promote obviously he still has a hold on them, and in that sense, whether it's unitary or federal it doesn't matter. If you don't make your judiciary not only free from the executive, but independent, you see that's an operative word, the judiciary must be independent.

Then the question arise what are elements which makes the judiciary independent? It's what I have said, appointment for what period and salaries, to remove them from the control of the executive. Thanks.

CHAIRPERSON: Okay Mr Rabie follow up.

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

ADV MOTIMELE: Two problems with that. One, I don't have the facts. I have also read about that, but I thought that was determined somewhere and sent to the President for approval, and he just approved.

CHAIRPERSON: Okay thank you for your follow up Mr Rabie. Ladies and gentlemen that concludes questioning under this section. We have 45 minutes before tea, can we take the last speaker before tea time and then after tea we will have the last speaker and the general discussion over what we have been doing.

### **3. CHECKS AND BALANCES: THE ROLE OF THE LEGISLATURE WITH REGARD TO THE EXECUTIVE AND THE JUDICIARY : Prof. N. Steytler**

#### **3.1. THE SUPREMACY OF THE LEGISLATURE / PARLIAMENT**

It is said that Parliament is the foremost democratic institution of the three branches of government. In a parliamentary system where the executive is drawn from the legislature, Parliament is, per definition, the sole democratic institution. Even in a presidential system where the people elect the president directly, the legislature lays claim to greater democratic legitimacy because it represents not only the sole winner but the entire population.

In theory Parliament ought to be all powerful because of its strong democratic base. It makes laws and scrutinizes how they are executed. In practice, however, the executive has tended to more powerful; it formulates policies which are translated into legislation and which it then executes. While legislatures are often ousted from the centre stage of power, they remain at the core of any system of checks and balances vis a vis the executive.

## 3.2 CONTROLLING THE EXECUTIVE

As the supreme legislature, Parliament defuses state power between it and the executive. The executive has only delegated power to pass legislative enactments.

Equal to its lawmaking function is Parliament's function to scrutinize and exert control over the formulation of policy and the execution of laws and policies. A number of parliamentary controlling and oversight devices have been developed.

### 3.2.1 DISMISSAL OF THE EXECUTIVE: MOTION OF NO CONFIDENCE

In a parliamentary system the legislature can dismiss the executive by a motion of no confidence. This method is not popular because it is often linked to the dissolution of Parliament itself.

### 3.2.2. SCRUTINY OF THE EXECUTIVE: PARLIAMENTARY QUESTIONS

Short of dismissing the executive, Parliament has a number of powers through which it can call the executive to account and scrutinize the activities of individual ministers and their departments. Important in this regard is the power of parliamentarians to question any member of the executive. Such a power is only meaningful if Parliament can demand an answer of ministers which is both full and satisfactory.

Linked to the parliamentary questions, is the right to call for an interpellation on a particular current issue.

### 3.2.3. SCRUTINY OF THE EXECUTIVE: STANDING COMMITTEES

Standing and select committees of Parliament serve an important watchdog function in Parliament. They may call members of the executive to appear before them and to give an account of any executive action. Members of committees develop expertise in the area and play an invaluable role in both the formulation of laws and the oversight of their administration.

While the interim Constitution provides that parliamentary committees "may be established" (s 58(1)), it is not constitutional entrenched that there shall be committees. Consideration should thus be given to the suggestion that there should be a constitutional provision requiring, for example, that for every ministry, there shall be a standing committee of oversight. A committee should also have the constitutionally protected powers to subpoena witnesses and call for documents and information (as is presently the case (s 58(2))).

## 3.3 CONTROLLING THE JUDICIARY

Parliaments have had traditionally some power over the judiciary through the processes of appointment and dismissal of judges. At present Parliament plays a limited though significant role in the appointment of judges. Four senators serve on the Judicial Service Commission (consisting of 17 members) which appoints the judges of the Constitutional and Supreme Courts (s 105).

Although the executive had in the past in South Africa, and still elsewhere, the power to appoint judges, it was usually in the power of Parliament to dismiss judges on the ground of misconduct. In the interim Constitution the National Assembly and the Senate play an integral part in the dismissal of a judge on the grounds of misbehaviour, incapacity or incompetence (s 104(4)).

One should also note that the office of the attorneys-general has recently been linked to Parliament. Although entrusted with the task of law enforcement through prosecutions, and thus falling theoretically within the executive sphere (as is the case in most countries), the attorneys-general have been given independent status by the outgoing regime by being placed under the authority of Parliament. While the attorneys-general are appointed by the executive, their dismissal is in the hands of Parliament. Moreover, the attorneys-general must report annually to Parliament on their activities. The exact relationship between Parliament and the attorneys-general is still undefined. In 1994, their first year of reporting, Parliament hardly commented on their reports or questioned them individually on their reports.

### 3.4 MASS PARTIES AND THE EFFICACY OF PARLIAMENT

Parliament is supreme and all powerful only in theory. In practice parliaments are overshadowed by the executive. Where there is harmony between the executive and the legislature (as is the case in parliamentary systems) parliament often becomes an appendage of the executive. The reason for this is obvious. The emergence of mass political parties with strict discipline shifted power away from Parliament to the party hierarchy (often outside the ruling party's caucus as well). Where one party dominates the legislature, and thus also the executive, the prospect of a motion of no confidence exists only in theory.

It is thus not possible to talk of Parliament as a unitary body, but should rather be seen as a collection of parties in competition for power. It is in the competition for power that Parliament can be a check and a balance against an all powerful executive. The question is thus: within a parliament where one party enjoys absolute majority, how can Parliament be made to perform its role as the institution which can be a check on and a balance to the power of the executive?

The answer is to be sought in making Parliament function as a multi-party entity. That is to say, the rules constituting Parliament should seek, first, to make Parliament diverse and competitive in terms of political opinion, and secondly, make Parliament function inclusively, that is, as a whole, rather than exclusively in the interest of the ruling party.

### 3.5 MAKING PARLIAMENT COMPETITIVE

Parliament is competitive when it contains a diversity of views and opinions. When different parties compete for power they attempt to show the faults and weaknesses of the ruling party and in the process perform Parliament's watchdog function. An inclusive Parliament also becomes the consolidator of democracy when all major political parties are represented in Parliament.

How can one promote a competitive Parliament?

### 3.5.1. PEOPLE'S PARLIAMENT

Parliament must represent the people - i e, it must reflect the people's choice. Consequently, appointment to Parliament by any body other than the people should not be acceptable. Nomination by the president of persons to parliament disturbs the balance of power in Parliament and may undermine the competitiveness of Parliament.

### 3.5.2. BROADLY REPRESENTATIVE PARLIAMENT

Parliament should be as inclusive as possible of all shades of political opinion. An electoral system based on proportional representation with a low threshold for entry into Parliament should thus be adopted, as mandated by Constitutional Principle VII.

### 3.5.3. ACCOUNTABLE PARLIAMENT

Parliament should be accountable and responsive to the needs of the people. Where parliamentarians are elected through party lists without reference to constituencies, they tend to be more responsive to the demands of the political party than the needs of the people.

### 3.5.4 INDEPENDENT PARLIAMENT

Parliament should be independent. The greatest threat to a competitive Parliament is that bodies and institutions outside Parliament may dominate or control it. Of particular importance are political parties. Should they control the tenure of a member of Parliament then the right to speak out is illusory. The present rule that a member of Parliament loses his or her seat when he or she is expelled from a party, militates against the independence of Parliament. Including a constituency element in the electoral system undercuts any argument in favour of the present system.

The dissolution of Parliament should not be in the hands of the executive but governed by the constitution.

