

262.1/10/24



THEME COMMITTEE 2

MEETING: 04/09/95

TAPES: 144

CONTENT

- 1) PRINT-OUT
- 2) NOTES
- 3) 1 COMPUTER DISK
- 4) 4 TAPES

Just to bring a few general problems under your attention:

1. Again, I have struggled with the speakers. This time not necessarily their names, but trying to figure out who is the current speaker. You would see that they have marked this problem "Speaker [#]?" to indicate where I have queries regarding this particular problem
2. I have indicated in the margin with [#] when I was unclear of a word in that specific line. Then in the same I have tried to type the word (in brackets) as I've heard it, with a question mark behind it.
3. I wasn't sure if the one speaker was Ligege or Mcqege. It definitely sounded like Mcqege, so I have used the name Mcqege but I saw on the attendance register there was a Ligege. I have also that not all the names were on the register, therefore I've used the name Mcqege.
4. There were two or three occasions where the speaker weren't speaking directly into the microphone and therefore there were a few words unheard. I have indicated it with a number in the margin and with a few ??????? in the text itself. Or one of the situations were when the microphone was simply switched off and only turned on halfway through the particular speaker's speaking turn.

HANSARD

Ass	Rep	Del	CoP
			JM JS

HOUSE
COMMITTEE

Date

TAKE:

TIME:

TAPE:

DISK:

SPEAKING:

ORDER No.:

IN CHAIR:

"Ranshot"
instead
of
Ranchod
unacceptable.

Transcribers note:

These tapes were of poor
sound quality and were
inaudible.
We tried our best with
them.

Thanks.

RE: TC 6.2

TRANSCRIBER NOTE

PLEASE SUPPLY AN UPDATED LIST OF THE COMMITTEE MEMBERS AND ALTERNATES AND WHICH MEMBERS STAND FOR WHICH PARTIES.

THEME COMMITTEE 2

MEETING 4 SEPTEMBER 1995

TAPES 1 TO 4

(Tape 1)

Chairperson: On page 2 Mr Mahlangu's name is spelled incorrectly. That must just be rectified. And then on page 3, item 6(d), it's incorrectly worded there. It should read "there appears to be consensus on the fact that negotiations should continue on self determination in all it's forms. Page three of the minutes, item 6(d), just below 4.4. I read it again " "there appears to be consensus on the fact that negotiations should continue on self determination in all it's forms". And then the document 31 on page 50, (d) must be deleted and substituted with the sentence that I have just read and I'll repeat it again, that (d) must be deleted "there appears to be consensus on the fact that negotiations should continue on self determination in all it's forms". Can I have a proposal for the adoption of the minutes.

Did you take note of that? They say you didn't sign the register. So members must make sure that they sign the register before they leave the meeting. Can we approve the minutes? Thank you. Minutes approved. Mr Mahlangu I make use of your kind offers just to lead us through three, feedback on Theme Committee reports to the Constitutional Committee.

Mahlangu: Thank you Chairperson. Well I think I did report last week. I don't know why it is coming back again today. All what we had Friday, I think in the Constitutional Committee, I was not present in the Constitutional Committee last Friday, was the report from the sub-committee to the Constitutional Committee. I am not in a position to report on that. Prof. Steytler once there maybe could help us to report on what happened on Friday, but we didn't have any report from this committee which was on the Constitutional Committee last Friday, except the report from the sub-committee to the Constitutional Committee.

Chairperson: Thank you Mr Mahlangu. Ladies and Gentlemen

Mahlangu: I think Prof Steytler should just give a brief report to the Theme Committee. Even if we asking it at the last minute. I'm sorry.

Steytler: Mr Chairman as I understand correctly, it's on Friday, this past Friday's report on the Constitutional Committee. It actually went extremely quickly, I think half an hour, if not 20 minutes the whole thing and it didn't really deal with anything of substance. So, I think there is actually nothing to report on. It simply didn't look at the amendments proposed by the sub-committee of the Constitutional Committee, and I think properly the Constitutional Committee have to relook at the report from the Constitutional Committee sub-committee, because the Constitutional Committee was looking at the report of the sub-committee of the Constitutional Committee.

Chairperson: Thank you Professor. Then with your permission, we would just like to rearrange the agenda, because Prof. Mcqeqe must leave earlier and should did Professors with regards to the traditional

authorities. We know place item number 7 then 1, item 5.2, because Dr Ranshot must go and see to arrangements with regard to the visit of Helmud Cole, the Chancellor of Germany, and number 8 becomes number 3. Is that OK with you. Thank you.

Ranshot: Mr Chairman, I appreciate the effort to rearrange the program, but I have to leave here the latest at 25 to. So, if that item is not discussed first, you will have to excuse me.

up with I am sorry in the absence of the speaker, I am unfortunately tied meetings this morning. That is on the Provincial Government structures. Just a few technical comments that I want to make, shouldn't delay us.

Chairman: Professor Mcqege over to you.

Mcqege So, sorry Mr Chairman why don't we take that first, if Prof. Ranshot has to leave. I mean what difference does that make to us, in terms of how we, if he wishes to make an input before he leaves. It makes no difference to us in terms of how you rearrange it.

Chairperson: I think we can accommodate that. Professor flight is at 12 o'clock, only I believe. Is that correct? I think then we deal with the Provincial Structures first. Where is Prof Steytler?

Steytler: Mr Chairman, the draft that you have before was prepared at the Law advisers and just one/two things that I wish to remark on it. The draft here is more or less word for word repetition of the interim constitution just with amendments here and there where necessary, but the language remains exactly the same. A lot of the provisions here pertaining to the Provincial Legislature and executive are again replications of the provision pertaining to the National Assembly and the National Executive. So the draft here has not take into account the changes in formulation, the shortening of language, the omission of certain provisions which has taken place in terms of the National Assembly and the National Executive. So one have to take that into account that one shouldn't perhaps down to a debate about the wordings here, because they are not as they stand here reflecting the developments that has taken place in this committee and in the Constitutional Committee.

Chairperson: Can you assist by just taking us to the relevant pages as far as that is concerned.

Steytler: I will, just further properly point is that as these provisions are almost exactly the same as the National Assembly, one may eventually want to consider whether they should actually be included in the same form in the constitution where simply by

reference to provisions pertaining to the National Assembly and National Executive. There are ever a number of provisions which are particular to the provinces and I think one should look at those in particular and the others can be perhaps those of general significance can be dealt with later.

Chairperson: Do you want to take us through those particular pages at this stages.

Speaker [111]: Assist if we raise points as Prof Steytler goes through it, page by page.

Steytler: Chairman, the first section then is establishment of provinces, the following provinces are hereby established that probably will have to be reformulated to say well they are already established. The provisor provided that Parliament shall at the request of Provincial Legislature alter the name of the province in accordance with the request of such legislature again the way it be framed and also then whether it is absolutely within the discretion of the province or whether the national legislature have some final say over a particular name of a province, that may be for consideration.

Chairperson: Any comment on that? Agreed ? Agreed to.

Steytler: Chairman, just a question. The last question ... should it be read as the question of Parliament simply ratifying decision of Provincial legislature about the name change?

Chairperson: I think that's what they agreed to. Anything on page 2?

Steytler: Provincial boundaries, there again the formulation will be established at the commencement of this Constitution as opposed to referring to a previous act like the interim Constitution that's the way that the present Constitution has been drafted.

Chairperson: Just rephrase it for us Professor please.

Steytler: The areas and boundaries of the respective Provinces shall be as established, as defined at the commencement of this Constitution. It says the exactly the same thing, but one avoids reference then to a particular act, the interim Constitutional act now. Sorry, let me just get the Section 2.

Chairperson: Satisfied ... agreed. Please

Steytler: Provincial legislatures and the authority, Section 3.1 there shall be a legislature for each province, stand 2, the legislature of authority of a Province shall, subject to this Constitution fest in the Provincial legislature, one may want to delete the rest [151] because it seems a bit [toledious]? but that's again just phrasing reformulation.

Chairperson: Just in that ... the whole section starting with which until Constitution must be deleted.

Steytler: No, which shall have the power to make laws for the Provinces
i n a c c o r d a n c e w i t h
[154] this Constitution. One just see whether it
c a n b e
put more [succulently]?, whether it is not a repetition of the previous clause, which fest the Province with the power to make laws.

Chairperson: Dr Pahad ...

Pahad: Can I ask that where it is going to concern just a word, we don't actually waste time. We look at the substance of issues, otherwise we are going to go through everyone and decide whether or not to a particular word. Um, because that goes to the Constitutional Committee where it has to be defined. I think we should look at substantial issues as a Theme Committee rather than whether you summarise one phrase into one word, or

Chairperson: I am going to share that view. Will you accommodate it in that fashion

Steytler: Sub-section 3, laws made by provincial legislature shall subject to any exceptions as may be provided for by an active Parliament be applicable only within a territory of the province, there seems to be no problem with that. Sub-section 4, the Provincial legislature shall have such powers and authority as maybe conferred on it by this Constitution or any other law. This again is reflection of the interim Constitution and the question would be the powers of the legislature whether in any other law increases or changes it, what does that other law means, that may be something one will have to look at.

Chairperson: Any objection to clause 3 and it's sub-sections? None. Approved? Nothing on clause 4, except to say the matter is still under discussion. Clause 5

Steytler: The composition of provincial legislatures there it's omitted the number, the range of numbers that may be permissible at the moment ... what is it .. Between 20 and 100, 30 and 100, and it is there subject obviously determining the number of the National Assembly, that is not been dealt with at all.

Chairperson: Approved ... Clause 6

Steytler: Sub-section 2, of Section 5 ... number of seats of Provincial Legislature shall be determined in accordance with, that comes also out of the interim Constitution, it may be a question of how it is determined within the range that maybe determined the range between 30 and 100, how it is determined a particular legislature. One may have to give attention to that mechanism.

Chairperson: Approved ... Approved. Can I just at this stage because Dr Ranshot must go, he say he's got a few technical comments to make. If he can just do that, so that the technical advisor can assist us?

Ranshot: Mr Chairman, I am sorry to have to ask you to give me this opportunity, but under 9, par. 9 there is a reference to the High Court, I am not aware of a High Court in South Africa. Perhaps that should read Supreme Court. Deputy Speaker ... clause 9, or section 9.

Steytler: Mr Chairman, that is the new language of the Theme Committee
5 t e r m i n a t i o n o f t h e S u p r e m e C o u r t n o w .
We can still have it there as Supreme Court, but eventually there will be a consistency in the language, depending what the Court structure going to be named

Chairperson: Satisfied, Dr Ranshot

Ranshot: Just the .. I think the early comments were that we should try and follow the procedures of the National Assembly in the case of the National Assembly wants a Speaker, he has elected the Speaker, then assumes the Chair and the Deputy Speaker is elected, but the formulation is here that of the present Constitution, why this inconsistency? If we have taken a decision on the National Assembly, should we not try and be consistent?

Chairperson: Prof Steytler ...

Steytler: That's precisely the point why it is not very useful to look at the wordings now, because they are not reflecting the decisions of this committee subsequent. This is really affecting the interim Constitution and unless, it is not very useful to discuss these points, because it is precisely as Prof Ranshot indicates, there are these inconsistencies and they bound to occur right through because of changes in the wording and principles that has emerged from this committee.

Chairperson: Cross check that

Steytler: Yes, simply duplicating what we have decided in terms of the National Assembly so on the Speaker will be then reflecting it again in the National legislature.

Ranshot: Section 10 .. There is a reference to persons who do not qualify

for membership unless he / she is qualified to become a member of the National Assembly. I just like to make the point that if there is going to be any accommodation of traditional leaders in the Provincial Structures that we have another look at that formulation over there. We haven't decided what we are going to do with the traditional leaders. Anyhow, it is just a comment which I would like to deal with here. Then 11(d),

Chairperson: Sjoe, where are we with this thing .. I think the present formulation should stay. As far as I know there is no agreement, even proposal that traditional leaders should become part of the Provincial Legislature unless they are elected to it. There is no provision for non-elected people to become part, it is only at the level of the Local Government. So, my own view is that just thing should stay as it is. If, in subsequent negotiations it is decided that that is what should happen, then we could come back to it in the final analysis and then change it, but I think it should stay as it is at the moment, because it is consistent with what we are be agreeing to all the time.