The salaries and pensions of members of Parliament should be controlled by Parliament

### 3.5.5 OUTSPOKEN PARLIAMENT

Parliament should be able to be outspoken. The freedom of speech in parliament is one of the key values in a competitive parliament. The right to criticize without fear of civil or criminal law repercussions is critical. The rights and immunities of parliamentarians should thus be constitutionally entrenched.

### 3.5.6. KNOWLEDGEABLE PARLIAMENT

Parliament should be knowledgeable. Freedom of speech is only of value when members of Parliament have access to information held by the executive. Constitutional Principle IX also requires that "provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government." Apart from informal sources of

information on which opposition parties may rely, the information produced by parliamentary officers is equally important. The following parliamentary officers are relevant in this regard:

(a) PUBLIC PROTECTOR

The ombudsman, as it developed in Sweden, the country of its origin, is a parliamentary officer. Appointed and answerable to parliament, the ombudsman assists Parliament in scrutinizing the activities of the executive and the administration. Through reports to Parliament, the ombudsman provides Parliament with information about the executive.

It is important to note that the ombudsman (or public protector), as Parliament's watchdog, has neither executive nor legislative powers. Moreover, it should not have these powers. It is through the powers of persuasion and embarrassment that the ombudsman performs its functions. This model underlies the present position of the public protector in the interim Constitution.

(b) HUMAN RIGHTS COMMISSION

The Human Rights Commission has a similar brief as the public protector, only broader to cover human rights violations other than administrative justice. The present HRC has also the mandate to advise Parliament and provincial legislatures on the constitutionality of legislation. In this capacity the commissioners of the HRC should thus be viewed as parliamentary advisors.

(c) AUDITOR-GENERAL

The task of scrutinizing the financial administration of the executive is entrusted to the auditor-general. Again, he or she should be regarded as an officer of Parliament. He or she is appointed by Parliament, can only be dismissed by Parliament and is accountable to Parliament.

4. MAKING PARLIAMENT INCLUSIVE

Parliament is by definition a collection of political parties. Parliament is also in practice the forum in which the party which enjoys an absolute majority dominates the proceedings and rightly so. Should the domination of Parliament by the ruling party be complete, then some of the checks and balances which parliament exercises over the executive and the judiciary could become meaningless. Thus, the usefulness of select committees would be undermined if election to those committees were to be dominated by the ruling party. The effectiveness of the officers of Parliament would also be undercut, were the ruling party to appoint persons who would, because of being partisan or lacking in skills, be unwilling or unable to inform Parliament of the maladministration of the executive.

The conception of parliament as an effective check on the executive requires that parliament operates not on an exclusive basis, the lap dog of the ruling party, but on an inclusive basis, in the interests of all the parties. Parliament as a whole should scrutinize the performance of the executive. This requires, in effect, strengthening the position of minority parties, by giving them also



a say in the appointment of members of parliamentary committees and the appointment of the officers of Parliament - the public protector, the human rights commission, the auditor-general. This will give effect to Constitutional Principle XIV which states that "Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy."

One method of securing that the officers of Parliament serve also minority parties is to require weighted majorities for their appointment. This appears to be the principle underlying the present appointment procedures.

The appointment of the public protector, the human rights commission and the auditor-general follows a similar procedure. A joint committee of both houses of Parliament with representation of every party in Parliament nominates a person (or persons) who then should be approved by the National Assembly and the Senate in a joint session by at least 75% of the members present and voting (ss 110(2) & 115(2)). In the case of the auditor-general the majority should be two-thirds (s 191(2)).

Although one may argue about the precise mechanics of how to fashion a weighted majorities, the principle is clear; all parties should have a say in the appointment of officers of Parliament because these officers work for the entire Parliament. It is important to note that these persons and commissions are officers of Parliament, and thus should have no executive powers. One of their primary functions is the gathering of information to assist Parliament in exercising its watchdog function.

### 3.7. CONCLUSION

In conclusion, in a parliamentary system, Parliament as such is not much of a check on the executive. It is rather opposition in parliament than opposition of parliament which is the most effective check on the executive. The principle of multi-partyism is thus of equal importance to the principle of checks and balances which underlies the doctrine of separation of powers.

### QUESTIONS / CLARIFICATION

CHAIRPERSON: Thank you Professor Steytler. You have said a lot of things in a very short space of time. You have been running very fast. Thank you. We have 15 minutes for questions for clarity. I start with Mr Lebona, Mr Mashwana, Dr Ranchōd and then Mr Ramusi.

MR LEBONA: Thank you Mr Chairman. Professor I hear you sort of trying to balance or sort of some fear for a dominating party. I say balance and fear you will forgive me for that. But I don't hear you come on a party that has evolved and has got to grips with democratic culture, which has within itself the balancing factors. A party which has the ability to criticise itself you know. In case whereby it happens to be the majority, how doubtful that can be within democracy with a parliamentary system. I want to say it's clear from what you have said of course there is no 100% check and balance, but I want to say

when it comes to the issue of questions and extracting answers, I have the fear that too much of a democracy is also not good for the state in the sense that it depends on the type of a question and the state of affairs, timing. Thank you.

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

DR RANCHOD: Thank you. I am prefacing it because I don't whether Professor Steytler has dealt with the questions that I raised earlier.

CHAIRPERSON: Yes he did.

DR RANCHOD: I think out of fairness for our colleague perhaps we could answer the question and I will deal with my question later.

PROF STEYTLER: On the question of the balancing and checks within the dominant party, I think obviously it is an extremely valuable culture developing that there is a freedom of Parliament vis a vis the executive developing. But it may also be a fact that it's a unique situation where there isn't complete harmony between the executive and the ruling party in Parliament, where you have an executive of a government of national unity, vis a vis a strong dominant party in Parliament, and therefore there is greater possibilities of disharmony. The point is that if there is a strong party with strong control then there is very unlikely to be disputes between Parliament and the executive because its matter is solved by the party itself. But clearly one can establish, and this is more the level of a culture that you establish rather than writing it into the constitution, what we are concerned here is to write in the long term into the constitution the ability of Parliament itself to form some type of check on the executive. Clearly it is a gadfly element as well in the hundreds of questions that have been asked, often no relevant, often more nuisance, but one has to take that gadfly with the true and very important questions that are asked. So it's not one that one can be too selective on which are the good questions and which are just the also asked questions.

In terms of the strength of minority parties, what one must be very clear in one's mind here is that minority parties do not, are not able to hold up progress. The power of minority parties is simply in Parliament is access to information, and that access to information is the issues on which politics are debated, that

you have an open government, that you have access to it and then you can ask is the majority party going in the right direction, is it performing a proper role? So the minority parties in Parliament with simply access to information asking questions, criticising, is not able to stop legislation.

So the argument here is simply the officers to be appointed should have broad representation that they don't become simply lapdogs to the dominant party. But they are not placed in a position to hold up legislation. Your usual rules of democracy, absolute majority to pass legislation continues.

The final point is that it is very often also in the interest of the ruling party to have a critical body within Parliament, to have the officers of Parliament criticising the administration. It's because it can then rectify those problems and then in the end can produce a better administration which often will then stand the ruling party in good stead. So it's not simply a destructive role, it also is a very constructive role, critiques, the reviews, checks on government. Very often in some African countries where the President appointed the ombudsman was clearly to make the administration more effective, to get greater support from the people for his policies to be able to rout out corruption etc. So it also works in the favour of the dominant party. Thank you.

CHAIRPERSON: Dr Ranchod.