Ranshot: I then would like to move on to Section 11(d), we've got there a member will lose his seat for his absence for 30 consecutive sitting days - now that's extremely high in my view and in the light of the current experience. I don't know for how many days the provincial legislature sat last year and how many days they have sat this year, but 30 consecutive days is in my view rather excessive.

Chairperson: Senator Groenewald

Groenewald: Chairperson, we had decided it would be 15 days and I suggest we change it to 15 days.

Chairperson: Mr Mahlangu ...

Mahlangu: Yes well, footnote 13(b) actually says that, that Theme Committee favours 15, though they state that can be debated further. But another thing which I just wanted to raise, was that though we have not taken decision on this issue, it was also a feeling when we discuss the National Assembly that this should rather be provided for in the rules and order rather in the Constitution but we have not agreed on it at the present moment, I just also want to raise that whether if we decide with the National Assembly that it should be provided in the rules, we also have to be consistent where it becomes to the provinces as well.

Chairperson: Prof Steytler ...

Steytler: Mr Chairman, it is another example which it is really not much point in discussing it here, because the debate is so much further at the terms of the National Assembly whether as Mr Mahlangu is saying, whether you have that section in it, whether it is simply provide for in the rules and so on. So, once finality is reached with the National Assembly, then one will see whether it should be also replicated for the Provincial Legislature.

Chairperson: We have dealt with yours, Dr Ranshot?

Ranshot: Section 18, if we could have consistency in the formulation of
[291] r e g a r d i n g [a c c e n t] ?
to bills. I think we are saying more or less the same thing that we had agreed upon, in the case of the National Assembly, except that we are splitting it now and referring to Section
2 5 (1) (b) a n d p e r h a p s y o u s h o u l d
[296] c o n s i d e r
a d o p t i n g t h e s a m e
approach as we have in respect of ????. That's really a technical matter.

Steytler: Mr Chairman, again on that point there is a huge debate in the
[300] C o n s t i t u t i o n a l
Committee on the powers of the present ?????
Again resolution of that issue will again affect provisions like this, so it may not be very profitable to discuss it now.

Chairperson: Didn't they decide that on Friday? Thank you Dr Ranshot, then we get back to Dr Steytler .. Section 7 .. The elections.

Pahad: Did he deal with section 6, Chairperson?

Chairperson: Ya, we have approved that already.

Pahad: No, we ended up with 5. We start at 6 ..

Chairperson: Page 3, sorry, section 6

Steytler: Mr Chairman, on 5.3 I think we just have to look at that .. It needs to be deleted, because again it drawn from the interim Constitution where they were only party list, so that sentence only make sense in the context of party lists. The members of Provincial Legislature shall be elected from party lists, what is the old wording, it may well be deleted there ..

Chairperson: Any objection ... no. Approved. Section 6

Steytler: That whole section I would submit, it is again subsequent on a formulation of the National Assembly, the duration, the solution, motions of no confidence, etc. all are dealt with by the National Assembly. Again, the solution of that issue should then reflected in the Provincial Constitution.

Chairperson: Senator Groenewald

Groenewald: Chairperson, I have a problem ... every clause we come to is affected by what happens in the National Assembly. Can we discuss this now? Does it serve any purpose to discuss this document at the moment?

Chairperson: Well at least we must deal with it, so that we can submit a report to the Constitutional Committee and what I understand from Prof Steytler is that the wording must co-incide with the wording of what is contained in the report on the National Assembly which have not been dealt with in this document. So, we are now saying that they must now make the necessary changes so that it co-incides with that of the National Assembly. Do I understand you correctly, Prof? Can we deal with it in this fashion, that Prof indicates to us which wordings in this document needs no changes at all. Then we carry on with those and deal with them and then he must come back with a report with a subsequent changing of wordings in the report to co-incide with that of the National Assembly. Can you assist us?

Steytler: Yes, I'll try and indicate those which are particular to the provinces. Only those sections ...

Chairperson: That's right and then we leave the rest.

Steytler: Chairman, Clause 21, page 12 ... the administration of Provincial legislature .. There the provision is a speaker shall appoint a secretary and such other staff as maybe necessary for the discharge of the work of the legislature. This again is taken from the interim Constitution and question whether it is necessary to have it in the Constitution at all. It was apparently necessary when there were no such structures initially to have such a provision.

Chairperson: Any comment, Mr Beyers ...

Beyers: Mr Chairman, can I just on a point of order ask exactly what we are doing now, because do you expect from us to say where we differ from the contents of this draft? Because on two points, I saw a situation where we do not agree with what is taken up in this report, but I don't know whether this is the right time to say whether we agree with that or not.

Chairperson: I think parties must indicate .. It is the right time to do that, where they differ with the wording as formulated in the draft. What we are doing now we are approving, trying to approve those sections that needs no word changing at all. So that the redraft can come back to us by next week.

Beyers: We have now past point 11, clause 11 and the National Party does not agree with clause 11(b) to be provided in the new Constitution, that is the question of Article 43(b). I don't intend to cross the floor. There is no way to go in any case, but Mr Chairman we do not agree on principle of that.

Mahlangu: If Mr Beyers look at the footnote, it says that this [contagious] m a t t e r i s s t i l l under discussion. There is no agreement on that, he is quite right. And the matter is contentious and would have to be discussed at the Constitutional Committee so there is no agreement on that.

Chairperson: Satisfied. Prof Steytler

Steytler: If you return to Section 21, Clause 21 whether you want in the Constitution that the Speaker appoints a secretary of the Provincial Legislature, the suggestion from the Law Advisor, the technical advisors is that it may not be necessary. There is no such provision in the, for the National Assembly.

Mahlangu: Who appoints the secretary in the case of the National Assembly, just to refresh our minds. Who appointed him?

Chairperson: Mr Eglin

Eglin: I maybe mistaken, but I think there was a historical reason for that, that was there wasn't a secretary that convened the first meeting of Provincial Councils in its old constitution and therefore I think the provision was that that the Government appoint a secretary, but once the Provincial Council was constituted the Speaker would in fact have that prerogative, but I think it was in the old Constitution that there would be a secretary appointed, that was merely to get the show going. But the concept of the Speaker appointing a secretary, I think is a appropriate one it happens in our own Parliament and that is how it should be. I don't think there is a need for a provision in a Constitution saying that the Speaker shall appoint a secretary, I think he / she is entitled to.

Mahlangu: Just to follow from what Mr Eglin is saying, am I then correct that that secretary is actually permanently appointed? So there i s n o n e e d t o a p p o i n t another secretary when the new legislature comes, he is there. He can carry on with his job for oh, he or a she ... thank you for the correction.

Eglin: The original concept was that the secretary was only there until the Speaker was appointed and therefore, but he had some f u n c t i o n a r y t o a c t u n t i l t h e Speaker had appointed a secretary. But I can't understand, can I just ask our technical advisors, is there any provision in our draft Constitution that we have been working on, for the Speaker of Parliament to appoint a secretary? I don't think there is a specific provision, but I don't think there should be.

Chairperson: Mr Mlangeni

Mlangeni: Mr Chairman, should this not really be the function of the Public

v a c a n c y , c a n y o u a d v e r t i s e a n d
[451] Service Commission? If there is a vacancy, such as that of the Secretary to Parliament, or whatever, that Parliament advertises or inform the Public Service Commission that we have this do you have the types of people we need. This ?? I think should be the function of the Public Service Commission to provide us with a person, then that person will probably be permanent. Thank you.

Chairperson: Mr Mahlangu, then Dr Pahad ..

Mahlangu: Chairperson, I understand what Mr Mlangeni is saying but one was of the thought that the members of the, sorry, the staff that belongs to the, or is under the Provincial Legislation is not actually controlled by the Public Service Commission. I thought that was a separate structure altogether. In that case, I think the secretary of the Provincial Legislation is necessary this case, because it performs a very important role. But the question I think that Prof Steytler is raising at the present moment is, should this be provided for in the Constitution, or can it be regulated by the rules and orders of the Provincial Legislation, I think that is the question that we need to answer now and I am just consulting with myself, I'll come back to you.

Chairperson: Dr Pahad ...

Pahad: I think at the moment we should delete that in terms of what Prof Steytler said and what Mr Eglin said, but there is something similar and I think we discussed in Constitutional Committee because that is I have an additional problem to constitutionalise and appoint such other staff as maybe necessary in the sense that constitutionally you giving speakers the right to go and employ a 1000 people if that is what they wish to do. I have a serious problem with that, and I think it should be deleted and if it is necessary to come back to it, after we discuss the National Assembly, then we could come back to it, but as of know I think it should be deleted.

Chairperson: And then we put a footnote that we come back to it when we have dealt with the National Assembly. Agreed?

Steytler: Mr Chairman, then executive powers, Clause 22, very form of executive power of the fest of the Provincial Government consisting of the Premier and other members of executive council and how they should exercise their power and sub-clause 2, this is again from the interim Constitution, the province shall have executive authority over all matters in respect of which the province have exercised it's legislative competence, so you first define the powers of the legislative powers of the Province, which is dealt elsewhere, and then the executive powers are then incidental to those or similiar to those legislative powers.

Chairperson: Any objection to 22? None. Approved. Prof?

Eglin: 22.2 The province will have executive authority on all matters in respect of which such provinces has exercised it's legislative competence. I would presume that actually as it strictly said, it first has to pass the law within the framework of it's competence in order to have any authority. Now I understand that in fact many of these executive authorities have been handed over to the Province, on the basis of laws that already exist. Now I don't think that it is intended that you first have to pass a law, I mean, if it is an area in which you have legislative competence you should also have executive competence, not that you should in respect of which those Province has exercised his legislative, I don't know what is meant by has exercised his legislative competence?

Chairperson: Prof Steytler

Steytler: I think Mr Eglin is correct as it reads there, it says first you establish the legislation and then in terms of such legislation the executive then acts. The question is where does the source of authority comes from, either from their own legislation, or some nearer to the legislation. We may want to relook at that phrase and reflect that they can exercise in terms of any law that give them competence, not necessary that they have created themselves.

Chairperson: Any other comment

Marais: Mr Chairperson, isn't that the question of irrespect of which province has exercised it's legislative competence, is that not just one of the criteria, the other being all matters assigned to it by or under section which ever it is, or any other law or matters delegated to it. So you're not saying only those with in which it has exercise it's legislative competence. So in a case, in terms of the schedule, the powers which has been given to Province are theirs already, they don't need to first exercise the legislative competence.

Chairperson: Prof Steytler

Steytler: I think Mr Marais has a good point there, because there Hendricks Hendricks. (Laughter)

[555] ??????

Chairperson: Any comment what Mr Hendrickse said.

Steytler: It seems to me that he's got a good point there, that is both the owned created legislature and then any on delegated to it by any other law. But this again is the interim provision, coming from the interim Constitution, which have to deal with this with schedules and so on, and one would draft it differently know when the competencies have been established and their functioning and there may not be such delegated, or there may be still delegated legislation coming from the National legislation

delegating certain functions and powers to provincial governments, but this all ties up with the powers and competencies of provinces and I think the final wording would probably be done once one got clarity on the legislative competencies and also executive competencies

Chairperson: So for the meantime, we keep the wording as it is ..

Eglin: No, no, keep the wording what we think that this matter is on hold until one is considered provincial competencies. But I've got a practical problem, what matters that are delegated, that is an additional one, but that's not what the first sentence says and I've got a practical problem, who has executive competence in areas which there is concurrent legislative competence? If it is in the schedule of Provincial competence but it states the central government can also legislate, who would in fact have executive competence? I would argue if it is in the schedule, it goes to the province if it isn't in the schedule it goes to the centre, but that is not what it says. If the centre and the province have concurrent competencies to legislate, who exercises the executive competence in that respect? I don't know how it works in terms of this.

Pahad: Mr Chairman, I would suggest what we do is that we actually put a footnote to say that this whole paragraph will well have to be revised after we have, the Constitutional Committee and Assembly has completed its work with regard to the whole question of competencies of powers in schedule 6, or not schedule 6, and then it has to be rewritten. So, we say from the beginning that we just putting this down, because this particular issue would have to be discussed at a later stage.

Chairperson: Do we agree on that. You've got that wording, Prof Steytler? That seems to be fairly straight forward. Any objection?

Steytler: Mr Chairman, ya, if you just go to the one which has been marked clause 25, again the executive competencies of the Premier, that may also have to be relooked in light of the powers of the President, because these are very much the same as the powers of the President in the interim Constitution.

Chairperson: I think we have decided that earlier on that that should be done.

Steytler: The next section, is clause 26 acting Premiers, which there is no provision for a Deputy Premier but the Premier of a Province shall appoint one of the members of the Executive Council of the Province to act as Premier during his/her absence or temporary incapacity.

Chairperson: Any objection to clause 26?

Pahad: Can I just ask that 24(a) the footnote, be a little more clear they say that we actually draw the attention of the Constitutional Committee to look at this and posed a question whether they think it should be consistent with what the Constitution may say,

the Constitution may possibly say, I mean the position of the ANC at the moment is two terms, now whether that becomes a position not remains to be seen, but if that is what the Constitution says, then the question remains do we want the same kind of principle to apply to Premiers or not. I am not saying we discuss it, I am just saying that we need to put a footnote to draw the attention of the Constitutional Committee to this particular position, that they would have to look at it in some point.

Chairperson: Any objection to that suggestion .. No. Agreed to. 25, 26 also is fairly straight forward. Any objection. Agreed to. 27?

Pahad: You see, as 27 stands now, I presume a Premier could appoint only one MEC and then decide, he/she can decide between him / h e r a n d o n e o t h e r person that they will constitute the executive in terms of this Constitution as it is drafted now, it just says not more than 10. And I am wondering whether we shouldn't say something to the effect that shall consist of the Premier and not less than five and not more than 10. So there is Constitution provision for the Premier to actually have an executive council and not just him / herself with one other person in terms of the Constitution. Now you say not less than five, because in some p r o v i n c e s w h e r e t h e r e a r e much more than numbers in the Northern Cape they may not require 10, they may require only five, so you give them that opportunity and I wonder whether we shouldn't put some such provision in the Constitution.

Chairperson: Prof Steytler

Steytler: Mr Chairman, certainly one ... it sounds feasible at the moment every province have got their 10 full quota, but it maybe say, well they shall be five not more than 10. That could well be done.

Chairperson: Everybody in agreement with that, there shall be five and not more than 10.

(Tape 2)

Chairperson: Everybody in agreement with that? There shall be five and not more than 10? Agreed to?

Mushwana: Sorry, before you pass there, Mr Chairperson, before you pass there, isn't it possible that you know this issues that fall within
t h e c o m p e t e n c i e s o f
provinces should be ... in every province for instance, will it be possible that we will have a province which has got only about five or seven MEC's instead of maybe 10, to cater for those departments that are actually within the competencies of the provinces.

Chairperson: Prof Steytler

Steytler: Mr Chairman, I think the aim would be to give as much scope for provinces to adapt to their conditions rather do it to prescriptive to them, but the only prescription is the maximum number and now also minimum number and the province must actually suit themselves how best they can use or operate within these parameters.

Chairperson: Satisfied, Mr Mushwana ... Thank you. Mr Beyers

Beyers: Mr Chairman again I think this is the clause that also refers to the composition of the executive council, there is no satisfactory footnote here, but this definitely does not reflect the standpoint of the National party, because we support a multi-party cabinet at provincial level as well, a constitutionally mandated one and I don't know where that is being reflected here, as far as we are concerned this is no consensus.

Chairperson: Just take note of that footnote, Prof Steytler. Agreed to 27? Thank you. 28.

Steytler: Mr Chairman there was some point raised by the law advisor on 28.2 executive councils shall determine its own procedure and shall in so doing take into account the need for effective government. The previous provision in the interim Constitution spoke about government of national unity and they should operate also to be effective government requirement whether one still needs that phrase to take into account the need for effective government pertaining to their procedure of operating now. Um, is it a requirement, can they set to have a ... what is the meaning of effective government? How does it impact on procedure? Does it mean closure, that you don't public have access to the meeting, or access to their minutes, something just to consider.

Chairperson: Seeing that you mention, the law advisors, won't it be advisable to have the law advisors here to, particularly with the interpretation of the legal interpretation of certain clauses as raised by Mr Eglin earlier on? I am asking Prof whether it wouldn't it be advisable to have them here?

Steytler: Mr Chairman, they ... it may or may not because the law advisors will be at the Constitutional Committee when this is again discussed and their comments there on particular interpretations of words could then be made. Here I think it is much more on the principle as opposed to the exact meaning given to a particular word.

Chairperson: Any comments on 28.2 Do we retain it?

Eglin: Chairperson, may I just say on 28 in general, I don't know whether you need that even one in that state of that way if you have responsibilities of 1000 functions of the Premiers, would be to preside over the executive. My problem about putting it in this brutal form is that the Premier isn't available, it doesn't even make provision or else somebody nominated by him. So this Constitution is saying, unless the Premier personally presides over a meeting, in fact is not a valid meeting of the executive. I think one should look at .. As far as the other is concerned, I don't know why we have to say the executive should determine its own procedure. I don't know why there should be a Constitution or provision, if you point an executive to administer portfolios. Clearly it has to determine it's procedure?

Chairperson: Agreed, so we delete 28 completely. Prof Steytler

Steytler: I agree with that, because in the powers of the President that is precisely what is done that one of the powers is to preside over the cabinet, but it doesn't [?] [61]

Chairperson: So 28 is now going to be accommodated under that section. Agreed to? 29.

Steytler: Chairman, 29.31 is more or less the same as the National Executive. 32 votes of no confidence also the same issues pertaining to the votes of no confidence pertaining to the National Executive and National Assembly.

Chairperson: Can I then put 29, 30, 31 and 32 together? Any objection?

Eglin: Mr Chairman, sorry, I don't know whether 39.1 is identical. I don't know 39.3 the member fails to ministers his portfolio and accordance the Premier of the Province may require that I don't know whether that is taken over from the National one and adapted, I am not aware of that? 39.3 I don't know whether that's a Constitutional provision which is taken over from the National Assembly, it seems to be that it is not in the National Assembly. It is just that the Cabinet Minister is responsible to

the President. But I don't know whether all of this three is in the draft for the National Assembly?

Chairperson: Prof Steytler

Steytler: Mr Chairman, it is not. This is again coming straight of the interim Constitution and therefore it is clearly not in conformity of what is happening now, unless one wants to have such a provision or simply wants the Provincial Executive to reflect the same structure and powers as the National Executive. This is not reflected in the National Executive and the question really would be, what type of similarity should there be between the two.

Chairperson: Mr Eglin

Eglin: Once again, thinking historically this particular phrase was put in because of the Government of National unity concept, in other words, if you have a, if the Premier is free to choose who he likes, and they are accountable to him that is one thing, but if he has to include members of other parties, then he has to have this provision to say that even if you belong to another party, you can recall that person to bring policy and conformity with the cabinet's decision. So, I think that was appropriate, but if you have a Government of national unity that should be there. If you not have a Government of national unity this is irrelevant. Same to number 4.

Chairperson: Any further comment.

Mahlangu: You can go further, and say to its relevant here and you would actually maintain 1 only, 31.1

Chairperson: Are we in agreement, that we only retain 31.1 and delete the other three clauses? Obviously with a footnote from the National Party indicating their position. OK?

Eglin: Mr Chairperson, are we onto 32 yet? Well, Chairperson I know at the level of the Constitutional Committee and now the sub-committee, the Democratic Party has raised and will continue and I think in the discussion today, to put the view and this applies I think even more particularly to Provincial Councils, that in fact if you have a vote of no confidence in the Premier or the cabinet, that in fact he should resign but it shouldn't necessary have a fresh election. In other words, the Provincial Council is elected for four years or five years and within that period, the Provincial Council can move votes from no confidence and there can be a reshuffle of executive but not that if in fact the Provincial Council said I want no confidence in the executive of the Premier, he can in fact dissolve the Provincial Council, we would believe that you can change it, as you can at municipal level, you can change the executives without changing the council, and likewise we believe, and if we take South Africa in

our argument as just this we are going to have a Parliament, and we are going to have nine provincial legislature. We argue very strongly that we should try to look for a formula whereby those elections of those bodies happen at regular intervals, if in fact nine different executives are going to have votes of no confidence, not in the legislature, in the executive, and the executive says no we not resigning we are going to call an election for the legislature. We are going to have 10 bodies calling elections at different times in South Africa and we just believe that this country cannot actually afford that in terms of it's resources and we would argue much more strongly, even if it is not accepted at Parliamentary level, that at Provincial Council level if you don't like the Premier and the people that he appoints to executive, you vote them out of office and you put a new one in there, but what you don't say because we are voting you out of office, you've got the option of dissolving the legislature. We believe that the legislature should continue for a fix term and within that framework, you can have votes of no confidence in the Premier's executive and they've got to resign and a new executive has got to be appointed. So, while I am not going to argue about it here, I think we should just take note that this is also contingent upon a discussion at National level as to when there should be elections and when there should not be.

Chairperson: Mr Hendrickse, and then Dr Pahad

Hendrickse: Yes Mr Chairperson, I think in terms of the National Assembly we need to delete 3(b), no sorry, 3(c), because number 1 is saying that if you pass in no confidence in the Premier and the executive, then he can either resign or dissolve the legislature, so you are giving him the option of dissolving the legislature 3.2 is saying if it is only in the Premier, then the Premier must resign, he can't call an election. Number 3 is saying if it is only in the executive and not the Premier, then the Premier may resign or reconstitute the executive, he shouldn't have the option under that circumstance to also dissolve provincial legislation and then it would be in keeping with the provisions for the National Assembly. So you basically have three options, one is the Executive including the Premier, one is the Executive without the Premier and the third is the Premier alone.

Chairperson: Sorry, you want c deleted, 3(c)

Mahlangu: I think Mr Eglin and Mr Hendricks maybe right, the point is that this issue as Mr Eglin is saying is being discussed both at the level of the sub-committee and then at the level of the Constitutional Committee. And this whole question of motion of no confidence we will have to return to it with regard to the National Assembly. There has to be consistency in terms of what applies to the, it seems to me anyway what applies to the National Assembly we should then apply to Provincial Legislatures and it would seem to me that we may well have to

come back to in the Constitutional Committee, the question of an impeachment of a President, we haven't resolve that problem, a l t h o u g h w e h a d , a n d I said earlier I think we might not require it, but it seems to us that on further discussion that we would certainly have to return to the question of the impeachment of a President as separate and differentiated from a motion of no confidence in the Government, so that you separate those two institutions and in terms of the way the votes of no confidence are put both in our submissions for the National Assembly as well as these ones, there isn't that kind of clarity and differentiation. So, I would agree with Mr Eglin and Mr Hendrickse, but I don't think we delete or add anything. I think we say that this issue will need to be returned to in conjunction with whatever is decided upon by the National Assembly, because it would then influence what we say with regard to the Provincial Legislatures.

Chairperson: Would the committee then suggest that it be contained in a footnote? So the Constitutional Committee knows exactly what our intentions are? Is that what you wanted to say Mr Mahlangu?