DR RANCHOD: I was dealing with at the earlier intervention with the importance of question time in Parliament, and I now want to just illustrate the weaknesses we have in our present system. Questions are put to ministers which are not satisfactorily answered. Our rules, as we have inherited from our past traditions is that the presiding officer does not interfere. If a minister behaves in absolute contempt of Parliament there is nothing that the presiding officer can do to elicit a proper answer. Now this may be putting it very strongly but let me give you an example. If false passports were issued to certain officials, this particular question has been posed thrice in Parliament without a satisfactory answer being given, yet it is possible for the Press to speak to the regional commander of the Western Cape police and obtain confirmation from him. Now somehow to me this does not seem right. Here we are the elected representatives of the people and we are incapable of eliciting answers from ministers on matters of public importance. Because everyone of us have to fill in a form when we apply for a passport, we have to go to a Commissioner of Oaths and swear under oath that the contents of that document are true, so obviously there has been a degree of perjury, but this has not been followed through effectively by Maps. The point you make about a large majority in Parliament I think is an important one, because the view was taken right at the outset of this new Parliament, that Parliament will not be a rubber stamp of the executive, yet we do not see critical

questions coming from members to the executive, or follow up questions, supplementary questions to make them account to us as representatives of the people on their actions or what happened in their departments. It is irrelevant whether this happened before the elections or since they have taken office. But I think Parliament must play this role, and I think we need to also focus on the importance of having good Parliamentarians who are able to play this role as a check on the executive. It's not good enough that we have 400 members in the national assembly and 90 in the Senate, but are we in fact good parliamentarians, or read newspapers, do we follow up things which appear to be irregular in the form of questions or interpolations to the ministers. Thank you.

CHAIRPERSON: Professor Steytler? Could we try to be brief in our questions. We have an hour's discussion of the whole panel being in front here after the last speaker has delivered the last paper. If we could just ask questions of clarity at the moment. You will have time to comment and debate the issues, you have an hour after that. Let's take another question maybe, Mr Ramusi first and the Nkosi Nxumalo.

MR RAMUSI: The Senate and the National Assembly, what should the ideal position be between those two houses to make sure that the one checks the other, or the one is not frustrated by the activities of the other or rendered nothing than the other? Seeing that our Senate is supposed to represent our provinces right here in Cape Town.

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

CHAIRPERSON: I don't know whether the Professor will have answer for that one, or shouldn't we have an answer as politicians in that regard? Anyway that's a question posed.

PROF STEYTLER: On the question of questions I find it a bit startling to hear that the tradition of the past is simply carried over into the new Parliament, where one would have thought that a new start would commence, and it's precisely because of the lapdog role of Parliament in the past that one thought that a more vigorous Parliament would have emerged, and that the Speaker of the House, who really controls the events, should be able to demand an answer. Because you compare the given answers in the whole House as opposed to giving answers in committee, there the committee has extremely powerful powers to summons, subpoena by law members to come and give evidence before them and I can't see that cannot include a minister and also ask for documents. So there is a duality that

you, on the one hand you are able to enforce answers, and question people thoroughly and have follow up answers, whilst in the more important chamber in the National Assembly you do not have that. But clearly one would not be able to write into the constitution and the Speaker could demand an answer to the satisfaction of the questioner, that will have to be the tradition that is established. But at least one could write it into the constitution that every member has the power to question a minister in Parliament.

The other question in terms of the role of the Senate vis a vis the National Assembly, again if one looks at the past history in South Africa, how the Senate was simply a reflection of the parties in the National Assembly, it played no check and balance because if there could be no check and balance within the National Assembly it's not going to be done in the Senate, unless there is separate ways in which you appoint people to the Senate, and that their composition alters significantly different and are given particular powers to stop legislation either on a waiting period, that is to delay it. I wouldn't like to see it that it may veto it because the National Assembly must be the final body which controls legislation. It is the democratically elected body, and power really should vest there. So it may be that the Senate may have a delaying action in terms of general legislation, or perhaps in very specific cases, vetoing power in terms of provincial legislation. But that has to be done once one has got clarity precisely about the functions of the Senate. The functions of Senate will be determined about their powers and also who are elected, whether they will have an independent base from the National Assembly to contest policies and to contest legislation.

So I think one can see, I think as Professor Van Wyk earlier said, in the end checks and balances is a whole system and one cannot say well this is the check list, if you have those questions, standing committees then you have done it, it may be, it's a broader system of which an element may be the Senate, but then constituted to give it some real powers, some real clout. Thank you.

**CHAIRPERSON:** I am taking the last question, Mr Mlangeni you had your hand up didn't you. Any other question, I am prepared to take the last one. If there is no question this concludes item 3 of our agenda, thank you Professor Steytler it has been very good.

#### **TEA ADJOURNMENT**

#### **4. THE CHECKS AND BALANCES BY THE EXECUTIVE : Prof. D. van Wyk**

Chairperson, during the last two and a half hours that I had to think about what I have to say now, I suddenly discovered that I do not have all the books in my head and I further, and that is the more disconcerting thing,

discovered that my colleagues have really put me, for some reason and I believe it wasn't malicious, in a very, very difficult position. To talk about the executive. Because Mr Chairman if we think about checks and balances and separation of powers clinically, it is easy and nice to say that we have three powers in the State, as you have heard now, the executive, the legislature and the judiciary, and that they exercise mutual control and check over one another. It is easy to say that, but I think, and this may be a bit of a provocative statement, in practice it's a completely different situation.

The executive is in a different situation from the judiciary and the legislature. The executive is where things happen. They have got their hands on the levers of power. They, unlike the judiciary where things normally go a bit slower, you will know that it's often not that quickly that one gets a judgement from the courts. There is a lot of argument, there is a lot of procedure, there is a lot of reasoning, it's more aloof so to speak, unless of course it's an urgent interdict application, and even then the judge can take a week or two to give his reasons.

The legislature on the other hand is normally a more numerous body, people elected by the people, their deliberations as you know, from your own experience also take time, it's an open, by definition, public body. What happens in Parliament is open for everybody to see, so openness is much more easily achieved in the legislature. The same applies for the courts, normally court procedures are open to the public.

The executive is the place where it is the most difficult to get openness, because they normally sit in a room and they discuss, and one doesn't see them. It is most difficult to get accountability, because it is not open to the public and they have to be called as it were, to account for their actions. Responsiveness in the executive is often, or a response in the executive is the quickest of the three branches because they can act almost on the spur of the moment.

So I would maintain if one looks also at the system of checks and balances, or systems of checks and balances, that the executive is actually the branch to be checked and balanced and that the executive checks and balances in far fewer instances than the other two branches of government. I think it's as a result of this different function of the executive, the executive is in possession of power, and I hope that in the little exposition that I will give you now this will become clear, if one starts making a list of the so-called checks and balances in which the executive is involved, it is interesting to see that mostly they affect or check and balance the executive and not the other way around. Maybe also because the executive would like to be in control. The executive would like to check and balance, but if they, and this is common wisdom, if they are left because they have power in their hands, immediate power, left to their own devices, one gets dictatorial, authoritarian government.

Now what I will do in the next couple of minutes is to take the three branches of government quickly, and look at controls exercised by the executive, but it will give an incomplete picture if one doesn't at the same time also look at the flip side of the coin and that is controls exercised over the executive, and I will try not to repeat what my colleagues have said, I

will deal with it somewhat differently .

I will start with the judiciary and the executive. Mr Motimele has given, I think, a very good exposition of how the executive is checked and balanced by the judiciary. All I need to say at this stage is that in the past in South Africa it was a very incomplete kind of control. Parliament was supreme, Parliament could oust the jurisdiction of the courts, Parliament could empower the executive to make unreasonable decisions, to take unreasonable action. The most notable case that I can remember was in 1962 when the Appellate Division said in regard to the Group Areas Act, we all admit that it's unreasonable, it's grossly unreasonable, it's a massive social engineering programme, but that's the will of Parliament and we can't say a word if the executive does it. There were even certain areas of executive action which were beyond the control of the courts, and I refer here to the so-called prerogatives, power to be exercised by the Head of State which were not subject to any form of the judicial control at all. This situation has completely changed under the interim constitution, which now binds, in so many words, the executive legislature and the judiciary, the courts are there in terms of the constitutional principle also and in terms of the constitution to safeguard and uphold the constitution. So the executive is under much tighter control, in principle at least, by the courts than before, and section 24 of chapter 3 now talks about administrative justice, in other words the executive in all its forms and at all levels have to act reasonably now.