Beyers: Mr Chairman, from our point of view we must also take into consideration the possible provincial Constitutions and I don't think that we must, I think this is one point where we must not prescribed to Provinces how their own constitutions should look alike as far as elections is concerned and motions of no confidence. So we believe, Mr Chairman that in the cases where a province decides to have it's own constitution where must not prescribe everything as has been debated this morning.

Mahlangu: What Mr Beyers is saying, whether you prescribe or you don't prescribe, the fact of the matter is that in the end, whether you prescribe or not, will be influenced by what you decide with regard to the President and National Assembly and all we are saying is that we hold this in abeyance until we've had that discussion and we have resolved that problem and then we can come back to this particular thing and the question about interpretation about whether in terms of the Provincial Constitutions also have to be consistent with the Constitution, so the question about which parts of the Constitution you say are not, still has to be discussed in terms of Provincial competencies, so I mean, at the moment all we were saying and that is why I don't understand with what he is disagreeing with, was that this is in left in abeyance and we will then come back to it once we have resolved the question at the level of the National Assembly and also at the level of Provincial Competencies which we haven't resolve.

Chairperson: Does that satisfy you Mr Beyers?

Beyers: I don't have a problem with that Mr Chairman, because of the fact that that Provincial Constitutions must be in accordance

with the National Constitution it is my standpoint that we should not describe each and everything like elections to the provinces.

Chairperson: So we approve those clauses? Thank you. Page 22 ... I am going to put it altogether from 33 to 37, because it is just the heading there is no particular formulation. Can we adopt that one? Thank you. Then 38. Adoption of Provincial Constitutions. Any comment on that? Or is it straightforward enough for us to accept?

Eglin: Mr Chairperson, it is straightforward in the sense that it is just taken from the old Constitution, but I don't know if it is as straightforward as it seems? Especially, if you take 3, Provincial Constitution shall not be inconsistent with the provision in this Constitution. I don't quite know what the word is "not inconsistent with" means in law and the principle set out in schedule so and so. As I understand it, it's likely that the principles are only set out in a schedule to the interim Constitution. That once they have been absorbed in the next Constitution, they would disappear. And therefore it isn't, that particular phrase is not appropriate. So, I don't know if you don't have the principles whether just the word "inconsistent" is good enough. We should really should conform to the fundamentals of the main Constitution. Then it said, provide that the Provincial Constitution may provide for legislative and

[223] executive structures and procedures, different from. Once again I think you are going to have one great legal tussle between providing that thing was existing or different structures and procedures, but at the same time remaining consistent with the provisions of this Constitution and it's principles. I've got a feeling that the whole question of what provinces can actually do in respect of their own Constitutions has got to be looked at with greater precision that is stated at in this document. It may be so that they can do what they like but what you can't refer to is principles which are not going to exist and the word inconsistent with I think is a dangerous word we should ask the law advisors to be quite sure that they know what it means, but what can they do and can't they under this, I don't know. You are going to have a tussle coming from at least one Province, I'm sure as to what this clause means.

Chairperson: Prof Steytler ...

Steytler: Mr Chairman, the law advisor who drafted this, as Mr Eglin correctly said, was just simply repeated the interim Constitution. I think the difficulty here is that the one of the Constitutional Principles says that the powers of the Provincial legislature may not be substantially less than what they have in terms of the interim Constitution and so the wording of inconsistent, different but not inconsistent is taken there from that and it is this difficulty of to say well are you reducing their competency to draft the Constitution if that must be in conformity with the final Constitution etc. So it is extremely difficult words which were

political compromised and Mr Eglin is right there is no clear definition of what is the difference between "being different" and "when you are being inconsistent". Afrikaans onbestaanbaar, is inconsistent. But this whole issue really need much further investigation also in terms of do one add further issues, for example names of laws, names of Premiers, length of the Provincial legislature, their duration, there is a whole lot of other type of framework in the report we mention there should be a framework in terms of the Constitution what should that framework be?

Chairperson: Do we refer it back to the drafters of this particular legislation?

Groenewald: Chairperson, I think once the competencies and powers of provinces have been decided, we'll have to come back to this, we can't do it now.

Chairperson: That's right, but I mean I think from the ANC side we are quite clear it doesn't matter what word you use in the end of terms of the legal indecencies whether it is inconsistent or inconformative. Our position is very clear, that no provincial Constitution can be at variance with the National Constitution or should at all be allowed to be at variance, now I mean how you then going to put it in legal terms is a separate matter, but I mean that principle of the ANC then needs to be clearly understood that we don't want any Provincial Constitution whether it is inconsistent or not inconformative, so the Provinces decide to do things on their own irrespective of what the National Constitution says, I think if that is understood then I don't have a problem.

Chairperson: Mr Beyers

Beyers: Chairman, there is also another problem and that is that the new Constitution must be consistent with the Constitutional principles[?]. That is another important aspect in South Africa.

Eglin: Chairperson, there may be a variancy, I don't want to get involve in a debate on the merits, but you can't tell a province that it can draw up a Constitution but then limited to the existing Constitution, because the existing Constitution defines a number of Constitutional concept for provinces, it defines the legislature, it defines the executive, so there has to be some elasticity given to the Provinces, otherwise if you say they can only do it in which conforms with it's strictly they already got a Constitution, and their Constitution is part of the National Constitution.

Chairperson: I don't mind what elasticity you give them, the question is not [of the lieu]? and elasticity, the question is a principle I am stating the ANC's principles here. We cannot be in a situation in which we don't make clear in the Constitution the Provincial Constitution, so that people then go and decide to pass Constitutions in the Provinces which are totally inconsistent with the present Constitution, with regard to any number of issues.

Because the National Constitution is supreme, that's what we all agreed from the very beginning, everything adds is subservient to that so every even law pass by Parliament has to be consistent with the Constitution. You can't after you've adopted the Constitution, then past legislation by a simple majority, which is inconsistent with the Constitution and therefore the same kind of principle should apply to Provincial Constitutions, and all I am asking in getting saying we changing this, that we don't lose site of that principle, that is all I am asking.

Speaker
[301]?

I think in simple terms what they is actually saying is that if the National Constitution says members of the Provincial Executive Council shall be the Provincial Constitution cannot now go and say in their Constitution that members should be 11 or 12. I think in the simple way that is what he is saying.

Chairperson: Any further comments ...

Speaker:
[307]? Say well all members shall be 11, that would not be inconfor-
mative with the Constitution.

Chairperson: Any further comments on Clause 38? Can we approve it as stated with the footnote? Agreed to. Thank you. I think we stop there with the report of the Provincial Government structures and we'll come back to the blocks after we have dealt with the traditional leaders and the report of Prof Raath and I will now hand over to Prof Mcqeqe.

Mcqeqe: Mr Chairman, our seven draft appears at Page 53 of this document, the agenda which is a response to the query that was referred back to the ad hoc committee. On their [approved
[323] term]? to be used, whether traditional leadership or indigenous leadership the ad-hoc committee has reverted to the [facility]? used in Constitutional Principle 13, traditional leadership. There is a footnote, footnote 2 on this pages. We have rephrased the provisions 1.1, we are reverting to the [facility]? in the Constitutional Principle 13 namely that institutions ?????????? laws shall be recognised other to the Constitution. Page 53, 32 on page 53.

Chairperson: Just to interrupt you, I must just point out that on 53 there is a spelling mistake rodigineous, in stead of indigenous.

Mcqeqe: Then the committee felt that the question of powers and functions should be separated from the question of the institution and status and role of traditional leadership so that powers and functions should be dealt with in National Law
[348] ? ? ? ? ? ?
the constitution. Then also dealt with the question of the competency of Provincial legislatures to deal with the whole question of institution role authority and status of [anomic]?
[352] in the Provincial subject to sub-division one above. We think

that we've addressed the concerns as present Constitutional Assembly on this matter. Thank you.

Chairperson: Any comments Just to make absolutely sure that the technical advisors are telling us that we are not going to revert to indigenous leaders we are going to speak to traditional leaders. Mr Holomisa

Holomisa: Just one small question relating to sub-section 2. They says the National law shall be subject to the Constitution is there any national law which is never subject to the Constitution?

Mcqeqe: Mr Chairman, one have to be explicit in this regard. We did not consider any other laws but we wanted to be explicit that any laws should be subject to the Provincial Constitution because we are ??????? subject 3 on fundamental rights.
[373}

Holomisa: All national laws are subject to Constitution. I mean is there a special reason for a national law relating to traditional leaders (voice going away?)
[379]

Lady? Mr Chairperson, if I could assist Prof Mcqeqe in this regard, I think since as this formulations are done in a piece meal fashion there shall be a stage where there is refinement of language and reconciliation of some discrepancies and things like that at a later stage, the point that Mr Holomisa is raising has been noted, I should say.
[382]

Chairperson: Further comment, Mr Eglin and then Senator Groenewald.

Eglin: Chairperson, just in 1.1 and I am looking both at the Constitutional Principles and has a strong view that my party has. The institution of indigenous leadership whether it is indigenous or traditional leadership is not a matter, is hereby recognised. I believe it should say the institution of indigeneity leadership according to indigenous law is recognised. Well the institution or I would say traditional leadership , but according to indigenous law, because I believe that the indigenous leaders that should be recognised are ones whose authority flows from indigenous law. Not ones we shall maybe artifitially contrive by other administrations who have appointed them. Now the Constitutional principle says that, it says the institution then deals with a lot of other things according to indigenous law and I believe the first sentence should make it quite clear that you recognising that institution of traditional leadership which is founded on traditional law and it should be stated because it is not only a principle but I think it is also correct.

Chairperson: Professor ...

Mcqeqe: Mr Chairman that is noted.

Chairperson: We mustn't note, because we'll have to have it in the

formulation because this must be presented to the Constitutional Committee for adoption. Mr Eglin must just repeat, because I read there according to indigenous law.

Eglin: Sorry, Chairperson I am looking at page 52 looking at 53. Sorry.

Chairperson: Mr Eglin is satisfied. Any further comments, objections? A question to Mr Holomisa, you and Senator Malagi wants a pronouncement of changing to indigenous leadership and Mr Coetzee Bester, I think. Are you satisfied with traditional leadership?

Mahlangu: Sorry I was writing a note to somebody else so I just needed to consult. Um, I think comrade Holomisa is right in number 2, the powers and functions of traditional authority shall be spelled out in national law, full stop. I don't think you should be in a position in which you start saying which particular parts of legislation is subject to, because he is right every single piece of legislation must be subject to the new Constitution, because the new Constitution is supreme and I think that if you know giving the impression that we trying to do something else in relation to traditional leaders which could be interpreted as limiting the powers and functions relative to other [sacreds]? of society, I think we sending the wrong message, so it seems to me that it could make sense if we just said the powers and functions of traditional authority shall be spelled out in national law, full stop. That every law is subject to the Constitution I think is quite clear and then the first one does state correctly it is according to indigenous law, it shall be subject to the Constitution. So I mean I just think that it would save us a lot of debate further on if we actually just delete "subject to the Constitution".

[442]

Chairperson: Can you live with that Professor? Anybody that wants to object to that? Mr Eglin

Eglin: Mr Chairperson, I generally support that concept but I think we should ask our law advisors at the Constitutional Committee level to look at this in general, because every now and then this clause slips in "subject to the Constitution" and we've got to make it quite clear if in fact the Constitution says you got certain rights you can spell out in National Law, are they saying "subject to the Constitution" or are they saying that in fact in spite of the Constitution, the Constitution is giving you power to spell this out in National Law? I am not arguing, but I think because it crops up a hundred times, it's very untidy always to say "subject to the Constitution" but equally I think it is necessary to clarify that without saying that it automatically is subject to the Constitution. Chairperson, the other one is slight confusion, I was looking at the wrong page, because 52 is also called second draft, and 53 is also called second draft, and I don't know whether 53 should not be called third draft?

Holomisa? Mr Chairman, this 53 is suppose to be an improvement on the

a result of comments that followed the agreement on accommodating the leader.

Chairperson: So I take it that this matter will have to be dealt with at Constitutional Committee level and perhaps at sub-committee level. Dr Pahad ...

Pahad: Could we ask the technical advisors whether in conjunction with the law advisors, they could look at those areas in this schematic report where there is agreement and see if it is not possible to produce some kind of formulation so that when we get to the Constitutional Committee we actually go with some kind of formulation rather than just repetition of agreed positions and that at the Constitutional Committee we can then discuss an actual formulation and see whether we agree or not, I mean if it is possible to draft a formulation which would take into account that we are saying. I basically saying three things that at National, Provincial and Local level traditional leaders have to be accommodated. Secondly, we are also saying that is agreement if you look at page 58, 3 where elected traditional leaders must [569] ??? with traditional positions. That if we could take that agreement and see if we could make a formulation, I think it would be helpful to the Constitutional Committee.

Chairperson: Once again, thank you to Professor and we hope to receive the draft during the course of this week as requested by Dr Pahad with regard to those agreed stances in the blocks. Thank you very much. Ladies and Gentlemen, last time we dealt with self determination.

Mahlangu:
588?

Can I also to Professor, thank you very much for the explanation which was required by the Constitutional Committee. I think it served a very great purpose on that question of indigenous traditional leadership.

Chairperson:

We dealt with self determination and there was a presentation from Prof Raath in addition. Dr Pahad in addition to what was drafted by the technical committee. Now, we have received that input from Prof Raath and it is in our documentation, now my question is how are we going to deal with that now. It was indicated that some of the matters belong in another committee, and so I want some assistance from all of you. What do we do now with the inputs from Prof Raath? Mr Mahlangu ..

Mahlangu:

Well Chairperson, it is quite true, we indicated that the subject of the human rights is being dealt with Theme Committee 4 but we actually said that we will then highlight that to the relevant Theme Committee. This matter will be referred to them, but there was also a request that maybe Theme Committee 2 should apply it's mind to that we should not just say let it go to the Theme Committee 2 if members are prepared to discuss that they should have the right to deliberate on that. That's all what we said. I think General Groenewald was actually saying maybe if there are some of the things that could be incorporated in the report to the Constitutional Committee rising from the discussion from today, then we could do so as well. So, I think if members want to talk about that, they are free to do so.

Chairperson:

Now, I think now the technical committee must assist us. If they look at the presentation of Prof Raath are there specific areas that falls within our jurisdiction that we can deal with? Senator Groenewald

Groenewald:

Chairperson, if we look at page 39, we find right at the top paragraph "further discussion and liaison with the other technical advisors has resulted in the following compromised draft". Yes, of Theme Committee 2/30/1, page 39, the original document was page 8. The top paragraph, Chairperson. The last sentence in the top paragraph reads "further discussion and liaison with the other technical advisors has resulted in the following compromised draft" and then there is a compromised draft proposed. Now, I would suggest that this be sent to the Constitutional Committee as a supplementary report by Theme Committee 2 for consideration and incorporation into the Constitution. What I mean by this is if the question of territorials self determination is not solved before the new Constitution is drafted, we should have something in that Constitution which makes it possible to solve this problem after the initial draft has been drawn up and this paragraph ideally I think provides for that, Chairperson.

Chairperson:

I am still not sure how you want to discuss the question, but there are certain procedural things that I think we need clarity on.

[693]

There is not been, it seems to me the practice of any Theme Committee to submit separate reports of technical experts and I think it would be wrong to do so in this case. What generally they have done, is they have tried to summarise for the purposes of all of us the different submissions that had come and I don't think we should get into a position in which we take one particular submission however important it is and I've no doubt it is important, but [allocated]? into something else. So, we just need to be careful how we are going to proceed with the thing. Um, the second point is that I think it is quite right that what we need to do as a Theme Committee, if we haven't done so through again our technical experts, is to bring to the notice as Mr Mahlangu is saying of the other Theme Committees those aspects of Prof Raath's papers which are directly relevant to them to say that these issues were raised in Theme Committee 2, they do not directly concern the work of Theme Committee 2, but Theme Committee 2 thinks they are of sufficient importance for whatever Theme Committee

(Tape 3)

Chairperson: that what we need to do as a Theme Committee if we haven't done so through again our technical experts is to bring to the notice as Mr Mahlangu was saying of the other Theme Committees those aspects of Prof Raath's papers which are directly relevant to them to say that these issues were raised in Theme Committee 2, they do not directly concern with the work of Theme Committee 2, but Theme Committee 2 thinks they are of sufficient importance for whatever Theme Committee for to give consideration to so that the views are giving consideration but we would pass them on to the relevant Theme Committee. It would seem to me that the issue that General Groenewald raises on page 39 is then covered in page 50 of the possible approaches which is what we ask our technical experts to do to suggest possible approaches to looking at this problem and we therefore don't take in my view if possible approach of one technical expert who is giving us an overall assessment phylosogical, political, theoretical that assessment but we then come to page 50 and then see whether it does accommodate Prof Raath or not, and if it doesn't then lets discuss that in that context to see if it would accommodate both General Groenewald and Prof Raath but I would rather that we then discuss it in relation to the suggested approaches on page 50, rather than separately... Senator Groenewald and Mr Beyers.

Groenewald: Chairperson, just as a point of clarity. You will remember that in discussion of this particular point, we expressed concern and the Freedom Front particularly expressed concern that the whole question of territorial self determination is so vague and the decision is so vague, and we in actual fact ask the technical advisors if they could not propose to us a clause which could be put into the new Constitution and which would clarify this matter. The one thing the technical advisors also warned us is that at the moment, with the new Constitution, and as the Constitutional Principles falls away, we need a new Principle and all we doing is that we suggest to the Constitutional Committee that they should consider this particular one paragraph as such an addition in the new Constitution should it become necessary, that's all we are really doing. If other parties do not agree with this, then perhaps they should say so. The second point which Mr Pahad made and which I fully agree with him is whatever action we as a Theme Committee take, I believe that this whole report by Prof Raath, if the technical advisors agree if they do not disagree with this, should be referred to Theme Committee 4 because I think they also need to consider it, but that's beside whatever action we as a Theme Committee take.

Chairperson: These proposals on page 39, let me just understand it very clearly, it doesn't substitute what is contained on page 50. It's an addition to that. Can the technical advisors assist in this. Oh ya, Mr Beyers sorry.

Beyers: I want to support General Groenewald on this Mr Chairman. I believe that also the Constitutional Committee and not only the

other Theme Committees must have the advantage of this report and I support the idea, the notion by the technical advisors to take this up and bring it under their attention. Possibly as a further addendum to our report. I have no problem Mr Chairman and I would support this.

Chairperson: Prof Korder and then Dr Pahad

Korder: Could I just perhaps refer to one sentence immediately below the paragraph, there is a sentence which there was general agreement among the technical advisors on the content of this compromised formulation. I saw the text of this this morning when I received the documentation and the argument is, Prof Raath's argument, the general agreement I think it would be fair to say, at least as far as I am concerned, doesn't extend to all the details of the formulation which is there, for instance in discussions which we had privately before. I would have prefer there to be no reference to words like "of peoples", I would have prefer there to be less emphasis placed on "territorial self determination" so there are differences of emphasis between us I think it would be fair to say, or at least between me and Prof Raath, I don't Prof Breytenbach must speak for himself on this. I think that the, from my point of view, from a technical point of view, the point is that Theme Committee 4 at least should be asked to consider the kinds of arguments put forward by Prof Raath in this paper and that the formulation which appears on page 39, is the type of thing which bears consideration. I wouldn't push it as perhaps as strongly as Prof Raath would push it, but I think it bears consideration, that's really the, I wanted to amplify on that sentence which appears immediately below that paragraph. And Prof Raath and I and Prof Breytenbach have discuss the difference of emphasis that we would place on particular words or formulations here. Thank you.

Chairperson: The technical advisors are making it very difficult for us. Last time we discussed this, there was also differences of opinion with regard to the report itself. Now, you are coming again with different emphasis with regard to a report that we've got to deal with, it makes it fairly difficult because who's report must we now consider? It is a general understanding that the technical advisors must get together and come out with one draft report for us to consider. Now, it appears that one member feels that the draft should be like this and the other members don't feel like that. You must assist us in getting some consensus about this issue. Dr Pahad ..

Pahad: I wonder if I could be of some help. I thought what we should do, and you are right in that sense, but I don't think we should [delay]? with that point is to go to page 50 at some point, look at the possible approaches as suggested by the report of the ad-hoc committee and when we come to a particular area 6(d), then Prof Raath and General Groenewald and anybody else who thinks that 6(d) could possibly be strengthen, can then make a concrete proposal, but we can't discuss two separate proposals at two

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different times, that's all I am saying. So I am really suggesting that the way to move forward, is to go to the possible approaches and see whether that possible approach does or does not accommodate General Groenewald. And let me add here, that we have to accommodate political parties with great respect to our technical advisors, it is not our responsibility, it is not our duty to accommodate technical advisors, it is our duty and responsibility to try to find accommodation with political parties as we are sitting here. So I am not saying that I agree or disagree with Prof Raath, but it is not my responsibility in this Constitution making process to come to agreements with the technical advisor, it is to come to agreements with the political party, the task of the technical advisors as I understand it, is to make our task easier by taking concepts differences and see whether or not they can come together and where they can't to say the issues are contentious. I am saying this, because I don't want to get involve and I don't think we should get involve in a debate with Prof Raath, I think it would be wrong for us, it would be wrong for Prof Raath, because it would be placing him and the rest of his technical advisors in an invidious position. So once again I want to suggest the way forward, which is that we take the possible approaches suggested on page 50, taking into account what is said on page 39, by Prof Raath which is fine, because we should take that into account, and see whether we can't accommodate both and it seems to me that it may well be possible to accommodate some kind of formulation which we can then send to the Constitutional Committee.

Chairperson: Prof Raath, then Prof Breytenbach. Just what was said previously and the suggested approach to how we resolve this.

Groenewald: Chairperson, as Mr Pahad suggested, if we look on page 50 at paragraph 6(f) where we indicate that Principle 34 be retained in some form and then put in a footnote, and in this footnote if it is acceptable, to say that the Freedom Front proposes that the formulation as in paragraph 39 of that one paragraph, is an example of the kind of provision that should be made for in the Constitution. If you do that, I am quite happy.

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Pahad: Chairman, let us first discuss the issue because you may well find that some parts of paragraph 39 are not acceptable to us in the way they are now drafted in relation to territorial things because they seem contradicted but I was saying let us discuss the matter and then see how we can accommodate it, because I am pretty certain in my own mind that we can find a formula which will satisfy all of us with respect to the report of Constitution. I have no doubt we can find a formula.

Chairperson: Prof Raath

Raath: Thank you Mr Chairman. May I lucidate a view points with regard to the status because I have the idea, or I have the impression that what is involved is the status of these proposals. May I say referring to the minutes of the last Theme Committee 2 meeting, and referring to that report, point 6(f) there were

questions as to how such a formulation substantiating Principle 34 should look and the formulation given there on page 39 is nothing more than a possible formulation which could give expression to such a substantiating of Principle 34. Now, the idea I have, the impression I have and I think that Prof Breytenbach could elaborate on this, was that there was general agreement as to a possible content but as far as editorial aspects are concerned, in other words specific wording and so on, that could be changed. And I would like to hear Prof Breytenbach on this, but I just want to emphasise that this report was actually requested at the last Theme Committee 2 meeting as a result of discussions there as to paragraph 6(f) and 6(g), this is in other words an effort to concretise ideas which have already been expressed. That does not mean that the formulation there on page 39 should remain as it is in all respects, but I think that the technical advisors were ad idem as to the general gist of the formulation found there on page 39.

Chairperson: Prof Breytenbach ...