They have to give reasons for their decisions, so that situation has changed completely, and I think that was a massive step forward in terms of control of the executive by the judiciary.

The one thing that the current constitution is still silent on is the powers of the executive in relation to foreign affairs. The constitution doesn't say a word about it and it's a question of whether there is judicial review of the actions of the executive in foreign affairs.

If one looks at the other side, and this is what I am supposed to talk about, controls over the judiciary by the executive, one finds that normally if it can be called a control, it relates to the appointment of judges. You will remember in Kempton Park, about two ago, the large debate that raged around the question who should appoint the judges of the Constitutional Court? Should it be the President of the Republic or some other body? There is no uniform system in the world. Often the executive has a substantial say in the appointment of judges, but it doesn't have to be so. In Germany for instance, the lower House and the upper House so to speak, appoint members of the Constitutional Court, but in the United States it is well known the President appoints judges of the Supreme Court. But here comes in something of what I prefaced my little talk with, the executive isn't quite trusted on its own in this matter, and then one gets a kind of web like system of check and balances. The Senate in the United States is also brought in. I think we have a similar situation in South Africa where the President appoints judges, but there must be some other control, also in our case, and the same applies in Namibia, the Judicial Services Commission.

So what one sees here is that it's not a single check or a check on its own by the executive. It's a check by another check, or another balancing factor

built into the system, almost to once again limiting the executive in its involvement in this other branch of government, in this case the judiciary.

If one looks at the legislature and the executive, Professor Steytler has given us a number of good insights there. It seems to me that the way in which checks and balances operate there depends on the system of government. Whether it is in broad classifications a presidential system or what we call a parliamentary, or perhaps, as in South Africa a mixed kind of system.

In presidential systems such as the United States where the President is elected by the people, where the president stands on his or own with his or her cabinet so to speak, which are not drawn from the legislature, there is greater separation. The President is not a member of the legislature, therefore the President is not directly checked by the legislature, but the President also doesn't have the kind of direct influence on the legislature that one has in a parliamentary system.

So where does the check come in? The check comes in, or the balance comes in that the legislature makes laws and those laws need the approval of the President. So the check on the legislature in this case is the President who can say, no I don't like that law, and I veto the law. But by the very nature of checks and balances where it's not originally intended to be a complete interference in the workings of the other branch of government, in this case the Executive President in the workings of the legislature, the President in the United States for instance, has a limited veto. He can veto up to a certain point, but that's a check because the Congress knows that if the President vetoes we need special majorities to override that veto. Interesting result of this system of checks and balances is that the legislature and the executive are almost forced into negotiated compromises. You may remember that when the Republican Party took over the Senate and the House of Representatives in the United States recently, fear were expressed that President Clinton will be doomed now. He is the Republican President faced by a so-called hostile, but I think hostile is a misnomer there, by a hostile Congress. What we are seeing at the moment, is that President Clinton and Congress have to find some way of living with each other, and the ironic, in an ironic sense of the word, outcome of that maybe that they end up with better legislation than when the President and the Congress belonged to the same party. There will be much more critical analysis probably. There will be much more horse-trading so to speak, but eventually maybe also much more openness and much more responsiveness in the whole system.

On the other hand in a parliamentary system, and you will know that the British system, the Westminster system is the typical form of parliamentary system, the executive are drawn from the legislature. That means the ministers sit in the legislature, the ministers are the executive, they sit in the legislature, they need the confidence of the majority of the legislature, in other words the support of the majority of the legislature. The check and balance operating there is in principle a phenomenon which is called ministerial responsibility, which means, as it stands in our interim constitution also, that ministers, or the ministers are individually and collectively responsible to Parliament for their departments, which on paper is a very effective check on the executive, but in practice, as I have also said earlier, a rather weak one, because it depends to a large extent on the



culture underlying a specific system.

If one looks at the way in which ministerial responsibility operated, and still in a way operates in the United Kingdom, and the same principle which has been part of the South African constitution since 1910 effectively, in which it operates in South Africa, one sees huge divergences.

A few years ago for instance a British minister of labour resigned her post, I think it was a woman, resigned her post because of rumours and later a few confirmed cases of Salmonella in either eggs or in milk, and it was seen as such a major dereliction of duty on the part of that minister, I mean I don't imagine that for one moment she has ever seen a Salmonella or handled an egg with Salmonella, but it was seen as such a major lack of control by that minister over what is happening in her department, that she simply resigned.

In South Africa we have seen over the last number of years often accusations, and in many cases also proof of for instance massive corruption in government departments, and ministers consistently refuse to take that political responsibility. What they did, and this is how the system began to operate in South Africa, what they did was to say, I am the responsible minister and I will try and do something about corruption. If it worked the same way as in Britain, the minister would have said, the fact that there is corruption in my department, means that I am not in control of my department which means that I am not a fit person to run the department, and I must resign. It doesn't work that way here, here the minister says I am responsible and I have to root out the corruption. There is a very fundamental difference in the approach. That's why I say that on paper it looks like a good thing, in practice it may not be such a strong check on the executive. It depends to a very large extent on the, call it the political culture in a country.

Now South Africa since 1983, and also under the interim constitution has what one can describe as a mixed system. The President who is also the head of government, in other words part of the Cabinet, the President is not a member of Parliament, but the President is elected by Parliament. So the President to a certain extent, the legislature affects the executive by electing the President.

Ministers on the other hand are members of Parliament, except now for the amendment that a minister or a small number of ministers may be appointed from outside Parliament, but as a general rule ministers are members of Parliament. Here is an interesting kind of chain of check and balance in the South African system. The President is not by name responsible to Parliament. The Cabinet, however, of which he is a member is individually and collectively responsible to Parliament, but there is an indirect Parliamentary check on the President because the President has, in the majority of instances to perform his or her functions in consultation with the members of the Cabinet. If you look at the definition of in consultation with in our constitution it means that it's not simply a matter of I will listen to them, that's after consultation with, and then I will make my own decision, it is in terms of the constitution effectively in agreement with the ministers of the cabinet. So the ministers of the cabinet are on paper responsible to Parliament. The ministers of the Cabinet in most instances have to agree with what the President wants to do. The ministers can always tell the

President, listen here, if we don't do it this and this, we must go back to Parliament, we must report to Parliament and Parliament can kick us out if they don't like what we are doing. So indirectly Parliament does have a checking function on the President in the event. So some system of ministerial and call-it presidential parliamentary responsibility does still operate in South Africa.

The question however is, and I think that's was asked by Dr Ranchod, more than once now this morning, how effective is this parliamentary control over the executive? But that's not actually my job to ask that question, that was asked by Professor Steytler, how does the executive check and balance the legislature? That's the question that I have to answer.

Once again it depends on the system. If it's a presidential system the only effective, formal check that the President has over the vis a vis the legislature is through his or her veto power, which as I have said is a limited, a restricted veto. It can eventually be overridden by Congress. In the parliamentary system, and that is what we have at the moment, it's a different matter.

I would allege that the executive does not only check and balance Parliament. The executive, and I think that's also what my colleague said, the executive is in effective control of Parliament. Through just ordinary mechanisms, the fact that the executive needs to enjoy the support of the majority in Parliament, to get its laws through, through a procedural rule which flows from the fact that the ministers need to be part of Parliament, and that is that government's business normally takes precedence in Parliament. Which means that normally in the South African and British context it is the state departments, the ministers, who take the legislative initiatives. As a rule laws are introduced in South Africa and in Great Britain by the ministers. Private member's bills are also entertained, but private member's bills have historically become a kind of anachronism.