Breytenbach: I agree with this assessment just to underline the point is that the main body of this fourth report which is pages 50 and 51, on that one we have consensus as this Theme Committee 2 also has consensus. The submission by Prof Raath which is now the point of somewhat controversy, was not a request made to Theme Committee 2's technical advisors, it was a request made to himself after he had read out his handwritten notes last time. He had been given chance to put it on paper which he did, and which he faxed through to Theme Committee 2 and that's the reason why I only got it over the weekend and Prof Korder only got to read it this morning. This does not invalidate the submission of this report, because it was a request made to him and that it's only after it has been read now that Prof Korder did discuss that he may go along with the general thrust of what has been said, except in two instances as far as definition is concerned, I think Prof Korder would be willing to live with this definition properly as put by General Groenewald, namely that as a footnote to in page 50(f), because this is the crux of the matter that we are now dealing with, namely how to concretise the continuation of Principle 34 if we come to the time of the deadline which is approaching very fast.

Chairperson: Mr Mahlangu, assist us with regard to the proposal by Dr Pahad. How can this formulation on page 39, possibly be incorporated into what is contained on page 50 and 51?

Raath: Mr Chairman, may I support the advise of Prof Breytenbach as convenor of our technical advisors to put this in as a footnote. And to state there explicitly that this is one way of dealing with the concretisation and the substantiation of such an article in the body of the Constitution to give effect to Principle 34 and that would be the only status such a formulation could have, but then it will accommodate the other views expressed, namely that it would be brought to the attention of other technical committees but then it will have the status of a footnote provisionally.

Chairperson: Mr Mahlangu and then Mr Eglin. Mr Eglin

Eglin: One should state, the footnote I think should say that after this has been drafted that there has been a submission at the request of this Theme Committee, made by Prof Raath and supported by General Groenewald, and it's noted, it's given for noting and any action to flow from it. I think that would be the status, it was at the request of the Theme Committee that Prof Raath, has presented it and it has the support of the Freedom Front. I think that's where it is and it should also be considered in conjunction with anything else it's going to be considered.

Speaker: [198] I think we would be happy with that, we as technical advisors.

Chairperson: Dr Pahad

Pahad: You see, I don't have a problem with it to put any number of footnotes that you want, the question is what are we saying? Because is what appears on page 39, consistent with Constitutional Principle 34? I have some doubts whether it is. In the way it is phrased on page 39, and the way it is phrased in Constitutional Principle 34, so I mean we will debate this thing certainly at the level of the Constitutional Committee and all I was asking before when we came as General Groenewald suggesting that we have to come to page 50, because we've got to agree to page 50 - 51 or disagree, whatever we do. Today we got to make a decision with regard to that. We then come back to that and say that whatever we going to say should then be consistent with, or in line with Constitutional Principle 34, but if you want then to define Constitutional

[214] Principle 34, I think that opens up another [can of worms]? and in my personal view, Prof Raaths definition of on page 39, is takes Constitutional Principle 34 further then my reading of it and therefore I don't have a problem if the footnote says, not that we ask Prof Raath that the Freedom Front, or the National Party, or the ANC, or the PAC, or the DP, in the footnote says that the view of this political party is that this Constitutional Principle should be understood in the following manner. I don't have a problem with that, because that's the right of the political party. It then becomes from the point of view, I am trying to be procedural from the point of view of the Theme Committee a

matter for contention which the Constitutional Committee should discuss. I just think we should follow certain procedures in the way we are going to make reports to the Constitutional Committee and in my own view, then I am repeating it now, let us go to page 50 and 51, Mr Chairman, let us see what is acceptable there to us and then see where if necessary, a footnote should be added in the name of the party which makes the issue contentious rather than keep on discussing it in this vague circular manner.

Chairperson: I try to assist there, was a previous occasion where the matter was contentious and the footnote only stipulated the National Party and the Freedom Front supports this view. And it was contained in that report, so I don't think it will be procedurally incorrect to follow the same procedure if they are adamant that it be retained as a footnote, not reflecting the views of the Theme Committee as such then I don't see any problem with that. Mr Mahlangu ...

Mahlangu: Well, Chairperson seeing that it's a matter of technical aspect, is it not very, very important that this matter also be looked at with other technical advisors of Theme Committee for that's their jurisdiction and once the other technical advisors have come together and discuss this issue, maybe can advise us better as to how do they see it to be incorporated in the Theme Committee 2 jurisdiction, or whatever the case may be, because it seems they haven't discuss it with Theme Committee 4 advisors too. I think it becomes more important that they also discuss it with them.

Chairperson: James is just telling me that Theme Committee 4 has completed their work together with the technical advisors so they are no longer meeting unless we get a special arrangement with them so that they at least report to the Constitutional Committee with regard to this matter. Are we agreed then it is footnote supported by the Freedom Front and the National Party with a decision that the technical advisors be in liaison with the technical advisors of Theme Committee 4 to place a sort of report before the Constitutional Committee with regard to the suggestions contained here as suggested by Mr Mahlangu? Mr Eglin ...

Eglin: [263] ???? the first part, but I think you could then, all you could say is you've draw the attention of the Constitutional Committee to the fact that this report may impinge on the work of other Theme Committees. And it is then for the Management in order to decide where it should go, but I don't think it should be a liaison between technical advisors. It should be handed to the Constitutional Committee, the Constitutional Committee will then say take note of that, Management see that Theme Committee a, b, c are all now put in touch.

Chairperson: Mr Beyers

Beyers: Mr Chairman, may I just make the point of the National Party clear and that is that we want this very important information to be brought to the attention of the Constitutional Committee and

must be taken up in the report, but the National Party do not support each and everything on page 39, with specific reference to the territorial entities but apart from that we can associate with the Principles of 39, but we will support the notion of a footnote and not to make things difficult in that light I think we should not be part of that footnote, because it also refers to territorial entities which is not part of the policy of the National Party, but as far as all the Principles are concerned, with the exclusion of territorial entities, we would support the contents of this formulation of 39.

Chairperson: Mr Mahlangu, Mr Eglin has made another suggestion, namely that we report to the Constitutional Committee and that they take the necessary steps as to what do they do with the report instead of us deciding that this technical committee advisors must now liaise with the other technical advisors. Would you go along with that?

Mahlangu: Are you asking me? Oh, Chairperson, I don't have a problem with Mr Eglin's proposal. I just hope that all members don't have any problem, because it is merely reporting to the Constitutional Committee that at least this matter can then be debated further in the Constitutional Committee and they will decide whether they refer it back to us or to the sub-committee or which will be the relevant structure to deal with that.

Chairperson: It is perfectly within our competence to suggest to our technical experts to go and have a discussion with another Theme Committee's experts. Nobody is adopting any positions. Once they get together, they may decide that they can or cannot make some kind of recommendation to the Constitutional Committee. Now, we want to wait to the Constitutional Committee and then discuss it to the Constitutional Committee and then get the Constitutional Committee's permission. I think it is gonna take time. I think what we should agree here, is that our technical experts should go and meet technical experts of Theme Committee 4 and discuss this matter and if they can't come to an agreement, they should report that to the Constitutional Committee. I just think it saves a lot of time, instead of us going around and around. So, that's my proposal.

Holomisa: Mr Chairman, I don't know I got the impression and I am confused now because earlier you said if just have been reported to you now that the Theme Committee 4 has completed his work, now I don't know if it is going to serve any purpose for the two technical committees to have a meeting on this issue.

[319] I thought [Essops']? earlier suggestion was an appropriate one, obviously this is a contagious issue. We cannot resolve it here. And I thought as I said earlier, that his earlier suggestion I thought was an appropriate one, when he says that somewhere either in the footnote, we should include this report, this section in our report to the Constitutional Committee, but state somewhere either in the footnote or something that the Freedom Front would like Principle 34 or their understanding of Principle 34 is that it covers this aspect which they've mentioned here. Let the Constitutional Committee decide, we don't agree with it, let the higher body decide. I thought that suggestion was a good one, getting it out of our hands because we cannot agree, let another structure of the Constitutional Assembly discuss this matter.

Chairperson: Before you ask the technical advisors, is it possible for you to consult with the legal advisors of Theme Committee 4?

[341] ??????? just ask here, was two proposals coming from the ANC side with regard to that and I just want us to get to some sort of consensus.

Speaker:[344] It would be very difficult Mr Chairman, one of that Theme Committee 4 has already completed its work and one of the major role players there is Prof John Dueguard is now leaving the country temporarily so it would be very difficult for us to get this kind of procedure going.

Chairperson: Mr Mahlangu

Mahlangu: Chairperson, I am just thinking, because really we would like to get into this matter and resolve it, you are aware it is a very sensitive matter. We don't just want to brush it off and say it's finish with it. Will it may be again solve then, to start off fresh and look at 6(a), (b) up to (h) and see how can we accommodate this other submission. I don't know, will that solve? Let's discuss open again the whole item 6 that we are talking about and discuss it. I just try to find the way on this issue.

Chairperson: Let me just ask again when were you suppose to leave at the latest?

Breytenbach: half past twelve, which is an hour.

Raath: Mr Chairman, yes, I have time until I understand five this afternoon, so I will be available, although the other two technical advisors did indicate that they have to leave at lunch.

Chairperson: Why I am asking the question, I want to suggest that we leave this in abeyance now, and the technical advisors go and discuss the request of comparing page 39 with 50 and 51, and come

back to us within half an hour I would say, 5 minutes - they won't do justice to it in five minutes. 15 minutes - then you come back to us with suggestions made by Mr Mahlangu and Mr Pahad to see how we can incorporate. Then just for Dr Pahad's information, 50 and 51 has already been approved by Theme Committee 2. No, no, no ... we've made the amendments to the report in the last meeting and we then approved it.

Speaker: 384 Mr Chairperson, if I can refer you to the minutes of last week's meeting, have you looked there at 4.6? In the minutes this page we had this morning, you'll find in the minutes there has been a change to the wording of 6(d), which hasn't been reflected.

Chairperson: Before we start in approving the minutes, I read out the correct formulation. That 6(d) and 4.6 must be deleted and it must be substituted with the amendment that we reached consensus on, which should read "there appears to be consensus on the fact that negotiations should continue on self determination in all it's forms". So that substitutes (d) on page 50 as well. We agreed to that. That's why I made the alteration this morning, before we started. Okay then, we leave the technical advisors to carry on with their consultation amongst themselves and then come back to us about that. Not yet? Let's adjourn for 10 minutes and have some coffee. Mr Eglin

Eglin: Just for the benefit of advisors, may I give notice that because it has been included for the first time in our Constitution is the word "ethnic" and I would like to have Constitutional terms what the word "ethnic" means, because generally we have spoken of cultural linguistic, we now coming on to "ethnic" and you are now giving it a formal Constitutional meaning and I think we should have a definition of what we mean. So when we debate it at the Constitutional Committee, we know what we are talking about.

Breytenbach: Mr Chairman, as far as the wording is concerned, so this now reflects the consensus between the three technical advisors but we will have to decide if this consensus is acceptable, whether it's in the form of the footnote or 6(l) we think that under those circumstances, if accepted that it may well be part of the body, namely 6(l) and not a footnote.

Chairperson: Let's hear you.

Breytenbach: It's on page 39, the topic was mainly we are removing, let me just say in general, we removing all references to ethnic and where there are references to self determination of peoples, we replaced that with self determination in all it's forms, these are the two major general guidelines and therefore it would read as follows, and let me also say a third point, we brought it absolutely in line with the wording of Principle 34, so this is the wording that we suggest are [yota, crossing the t]? everything consistent with the wording in existing Principle 34, so as not to introduce new concepts I think as Mr Eglin pointed out that we

now raise in the word "ethnic" but as "ethnic" was omitted from the original word, so we went back to the original wording and that is on that page is that we actually found our consensus. Right, so then the heading would be "Acceptance and Recognition of the right of cultural and linguistic self determination in all it's forms". So the changes are there, ethnic comes out and "it's cultural and linguistic self determination in all it's forms" rather of peoples. Then the first sentence would read, the state accepts and recognises the right of cultural and linguistic self determination, so ethnic comes out, and then of peoples come out, and then again in all it's forms in stead of "of peoples" in the second line, "in all it's forms". Then it goes on "and with reference to Principle 34, accepts the responsibility to assist communities and 'of peoples' comes out and 'of people' come out, deleted, to assist communities sharing a common, the word 'ethnic' out, a common cultural or language heritage to express such right, now again the exact wording in Principle 34, 'Whether in a territorial entity or in any recognised way', this is the exact wording of Principle 34. I am reading it "language heritage to express such right whether in a territorial entity or in any recognised way". And then the sentence as it stood here, can still exist or continue "of their choice in so far as it is reasonably possible, provided that nothing shall be done which may prejudice the civil and cultural rights of existing communities of different 'ethnic' deleted, of different cultural or linguistic origin in, in stead of 'such', in possible, the word 'possible' takes place in stead of 'such', or linguistic origin in such possible territorial entities or the rights in political status enjoyed by the people of similar, the word 'ethnic' deleted, of similar cultural or linguistic origin outside such possible entities. Yes, I have just been pointed out, where I referred to the wording in Principle 34, in the middle of our paragraph, that paragraph where it says "language heritage to express such right, whether a territorial entity or in any other, that's the correct wording in terms of Principle 34, the word 'other' must come in there, whether in a territorial entity or in any other recognised way. That's the exact wording of Principle 34. So then if we read it through, then it reads as follows: "acceptance and recognition of the right of cultural and ethnic self determination in all it's forms, and linguistic self determination in all it's forms. Then it reads as follows, please follow me there "the state accepts and recognise the right of cultural and linguistic self determination in all it's forms and with reference to Principle 34, accept the responsibility to assist communities sharing a common cultural or language heritage to express such right whether in a territorial entity or in any other recognised way of their choice in so far as it is reasonably possible provided that nothing shall be done which may prejudice the civil and cultural rights of the existing communities of different cultural or linguistic origin in possible territorial entities or the rights and political status enjoyed by people of similar cultural or linguistic origin, outside such possible entities". It's a mouthful.

Chairperson: Any comments Dr Pahad

Pahad: If you want to put it as a footnote, please put it as a footnote

and say whichever part you agrees with it, my interpretation of 34 is that there is no responsibility that devolves the state to do anything and now we are saying that we then accept the responsibility to assist communities, it's very different from the way Constitutional Principle 34 is state. I am not saying that in the end the state may not very well decide to do this, but it's not in Constitutional Principle 34 and therefore I was saying that there are elements there in terms of the thing. Now if you want to then repeat Principle 34 and therefore I was coming back to my original version and lets find a way in which you repeat Principle 34 without seeming to interpret it in a certain manner, and my problem is that this is an interpretation and even when you begin by saying the state accepts and recognises and so forth, you already beginning with a position. Now, you then say

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tomorrow, and says

[546] well I live in [Walkinson]? or in Oranje and you have now taken on the responsibility of assisting me, I mean that's the first point. The second point is that we know that is I have found out in terms of the negotiations that to say reasonably possible

[549] just opens also very many [cans of forms] to us as to how you are going to interpret that particular thing. Now, let me say this, my own feeling is that what you don't want to do in my view, is to throw open this debate in a way which become acrimonious or difficult. What we want to do at the end of this Theme Committee, is to find a way in which this question of self determination is not side-lined, it remains an important part of the issue that we must continue to discuss and then, thirdly whether or not we can resolve this problem before the new Constitution is adopted, in my view then should not affect our capacity to continue with negotiations on this question. So, we shouldn't put it as if we want to resolve this problem here and now if we can't, because it involves many other complicated issues. So the issue must remain open for discussions, whether or not we are able to resolve it in terms of the new Constitution. Therefore I am saying, if you wish in the end that this goes in as a footnote, offcourse, that's the right of the Freedom Party and you correctly point it out afterwards, that offcourse even the technical experts also have the right and the authority to say in the footnote that the technical experts wish to suggest the following formulation to cover this thing, so there is nothing to stop them, and on our side we cannot say we are going to stop you, offcourse not, that's no problem. But, we from our side would not agree that this as presently formulate the Constitute, the content of pages 50 and 51. That's all, so if you want to put it as a footnote, let's proceed to do so.

Chairperson: Senator Groenewald

Groenewald: Chairperson, in order to get the record straight, I would first of all ask that the paragraph as formulated at present, should be changed in our records. In other words so that this change should be brought, placed on record so that we know there is general agreement amongst the technical advisors, that's the first point I would like to make and we have it on record, then it becomes part of the documentation of the Constitutional

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Assembly. Secondly, if this question becomes a matter of contention, as it would appear from what Dr Pahad has said, I don't think that's quite necessary. Um, if we look at page 50 and 51 of the approved report, it also quite clearly makes provision, it also seems desirable in page 6(f) that provision be made in the draft of the final Constitution for the continuation of negotiations which may lead to some form of self determination. Now, as I have said earlier, we should also see the progress of this issue in line with the accord, which is extremely important and in line with the accord, [bilateral]? negotiations are taking place at this stage. And obviously that's the place where this kind of agreement should be reached and should be introduced. And I am quite happy if we accept the report as it is at the moment if we bring our records up to date with the change in the formulation as stipulated above, and if my Principles then would like it introduced as a footnote, then I will come back with our next meeting and either as a supplementary report to introduce it as a footnote or else just leave it out entirely if you are quite happy with that.

Chairperson: Prof Raath

Raath: Mr Chairman, from a technical and academical point of view, I wish to point out that in the Constitution writing process, it is very difficult to on the one hand accept the existence of a right as we have there implicitly or explicitly in Constitutional Principle 34 and in this sort of formulation we have here as we agreed on by the technical committee and to place it somewhere in the Constitution, but outside the Bill of Rights, because the Bill of Rights is actually the place where a consolidation of the recognised rights should be written in. And this is the reason and the background of this whole formulation as you will see here, offcourse there are difficulties formulating this in typical human rights first generation terms, but I just want to emphasise that this must be read against the background of, and this is the gist of the submission, that this does not preclude the recognition of this right as a second or third generation human right and then offcourse it must, it seems to me technically correct be included somewhere in the body of the Constitution with the other rights. I actually situate it. So, to tell you this is just a technical point which I want to emphasise which one must bear in mind evaluating the content and the position and offcourse the status of a formulation of this sort.

Chairperson: Now there is a proposal from Dr Pahad that it be included as a footnote and Senator Groenewald said it must go back to his Principles and then come back to us at a later stage whether it be left out completely or whether it be included as a footnote. What do you suggest we do?

Pahad: Part of this problem is we being discussing it to piece fully and that's why I asked about a 100 times that we should have looked at it together with page 50 and 51. We have agreed Prof Raath that your report would be made available to Theme Committee 4. They will discuss in Theme

Committee 4, whether you are correct or not in terms of whether or not this particular element will form part of the Bill of Rights, it is not our responsibility here. Theme Committee 4 will discuss that and make their recommendations accordingly. But I thought if you look at 51(g) that's really, it seems to me, the critical one in terms of the approaches which says "members of the ad-hoc committee have to consultate with Theme Committee 2 to proposes the following, and I quote 'the most appropriate form of Constitutional provision is one, that would not preclude the pursuit and / or realisation through negotiations of the right of self determination you can include if you want in all it's forms, in some form it says here. The outcome of which will be binding on the new future government. This is what we have agreed to last time on the basis of what Mr Eglin pointed out, that that was the important thing and I thought what is really important here for this Theme Committee,

(Tape 4)

Pahad:

... what is really important here for this Theme Committee is not so much to find a solution to this problem, because this Theme Committee is not good to find a resolution today, but from this Theme Committee to see whether it was possible to give some guidance to the Constitutional Committee on how to try to find a way forward and I thought this (g) is a way forward to the Constitutional Committee without again walking down the Constitutional Committee if you doesn't want to in all kinds of discussions. Lastly, I would agree with Senator Groenewald that in the sense that in the way we moving now, whether we go to the sub-committee or whether the issue is going to be resolve at the series of bilateral meetings remains to be see. And therefore I am now making a concrete proposal, that if I was the technical experts and I was Senator Groenewald I would not put that page 39 in a footnote, but it is up to them, if they wish to put it it's their right and it must then form part of the documentation, because it is no problem on our side. But then to we don't lose sight of our report to the Constitutional Committee to really bring to their notice (g) which is really suggesting a way forward with regard to how we should deal with this thing I mean all this others can stay, but (g) becomes a critical fact. And lastly to repeat again, that the arguments of Prof Raath with regard to the question of self determination and being either second or third generation or first generation or

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[w h a t k i n d s] ? i s n o t a n i s s u e that's going to detain us as a Theme Committee, it's an issue that we are now recommended should go to Theme Committee 4 and if their Prof Deugard is on holiday, then our technical experts as it is normal would then go to the Management Committee people where they make a report or to the administration and say that this is the point, this is what the Theme Committee wanted through you we want to find a way in which this issue is raised at the level of the Theme Committee, if Theme Committee 4 so wishes can invite our technical experts including Prof Raath to make an input on this question and I really believe this is the way forward for us.

Chairperson: Senator Groenewald

Groenewald: Just on a point of clarity, I am quite happy with that, that is what I meant that the report as approved here go forward and should we, or my principles feel that it should be supplemented then it is done by means of a supplemental report. In other words there is nothing on the books as far as that is concerned. But secondly that are asked that for record purposes, the documentation be brought up to date with the changes as suggested by the technical committees that it is on record, and it can be used by the Constitutional Committee or whatever committee looks at it even if it is Theme Committee 4. Thank you, Chairman.

Chairperson: Any further comment.

Eglin:

Supposing this is a concept, but just so that one then understands what the status of this amended formula is. Is this a compromise reached on a particular item in which you wanted to adjust wording, or is this what the technical committee would have dealt if they didn't have a text before upon they have to reach a compromise. I say this cause apart from the wording, the heading, the first sentence and the second concept all go way beyond the principles, either principle 12 or principle 34, so are we saying this is a compromise on wording or is this an agreement on substance, I mean if you take acceptance or recognition of cultural linguistic self determination in 12 it very specifically relates to organs and civil society. If you look at the other one, the question of possible ... it's allowing people to have to pursue the notion of self determination which is fundamentally different from saying the state has the responsibility to promote it. So I want to know is the agreement between the three gentlemen there, agreement on the text which was presented as the best way of presenting it or are they saying the substance of this we support because we think it does reflect the principles contained in the Constitution. I don't know.

Raath:

Mr Chairman, may I point out that the difficulty one has with making any formulation to give effect to what is already being decided in Theme Committee 2, is the fact that there are no real guidelines as to the suitability of principle 34 as it is, and we've taken note of the fact that a lot of criticism has been levelled at the sort of formulation we had in principle 34, because it is insert to a certain extend and refined formulation, and we've also taken note of the fact that the views were expressed that principle 34 should be revised and that it should be rewritten to make it more streamlined and I think the point taken by the previous speaker is a very valid one that there must be guidelines, guidelines must be issued if possible by the Constitutional Committee. As to the suitability of principle 34 being taken up in a future Constitution or not.

Chairperson:

Prof Korder

Korder:

May I just say that from my point of view, I regard the paragraph which is on page 39, in the first sense that Mr Eglin proposed. It is taking Prof Raath's original formulation and trying to make removes some of the language which in my view does not accord with principle 34, at the same time Prof Raath's point has been consistently that this is a concretisation of principle 34 but I certainly accept that it goes further than principle 34 in a new Constitutional context which is being argued for by a political point of view and it's in that sense that I go along with this formulation, it's in the first sense of what Mr Eglin referred to now.