One finds that, interesting enough, university bills for instance, are still treated as private member's bills, but they are dealt with in the so-called public bill procedure, because they are in effect also public bills, but private members have actually very little legislative initiative.

So the executive is in effect in control of the legislature, and I would venture to say that that goes further than check and balance in the classical sense, especially where there is one dominant party in a system, and this is not a reference to the present system, or the present system only. We have seen this for 40 years since 1948 when the National Party was in power and it increased it's position that with the increased numerical strength of the National Party in Parliament its dominance and control of Parliament became more and more pronounced. Which introduces of course another dimension in the whole check and balance debate and that is the role of political parties and the participation of political parties in the whole system of government.

The so-called mixed South African executive system is in essence still a parliamentary system and I have already referred to the so-called internal checks that the President has to act in consultation with ministers, they can control and check each other there, in the executive, and something which one can explore if one would like to is the exact role of the notion of a

government of national unity as a check and balance mechanism in the executive itself, but also in and on Parliament.

Mr Chairperson some things which haven't been, well references have been made to them but they haven't been addressed on the whole although Professor Steytler has referred to some of them, are other mechanisms for checks and balances. We have concentrated mainly on the three formal branches of government, executive, legislature and the judiciary.

The question was asked earlier what about the other levels of government, provincial levels of government with their various branches, local government with its various branches. Reference was made to the public protector, I think we can also refer to the Human Rights Commission, to the Auditor General. If one takes a broad look at checks and balances, some of these institutions can be described or related to as, or related to the executive.

Our interim constitution has quite a number of these bodies which perhaps can neither be said to be executive or legislature, in other words which defy categorisation but which perform a certain kind of checking or balancing function, the commission on provincial government for instance, the fiscal commission, that is another topic that one, in dealing with checks and balances I think should look at the system built into the interim constitution of so-called constitutional committees. I refer here to human rights, gender equality, land restitution, finance and fiscal, public service, judicial service, there are a number of them which I think essentially were also designed to operate as control mechanisms in the whole constitutional set up.

In conclusion Chairperson, I think it's important to repeat that unless there is an awareness and a culture of checking and balancing, and as I have said in my introduction in terms of the constitutional principles they should be directed at accountability, responsiveness and openness. The institutions that we create may be less efficient than we intend them to be. In other words institutions are very important and they should be carefully designed, crafted and reinforced, but they should also be reinforced by a culture and awareness of the exact purpose of checking and balancing.

Finally, just to repeat what I think is to me the critical aspect around the executive and the way it checks and is checked, is that by its very nature the executive is more given to be checked than given to be a checking mechanism in the state, and it seems to me that's almost a kind of obvious truth that one must take into account. Thank you.

#### QUESTIONS / CLARIFICATION

C/PERSON: Thank you Professor Van Wyk for that contribution. After such short notice you have managed to prepare, and we will now allow the members to ask questions.

Jack Rabie, Peter Hendrickse and Mike Mushwana in that order.

MR RABIE: Mr Chairman it appears that in South Africa we have developed a convention that parties don't ask ministers that belong to their party questions in Parliament. Whether embarrassing or not you hardly ask any questions to the minister belonging to your party. But of late we have seen members of the majority party criticising the government in

public meetings and in newspapers and what have you. How can we change or improve that situation so that dissatisfied members can at least ask those questions that they criticise the government about outside of Parliament, where the benefit for other parties is not there to react to that criticism, to ask the questions in Parliament so that it can be debated there instead of making a noise outside of Parliament?

MR HENDRICKSE: Mr Chairperson just some clarification. In terms of the existing constitution, can the President veto legislation? If he does, what happens? As you said in the States it get referred back to Congress and they need an increased majority or a special majority to then pass it, or override his veto.

Secondly, can the President call an election before the time on his or her own, other than as a result of a no confidence motion or rejection of a financial bill?

Then the third question is for a comment or an opinion by the Professor, is how does he see the USA type of situation, compared to the Westminster where you have opposing parties controlling the presidency and the congress? Why I ask this is, is that I see this as a cause of frustration, that a party having gone to the electorate, seeking a mandate to carry out a specific programme is then frustrated in carrying out that programme because the other half of government is controlled by its opposition party. For example in the United States now, where the Republicans went to the electorate, they are now not able to carry it out in the sense that the president can veto it, and the president having been popularly elected cannot carry out his programme because he is being vetoed by the new Congress.

QUESTION: Thank you. My question relates to the Auditor General. Presently I think we are busy privatising the duties of an Auditor General. Someone when speaking this morning indicated that you know the Auditor General is in a better position to check the executive as well as the legislature. Which is the best form, to have the Auditor General privatised, or to have him as a member of the executive?

Secondly it's the question of expertise within Parliament itself. When we discussed earlier on we looked into the question of coopting people who were actually not elected into Parliament, was this not a form of bringing in expertise that could be lacking in Parliament by getting an expert from outside to serve in the example of our minister of finance who doesn't belong to any political party, but is a complete outsider, but inside the executive to bring in expertise?

MR LEBONA: On discussing the executive I hear emphasis on the elected executive, not the appointed executive. We have an instance at the moment, whereby we have the appointed executive with, of course they have limited powers, but extreme powers because in the present South Africa they are the people with the necessary time and person power to play the ball of course of initiating bills and all the like. Politicians can talk but without that part. I want to find out really, isn't it the best way to practice the American way of doing things? When you have the party coming in especially the top positions, it

comes with its people so as to not have frustrations on the way, because there is a general mistrust. We are human beings we can put that on the paper but the practice, especially when there are hiccups, you start reverting of course to mistrust which is, as far as a I am concerned, justifiably so.

PROF VAN WYK:The first question about the members of a political party, especially the majority party who don't want to ask embarrassing questions in Parliament which means in public to their ministers, I think is a purely human phenomenon of course. But apart from the fact that it's a human phenomenon I think it's also part of the system. It results from a fairly strong caucus system that we have in South Africa, and that I thin we have inherited also from Great Britain. There is another dimension and that is that members of Parliament belonging to the majority party would probably all like to become a minister or a deputy minister or something at some stage, so there is a political career at stake. I don't think any person can afford to be seen to be too critical there in public, in Parliament, ...(Afrikaans) and but all these things stand in the Westminster books on constitutional law as well that these factors influence the behaviour of political parties. So the question is how does one change the system? I don't think the parliamentary system as we have it with ministers in Parliament, can really be changed effectively to make members of a majority party, or in this case the members of the parties belonging to the government of national unity, asking critical questions in Parliament, unless of course the caucus system or the party discipline system is abolished and members of Parliament are allowed, without any kind of suggestion that it will be held against them to operate on a completely free mandate system. In other words they can say and they can vote according to their conscience, they don't have to follow the party line. I think what I am saying is this phenomenon is inherent to the kind of political system that we have with, and the parliamentary system.

A new thing that Mr Rabie mentioned is the fact that members are critical outside Parliament. Exactly how one - but I think it also relates to the question or the observation that was made during one of the earlier discussions that the current majority party has developed a certain culture of self-criticism and self-evaluation and maybe it's a manifestation of that, that members feel themselves more free to be critical, to be critical outside Parliament. It may have a positive political impact on the way they behave inside Parliament, but I think that remains to be seen.

The next question on the President's veto and whether it doesn't lead to a frustration of the popular will because Congress has one mandate and the President has his mandate, or and I think as it was mentioned his contract, that's perhaps the operative secret of the American system, that both the President and the Congress are popularly elected. Both can fall back, although in terms of time, mandates given at different moments of time, but both President Clinton can still say I am bound by my election promises three years ago and I have to see to what extent I can get them through. The Republican Congress can say we are bound by our mandate or promises of six months ago, and we have to see to what extent we can get them through, the one

can't tell the other you are dependent on me. They can both tell each other, we are responsible, accountable to the people who elected us, therefore we will have to find some way of accommodating each other, and that's why I suggested that it becomes a very good example of compromise politics. With the final vote when it comes to legislation to the Congress who can with a certain majority finally override the resistance of the President.

I don't think I am really qualified to answer the question about the privatised or public Auditor General, except for saying that I think the important point is that the Auditor General should have, in terms of law, and ideally in terms of the constitution, full powers of investigation if the office is so-called privatised, it should not be used at any stage as an excuse, or a justification.

MR LEBONA: Sorry, actually the word I wanted to use is autonomous Auditor General.

PROF VAN WYK: Autonomous, but his or her very nature the Auditor General should be complete autonomous, in other words should be in a position to look into all aspects, all matters of public finance, and must not be excluded from any form of scrutiny and also not subject to any form of intimidation. I think that's where the notion of autonomy comes from.

Expertise from outside, that's an interesting question, and those schooled in the tradition of the parliamentary system and with a certain bias in favour of the parliamentary system always feel a bit uncomfortable about this idea that you can have a minister who is not a member of Parliament, who has not been elected to Parliament. This real or imagined notion that the minister is responsible to Parliament and ultimately through Parliament to the electorate still operates strongly in our minds at least, if not in practice. So one feels a bit uneasy about it.

On the other hand, the question is, why not? If for some reason, and that's the indictment, opponents of outside expertise normally use, if the party lists, or the political parties can't succeed in getting the necessary expertise on their party lists then it is better to get outside expertise than having no or very little expertise at all. But I think in any event, in a system that we have at the moment in South Africa where it's mixed, where one leg stands in a kind of executive president system and still on the other hand in Parliament in principle, I don't think one can really object against a minister being appointed as an expert from outside, especially since there is also at the moment still a provision which says even that minister who has not been elected is responsible individually and collectively with his colleagues to Parliament and to the President. So he is bound by the constitution at least to be accountable.

There was a final question about the appointed executive, and my response to that is completely subjective. I think that we have in South Africa or no, essentially a parliamentary system of government has become so much part of the political fibre of South Africa that it

would be rather difficult to implant a completely elected executive, almost a la the United States system in South Africa. Even if one did that I would predict, and my predictions are normally wrong, but I would predict that one will still find traces of parliamentarian government in that whole system. In other words what I am saying is that I don't see much chance that a system like the United States one would transplant onto South African soil and if the Namibian example is anything to go by where the President is directly elected at the moment, the same kind of traditions, same kind of history, it essentially operates still as a mix between parliamentary and so-called executive system. But that's a purely subjective view point. Thanks.

CHAIRPERSON: Thank you.

MR HENDRICKSE: A follow up or arising out of the Professor's reply, my first two questions had to do with the existing system we have in South Africa. Can the President veto legislation, in terms of this constitution? What happens if he does? Is there a way that we can override it?

Secondly the calling of an election, can the President on his own at any time call an election for Parliament.

PROF VAN WYK: My apology to Mr Hendrickse. I have noted the questions but I have missed them. I hope that my colleagues will assist me here. I seem to remember that the current constitution provides as has become strong convention in South Africa, and in line once again with the Parliamentary system, that legislation regularly passed by Parliament has to be approved by the President. The President now has the constitutional power that if there are irregularities, procedural irregularities the legislation may be referred back to Parliament to be corrected. But if Parliament has put its seal of approval on legislation, the President doesn't have a discretion. In other words, unlike the American President he can't say I don't like the idea that we are going to impose heavier taxes and therefore I send it back. That's Parliament's decision. If they said it and there wasn't a quorum for instance, the President can say, I heard there wasn't a quorum, I send it back, pass it again. It's simply a procedural veto, if it's a veto at all.

I think also that the interim constitution provides, and that's also part of the constitutional principles, I think it's constitutional principle 32 or somewhere there that, except for the circumstances provided for in section whatever, and that is the deal with no confidence, there may not be an election before 1999. In other words the President is constitutional debarred at the moment from calling an election for let's call it political or strategic reasons.

CHAIRPERSON: I would like the other two technical experts maybe to take a front seat here, so that we can begin to ask questions all over, and if you want to comment you can do so. If you want to ask a question, let them participate they can also answer questions that they come from the floor. The next one is Dr Pahad.

DR PAHAD: I would like to make some comments Mr Chair.

CHAIRPERSON: I am sorry Doctor, just before you carry on, Professor Steytler you had your hand up, you wanted to comment? You would like to ask a question first?

DR PAHAD: I would like to make a comment first and then maybe they can comment afterwards.

CHAIRPERSON: Okay, fine.

DR PAHAD: Because I wanted to comment on what Professor Steytler said in terms of how I understood him, that what you really want to do is to try to ensure that minority parties have some say in the appointments of parliamentary committees as well as select committees and so on and so forth, and that opposition in Parliament is effective check, meaning that as long as you have opposition parties in side Parliament and therefore multi-party system is important. The problem with this discussion is not the fault of the experts, its very institutionalised as if the only things that matter is what happens in this particular institution. There hasn't been a relationship between the parliamentary and the extra parliamentary forces, and so the question about how minority parties play an important role in the political process isn't limited to whether or not they have a say in who may or may not sit on certain committees. It's also dependent on their capacity to organise and mobilise forces outside Parliament in order to give weight to their positions, and I think that's very important. So I don't think we should reduce this to this thing.

Secondly I have a problem and as one who negotiated on all of these things, that sometimes you appoint people because you have to compromise, and you find you appoint the least offensive person. So if you get 75% you must look for somebody who is the least offensive and may not necessarily be the best person for the job. So it's not necessarily a good thing in my view. I think it's not necessarily a good thing to say that if you have this kind of checks you will land up with the best person. I think you might land up with the worst person, because you have got to negotiate now with the National Party, or the IFP and whatever it is and we each have our own people and then we find that this one person is really not objectionable to any of us and then we might appoint those people. I am not saying this has happened but I am saying that you cannot overrule that possibility taking place. What is important to some extent but what both Mr Ranchod raised and Jack Rabie raised, although I don't think they are matters for the constitution frankly, I think what Mr Ranchod raised are really basically matters for the Rules Committee to look at. What Mr Rabie raised is similar, you can't put that in the constitution, because it's a given fact that every MP has a right to ask a question, whether they answer the question or not is a separate matter. But we ourselves have been giving a lot of thought to the question about how our own Maps could ask questions of ministers, whether it is a government of national unity or not, because it becomes an important part of the democratic process that members of Parliament should ask questions to ministers.

Part of the problem I find now, both interpolations and questions, is



that partly we haven't asked many, I think that's wrong, but that the other parties I have asked I am never convinced in my own mind that those parties opposing the questions to illicit information, to get information, to enhance the debate, but it's basically used as a political football for party political propaganda purposes. So we need to look at it in itself you see. There might be a problem, so you can open the doors, but it can be abused. I think, in my personal view, I don't want to mention any specific names, I think it has been abused by parliamentarians of what we call minority parties. That is the first thing.

The second thing is that perhaps you would want to look at it, again it's not a constitutional matter, to see there are too many questions that are posed. So you sit there as a Deputy Speaker and you have got to tell somebody that time is up, so you need to examine the entire way in which it operates. Then maybe questions should come through political parties properly for the sake of getting information and more time given for answers. But I think we need to look at it, but it's not a matter for the constitution. It really is a matter for parliamentary rules committees to look at.

Lastly that there is no such thing as a pure democracy, there is no such thing as a pure checks and balances. It doesn't exist anywhere. ... (indistinct) once described democracy as the capacity of the people to change the government. That was his definition of democracy. So I think what we need to do in South Africa is ask ourselves what would be the most effective form of government which would enable people to feel that the representatives they have sent to Parliament are doing their task. I think this is critical. Whether you borrow some from America or you borrow some from Germany or whether you borrow some from somewhere else is another matter.