Chairperson: Can we now agree that this input of Prof Raath be referred to Constitutional Committee 4 as modified? And our recommendation is that it be referred to Theme Committee 4. Can we settle that now in that fashion? Thank you so much. Professors Breytenbach, Raath and Korder for assisting us with the rewording of such a sensitive matter and that we could at least make some recommendation as to what happens to the input. Thank you so much.

Ladies and Gentlemen, the one item maybe a short time, I hope so. Can we move over to Constitutional amendments which have been referred back to us by the Constitutional Assembly. There is a new draft on page 23 of document 30/1. Is that in order? Page 24 actually of 30/1, 24. Is that OK? Prof Steytler. You must indicate whether we have accommodated the chairman when he ruled that it be refer back to us. Prof Groenewald

Groenewald: Could I just ask there is an opportunity for confusion again with page 23 and page 24. I mean page 23 is first draft and page 24 is also first draft, but if we could just put in second draft in page 24.

Chairperson: Ya, that's quite in order. It should be the second draft. Prof Steytler

Steytler: Mr Chairman, just the changes that actually occur is just more for clarity. The first sentence is simply to say about Parliament now is possibly stated may by law repeal or amendment any provision of the Constitution. The law advisors then footnoted that or suggest whether one want to say accept this section as well, because it means that the nature of this section itself cannot be repealed and therefore always retaining a two thirds majority requirement for any change to a Constitution. Then the second change that taken place is the change requirement of at least two thirds of the members, then important the total number of members of the National Assembly provided for in this Constitution and the particular wording here is to settle the issue what is two thirds of a, how do you calculate the two thirds, is it, say the Constitution says 400, then we know precisely what are two thirds, the moment there are not 400 members of the National Assembly, there are 395, so that you don't calculate the two thirds from the 395, because there are number of vacancies. So it is just trying to settle that issue. The final matter which clearly, still to be dealt with is provincial participation in amendments to Constitution where provincial matters are being affected and that clearly we don't have here because it's not clear how that is going to, what the second chamber going to be like and how the second chamber going to participate in amendments to this Constitution.

Chairperson: Open for debate. Are we agreed? Mr Mahlangu and then Mr Eglin

Mahlangu: Well, Chairperson I just want Prof Steytler or maybe any from the National Party just to expand in regard to footnote two. Let's

just get clarity on that. Maybe the National Party could do it the best.

Chairperson: Mr Mahlangu wants to be explained, because it is quite clear that the ...

Mahlangu: Why this and not other sections for example of the Constitution, or other provisions of the Constitutions?

Steytler:
[142] Well first of all we believe in Constitutionality, we believe that the Constitution should be [soverant] and we propose that by these four methods it is a way to make a Constitution [soverant] and we believe it is necessary to do so. It's quite clear that we say that there should be absolute entrenchment of the commitment to a democratic form of state and democratic mechanisms, this is the one level and secondly that, the general entrenchment of the Constitution by requiring it [to this majoritising], there is consensus on that and then apart from that, that the specific entrenchment of provincial matters should also be retained and fourthly, we say that there must be [149] [juditional]? entrenchment of the basic fundamentals of a democratic state articulated in the schedule to the Constitution so I don't know what is not clear to Mr Mahlangu.

Eglin: Chairperson, I am not entirely comfortable just putting accord amendment to the Constitution, I think one normally says how you will deal with various bills, ordinary bills, money bills, bills effecting or amending the Constitution, so one would put it in that context rather than separate one. The other one is a strange phrase Parliament may by law repeal or amend any provisional Constitution so then you don't say it's going be done by Parliament, because it's done by the National Assembly. I don't mind, but I mean I think this thing should be, should look at this section dealing with how you pass various bills and then you have a qualification of a bill which deals with amending the Constitution. I will have no problem with the concept of two thirds, the question is whether the Senate should be involved, I think is also going to depend on the structure of the Senate. At the moment it is involved, so I just think that has to stay over. The other point which we made and we don't go as far as the National Party, but the clause which says the Constitution is the supreme law, we do not believe that that should be able to be altered by a two thirds majority, because take that away and the whole of the rest of the Constitution then just becomes an ordinary law. And therefore we would argue that particular provision should not be amendable. The third point I want to make in our submissions we indicate that as at the present once again it depends on the Senate and all the rest of it, changing the Constitution in a way which affect provincial powers, cannot be done by a simple two third majority, it would also have to involve the concurrence of the Senate or some other structures. So I don't like the way this is set out, but the other problem is the question of should there not the sovereignty of the Constitution, shouldn't that be enviable? And we have to make,

we would argue provision for provincial constitutional amendments, or amendments affecting the provinces once we know exactly the status of the provinces and the Senate.

Chairperson: Any comments from Prof Steytler about that? Then Senator Groenewald.

Steytler: I think the first question clearly is inconsistent in the use with Parliament here, because we don't know what Parliament means, I think that's not correctly used there. At the moment we only know what the National Assembly is and that could really stand over, or either to say the National Assembly or to change National Assembly by saying however Parliaments can be constituted. The second issue of Senate clearly is depended on what the Senate is going to look like and what role the Senate will play, if any role in Constitution making. The issue of the Constitution has a supreme law that touches on more or less similar way to the National Party's first point of absolute entrenchment of one particular concept and that is a, the Constitution will always be the supreme law, that provision cannot be touched by a Constitution, so it is issue that one will have to look at and say well are there one or two provisions which are excluded from amendment. Yes, the province is clearly has to, there is a Constitutional requirement, mentioned in footnote three there, must be accommodated within this amendment of the Constitution and they must be given affect to that principle 18.4

Chairperson: Senator Groenewald

Groenewald: Chairperson, you will remember that the attitude of the Freedom Front is that this is basically the last section of the Constitution that must be completed before the draft is finalised, and you cannot really decide on amendments of the Constitution, until you have a draft Constitution in front of you. And if we look at this proposal, then what is significant is not the amendment paragraph one, it's the footnotes which is really significant which illustrate the point that I have just tried to make. So, I would like therefore to substantiate or at least to support the points made by Mr Eglin in particular and also by the National Party as far as specifically point three of their footnote is concerned and certainly also the first one. There is still a lot of work to be done on the amendments before we can finalise this to the Constitutional Assembly.

Pahad: I would agree with Senator Groenewald that part of the recommendation should be that the Constitutional Committee will consider coming to this at the end and the footnote is fine, the NP's footnote, they will have to explain to us if not today at some other point what they mean by all of this things, d e m o c r a t i c f o r m s , s t a t e and democratic mechanisms. I mean how you constitutionalising mechanisms, but I will leave it to their representatives in the Constitutional Committee to explain it. What you would have to do is to change page 27, in this schematic thing, because Mr Eglin is now making the proposal which is the DP therefore doesn't propose that all provisions of the Constitution should be open to amendment, it is now proposing that one particular provision should not be open to amendment. So I am just saying that in order for us to be consistent it would have to be altered and therefore it remains contentious but I am just saying that that has to be clarified and presumably you would then want to have footnote two after the NP's position, you then want to say that the Democratic Party's position is that the only one that needs to be entrenched is the question of the Supreme law, is the Constitution.

Chairperson: Have you got that Prof Steytler? So we leave the amendment to the Constitution and we don't take a final position on that for report to the Constitutional Committee? Thank you. Now the Senate. We haven't received any further submissions, it starts on page 2 of 30/1 and then we've got the report in blocks up to page 13. Page 2 untill page 13. That's the block report from 14 to 22, it's just from the submissions received. Senator Steytler, I mean Prof Steytler.

Steytler: Mr Chairman I am very in favour of the Senate now.

Chairperson: Just a minute, James tells me that the report have been approved in the previous meeting. This report. Mr Mahlangu.

Mahlangu: I am just waiting, they are disturbing me they are still talking I am waiting for them.

Eglin: Mr Chairman, may I in the mean time ask a question for Mr Mahlangu?

Chairperson: Mr Mahlangu?

Mahlangu: Yebo.

Eglin: When will this committee have the advantage of the weekends discussion of the ANC as far as the Senate is concerned, I see they propose

Mahlangu: I am coming to that, that's why I raised my hand. Well Chairperson, let me put it this way, I really don't know how you want to deal with this today, but from what I can recollect, I think James is quite correct, this report has been approved

previously and the technical advisors actually say it is so difficult to compile a draft formulation because of their whole range of contagious issues revolving to the Senate. So, I think Mr Eglin did report this to the Management Committee as well and the decision that was taken at the Management Committee level, was that the report be submitted as it is to the Constitutional Committee for further debate and then they will give a direction as to what, they will then do thereafter. And then we came back to the Theme Committee meeting, we said no suspend that a little bit, because the ANC would like to come with a further submission to this, and we were not in a position to come with a further submission to the Senate until today, because our ANC was only meeting over this weekend to decide over other issues in regard to the Senate. So, I haven't got a full report of that now, I hope to be briefed, because I am not forming part of the ANC but I hoped to be briefed fully by today or tomorrow. Now, I don't know how we are going to deal with this at the present moment whether to say let's submit it to the Constitutional Committee as it is, but whatever further submissions or inputs that the ANC would like to make, should they make it there in the Constitutional Committee, or you'd like to hold on this let it come back to you, I don't know precisely how you want to deal with this, but I just thought that I need to give that bit of a background because even the schematic report will change a few decisions shall be taken by the ANC over this weekend, so we need to look at those decisions first and see how we are amend one or two things in this schematic report, so what I am saying is, it's going to be difficult for the technical advisors to come out with a draft formulation now until such time the whole issue of the Senate is settled. I just thought it is important to give that background.

Chairperson: Mr Beyers

Beyers: Mr Chairman, may I propose that the issue stands over until we have further report of the ANC on the Senate and discuss it further and well, I think that is the only way we can handle this.

Chairperson: Senator Groenewald

Groenewald: Chairperson, Mr Mahlangu asked a question should it go directly to the Constitutional Committee, or should it first come to the Theme Committee. I think it is very important that the Theme Committee should discuss this, because we advise our representatives on the Constitutional Committee on exactly what the point is. So, I think it should come back to the Theme Committee first of all and that, if we can receive the ANC's report as soon as possible and once that happens the co-group can decide on when we can discuss it in Theme Committee.

Chairperson: Dr Pahad

Pahad: OK, there's no problem if the feeling is that we should come to the Theme Committee first, before we go to the Constitutional

Committee. As you know, the ANC, we finished our work only yesterday, we had not had an opportunity to brief our own ANC members, I didn't have the opportunity to brief members of the ANC in the Theme Committee, and therefore it is not possible for me to brief the whole Theme Committee, because procedurally in the ANC's point of view we would like to brief our own people first. And there's no problem, I don't know when the next meeting of the Theme Committee is, for us to be able to come back and report in terms of what the ANC has decided. May I add in the end that whatever the proposals are with regard to the Senate, they haven't change substantially from what the ANC had made in terms of the general principle of the thing, but we will have to discuss it in some point, whether it is in the Constitutional Committee. Issues that are much broader that entertain this Theme Committee, precisely how the political parties are going to interact with each other in terms of trying to find each other with regard to all of this complicated proposals. But I have no problem to come, at least the ANC, wouldn't have a problem to come to the next meeting of the Theme Committee and give a report of what the ANC decided over the weekend.

Chairperson:

The only scheduled meeting for this Theme Committee is next week Monday. The last one in fact, and we'll have to decide about that meeting to because the afternoon when we suppose to sit, Helmut Cole will be addressing Parliament, so we will have to sit in the morning. Can we agree on that - we sit in the morning to deal with the Senate. Are we also saying that we don't submit any report to the Constitutional Committee at this junction. Is that the general consensus? Can we now go on our knees and plead with the ANC that we at least receive their submissions now, because they have really really kept us waiting for a very very long time? It has been approved by the ANC, I think they can submit it this afternoon to the Constitutional Assembly. It has been approved, so just submit the document so that we can get cracking on this issue. We agreed that it be submitted this afternoon. Ladies and Gentlemen, thank you very much. Then we meet at nine o'clock next Monday morning.