Lastly you see multi-party system is written into the constitution and should be. But there are elements of a one-party system which are not necessarily bad. In Tanzania the one party system was pretty effective democratic system for quite a period of time in terms of the discussions that were held. Yes, some of the fiercest debates were held in the Tanzanian Parliament and not the Kenyan Parliament which was, no, not the Ivory Coast Parliament which was a multi-party system. The question is, what are the kind of traditions that are held? So I am saying we can learn from other systems. I don't think we always need to be duty bound to look at the United States of America or to look at Britain in order to try to find some kind of answers which are relevant to South Africa itself. I am saying that when we are examining possibilities of what should go into the constitution, we need to have a bit of a greater breath in terms of looking at other countries which might have something to offer. They might not have something to offer. But I am saying that we need to look at, and so sometimes our own discussions are a bit narrower focused, as if there is always a permanent dispute between presidential system and a parliamentary system.

**CHAIRPERSON:** Thank you Dr Pahad. Can I take one question or one comment and then I will give over to the technical experts. Dr Ranchod?

**DR RANCHOD:** Thank you. I agree with Dr Pahad that our rules committee will have to discuss the manner in which we conduct question time, the role of the Speaker etc, but broadly speaking I think we were looking at the legislature as a check on the executive, and the point that I was trying to get across was that it is weighted in favour of the executive at the present time. That's just the point that I want to register. A minister could not appear in the house or he could give a simple single syllable reply to a question and sit down and there's nothing that the legislature can do under our present set up.

I would just like to raise another matter and that is that at present, I think we are all on a learning curve, but there is a sense of frustration that we stop, start, stop, start with Parliament, and there is no doubt in my own mind that the parliamentary programme is being determined by the executive. The executive will determine the amount of legislation that comes through, and if there is no legislation then Parliament's prime business is extremely limited. I think this is a source of frustration which will have to be addressed. The fact that we are not getting legislation through the system, and it's the executive that has to take that responsibility, it's not Parliament. But I would like some discussion on that particular aspect.

The other point that has not been touched on is the situation where ministers get involved or comment on matters which fall outside the portfolio to which they are entrusted to, and now this has been debated in Parliament, I don't have any very strong views on this, but if one goes back to tradition and you talk about the minister being responsible for what happens in his department, where we do have the sort of cross pollination occurring could one not then have a situation where a minister could get out of his responsibility for the running of his department? With the strengthening of the committee system where ministers are in fact referring matters to committees, would this not in time also dilute the minister's responsibility for what goes on in his department, because committees are playing a much more assertive role in the new Parliament. They want to get involved with the restructuring of department, they want to have a say in policy formulation. They want to be able to summon ministers to appear before them, senior officials etc, and this could impact on the classical situation of a minister being responsible for what happens in his department. I wonder if the panel could comment on these?

**CHAIRPERSON:** Thank you. Those were the two comments. I will take other comments after this. Mr Mlangeni I recognise you and Mr Dlova I recognise you. Mr Ramusi I also recognise you. Can I give the panel of experts, any one of them who would like to comment or maybe respond to the question and comments made by the members.

**PROF STEYTLER:** Just a few responses to Dr Pahad. Clearly any constitution should not be seen, this is a piece of paper and this is reality. The power that is wielded by any party is not how many people there are in Parliament, but also clearly linked to extra parliamentary ability to mobilise forces. Unfortunately we are writing a written document and what one tries to do is to, I think my colleague once said, you are thinking of the worst possible scenario and you are writing for a worse

possible case, if you are opposition and your worst enemy is in power, what would you see the constitution look like. So one are mindful of the context in which politics operate, but it is difficult to sometimes put it down on paper. The same comment goes for the appointment of the officers of Parliament. Clearly it's possible that you appoint the least offensive person if you have a weighted majority. Equally it is possible if you have an absolute majority for appointment of such a person that you get a lame duck which are therefore ...(indistinct) for a particular time just to - you know, so there is no perfect system and what one tries to argue here is the notion of Parliament acting as Parliament, as a body not as a competing parties. How do you achieve that? You get officers and Auditor General, public protector as getting some autonomy from political parties and being responsive to Parliament as a whole, and feeling owned by the whole Parliament rather than owned by the ruling party.

The questions in Parliament and being used as political football, I think that's the essence of the competitive Parliament is precisely to embarrass the ruling party, to get information, to advance their cause. It's not simply let us try to work for the good, it's to advance their own positions as well. So clearly parties are going to use it as political ammunition if they get embarrassing answers, or bad reports from the Auditor General. This department is not well run, it's unaccounted for monies. Clearly minority parties are going to say well this minister is not good, he doesn't perform his task, clearly the government is not fit to govern. So in that way the politics are conducted.

Just in terms of the last question I would ask my colleague here is, the importance of the President signing the final, the law as the third part of Parliament, because in that sense legislation is passed and then President becomes part of Parliament as the final signature on the - is it in fact simply tradition? Is there value in checking procedural requirements, or is it something one can actually do away with? Linked to that the notion of bringing into operation legislation whether there is or even the signing, say President delays in signing, is that a type of control, an informal control if the President simply said well I am a bit busy, I am not signing, therefore the act doesn't go into operation, is that constitutionally a protector or is it just simply now tradition which says that he actually does so, and that the bringing into operation of a piece of legislation is left to the executive.

**CHAIRPERSON:** Any other comment from the experts, Advocate?

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

mandate and that party goes and forms both the legislature and the executive. Now that's important to bear in mind because you will then realise that both the legislature and the executive have a single mandate from a single source, and therefore the ultimate ... (indistinct) whether they carry that mandate or not, is the source that puts them in government.

Now I know why the question may arise. There are instances where the source that put the executive in power, if the executive is a popular elected person, might be a different mandate which put congress or the legislature in power. So there is a distinction there, and I think in the particular instance, and especially in South Africa, if the mandate for the executive and the legislature comes from the same source, you therefore can afford to split hairs. That's all.

CHAIRPERSON: Thank you Advocate Motimele. Any comment from the experts now. Okay let me then take Mr Mlangeni and Mr Ndlovu. Professor van Wyk?

PROF VAN WYK: The question as I understood it Chairperson was whether we really need today as things stand because the President cannot really veto legislation whether we still need his or her assent to legislation. Of course this comes from once again the Westminster system where the Queen, the Monarch is indeed part of Parliament and until 1983 the President in South Africa was also part of Parliament. Under the present constitution he or she isn't part of Parliament, but as a result of the link between the President and Ministers in Parliament all legislation that goes to Parliament will have been seen, well not seen, but in principle checked in the cabinet meeting for instance and the President will be aware of it, and when it goes to Parliament the possibility that it will be changed by the governing party or parties in a way which will not meet the approval of the President is very limited. So technically on paper, we don't need the approval of the President, but it's nice to have it, it's customary and having said that I agree with Dr Pahad that we shouldn't in terms of our models look only at the, call them traditional ones. I would go one step further and say that our system can be linked to these historical models, but our aims should not be so much to either align ourselves with what has happened in other countries, I think the aim should be to design a system that works for South Africa. In that sense the experience gained in this process of transition which started effectively and formally on the 27th April 1994 should to my mind be effectively used and implemented in the writing of the final constitution. I think the members of this committee will have first hand knowledge and expertise and experience of the things that are good and the things that are not so good in the system, and I think that one should maybe within what my colleague Motimele calls here, the broad principles of fundamentals. One should look at what is happening in South Africa at the moment, and if we can learn from other systems, wherever they may be, but essentially it must be South Africa and South African conditions.

CHAIRPERSON: Advocate Motimele?

ADV MOTIMELE: Mr Chairman I just wanted to add that what I said earlier applies, it's a short answer to what my colleague Professor van Wyk said. You see we need to internalise this and understand it in context. If the President has no different mandate from the legislature then you have problem with the veto. You see the President would have a veto to veto legislation from the legislature, if he has a separate mandate from the legislature, because then he would say that's not my mandate. But if the mandate comes from the same source, both the legislature and the executive, why would the President have a veto over the legislature?

MR NDLOVU: Are you saying if, your last words, are you saying if let's say the President comes from the ANC and the governing party comes from the National Party ...(intervention)

CHAIRPERSON: Mr Ndlovu just carry on.

MR NDLOVU: And the governing party comes from the National Party, now there is two sorts now of mandates, two sorts of mandates. The President has another mandate and the governing party, the majority party in the house has another mandate, now are you saying therefore, or advocate, that he will have something to say that to delay or reject or send back because he has that thing in his mind because there are two sources that are giving the mandate to the same house?

ADV MOTIMELE: I am not sure I understand the question, but maybe the confusion lies in the principle, and I would like to use a system of further particulars in order to make sure I understand what is the question. Who would be elected, who would be the party elected given the mandate to run the country?

MR NDLOVU: Somebody else.

ADV MOTIMELE: Ja, in your example so I can answer it, which party would it be? Let's say it's the National Party and the National Party has the majority in the house. And it's that house which is going to appoint the President and they National Party uses it majority to appoint a Inkatha President.

MR NDLOVU: An ANC President.

ADV MOTIMELE: An ANC President. And what is the question? Whether that President, the ANC President should have a veto or not. Okay. You see the person who has the mandate from the people is the National Party. So the National Party uses that mandate in its wisdom to appoint an ANC President, that ANC President is not accountable, he didn't go and look for the mandate. It's the National Party who went to look for the mandate. So the primary source of the mandate is still the National Party. You can make that President accountable to the National Party, but in terms of the mandate the people haven't given the President the mandate.

MR NDLOVU: ...(indistinct)

ADV MOTIMELE: No then I don't understand. No, no, no I am no confusing myself, I want to be very clear on this matter. Don't say that I am confusing myself because maybe you are more confused than me. Let me just understand. If the National Party has a mandate for the certain programme or the election manifesto, and the National Party get an ANC President who then execute the ANC manifesto, then the National Party is guilty of dereliction of duty to the electorate.

MR NDLOVU: ...(indistinct).

ADV MOTIMELE: But then I don't understand.

CHAIRPERSON: Mr Ndlovu could you, do you want to pursue that? You want to hold it? No, no you have another three minutes I am giving you time. I just want you to be simple so that they understand you for the benefit of others members as well. Just be simple, straightforward what your question is.

MR NDLOVU: I am trying to say if the source, the source that would not prevent the President to give a mandate, it's coming from different sources. In other words the President now, the bill is in front of him for his signature, and he has got two sources that are conflicting for him to sign this bill and he is one of those sources that make him to go against this bill in front of him, but the house, let's say the house have agreed with the bill, but now when it comes to the signature, the authorisation of the bill, there are two sources that are in front of him that gave him the mandate to give him this bill, and one of those source, he is in part of the source that say no to this bill, will he go ahead and sign it?

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

CHAIRPERSON: Okay thank you. I think we have gone a little bit far with that question. Can we close the discussion on that, we won't finalise it today anyway.

MR MLANGENI: Mr Chairman it's a pity Mr Rabie is not here, because I wanted to make a comment on the question I think he raised with Professor Van Wyk and I noted that Professor van Wyk was very, very carefully choosing his words when he answered that question, he didn't want to commit himself. But if I understood Rabie correctly he was probably saying, how do we prevent say members of the cabinet making statements outside of the house when they did not raise, I am

putting in my own words, when they did not raise these questions originally in Parliament, seeking clarity or criticising or whatever legislation with their other ministers? I ... (indistinct) to be asking that question, that line. How do we prevent these people from making statements outside Parliament?

My simple answer to that would have been if he was here, that in political parties, political parties have structures within themselves where people have to raise whatever problems they have within the organisation, within their parties before they go to the media, before they go public, so that these problems are solved internally. Any person who goes public, it's obviously a person who is looking for trouble. That person is looking for trouble. You go and discuss matters in the public, matters which should have been discussed in the party, you are looking for trouble, you are asking for expulsion from the party. It happens everywhere and such people ultimately are expelled from their parties, and they find themselves forming new parties, some of them very insignificant. I think, even in the cabinet itself, just hang on Mr Ndlovu, just hang on, even in the cabinet I think cabinet itself should also have rules which are going to guide its members, and not allow people to go and make statements outside when matters could have been solved in cabinet. That would have been my comment if he were here. But the question I want to ask refers to Professor Steytler. If I understood him correctly when he was dealing with the legislature as a check on the executive and the judiciary, I understood him to be saying that Parliament should be inclusive of all opinions, something to that effect, and has the necessity, these are not his words, and has the necessity for proportional representation. Something to that effect. You will correct me if I am mistaken. Now about that, I have heard people outside here, public outside Parliament, saying the introduction of proportionality in our system, parliamentary system, is in fact destructive, it's destroying parliamentary system, how correct is that? Thank you.

**CHAIRPERSON:** Mr Ramusi do you have a question or a comment?

**MR RAMUSI:** I have got problems.

**CHAIRPERSON:** Can you do it in two minutes, because we have got to sum up.

**MR RAMUSI:** Yes. This government of national unity created by a constitution, is it constitutionally possible that it could really work? Seeing that the very executive is divided. Are we deliberately going into a situation where we know we are divided and we are quiet just like that, and war every day within the cabinet, and we are a normal people.

**CHAIRPERSON:** Thank you Mr Ramusi. Can I give three minutes to the technical experts to respond to the members comments and questions. Any one of you are welcome to do so. Professor Steytler?

**PROF STEYTLER:** Right just on the question of whether proportional representation is destructive of Parliament, have you any point, in what way is it

destructive, because I don't follow it? Because if one has a 1% or even a 5% threshold it's actually better for democracy because it's rather that the people are inside Parliament and be incorporating and consolidating democracy within an institution rather than standing outside and may want to destroy that very democracy. So the argument for proportional representation is you actually get most opinions, significant opinions within Parliament, bring them in rather than let them stand outside, it's a crude way of expressing it about what you do inside the tent rather than doing it outside the tent. So the question is, do you rather get the people inside the tent doing it outside, rather than from outside doing it inside. Okay you get the drift of my point.

**QUESTION :** As a follow up Mr Chairman, does it destroy the constituency system?

I am raising these questions, I don't know, I can't take them further except that you hear people as I said talking about this ...(indistinct) destroy the constituency system, they destroy parliamentary system, I don't know in what way. That's why I am raising it.

**FOLLOW UP:** That's a very good question but that's precisely the issue we are going to have to discuss when we discuss the electoral system, not now in terms of checks and balances. When we discuss electoral system we have to devise a system which takes into account what Mr Mlangeni is saying which I think is very important.

**CHAIRPERSON:** Alright we don't need an answer now. Ladies and gentlemen I think we need to wrap up this discussion now. Advocate?

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

**CHAIRPERSON:** Thank you ladies and gentlemen. May I thank our technical experts for making this workshop a very great success today. I think all of them have really come here today have been well prepared and they were ready to take heavy questions and you could hear that. In the future we would also like to have this type of workshop arranged. You could see the lively participation today, I think the message has been carried home, people are beginning to understand and to learn and all those things. I wish to thank you, the whole four of you, Professor Dlova in absentia. May I also thank our members from all political parties for your contributions and your participation. I wish to say thank you very much. I wish we



could do the same again in the future. I thank the administration as well for preparing this and making it a success. Thank you very much.

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