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THEME COMMITTEE 2 - Meeting 15 February 1995

Tape 1, Side A

NOTES

0001:

Who is speaker? Dr Maluwa?

0387:

Mr Maluwa?

0450:

????? pollution

675:

Who is speaker? Dr Maluwa?

0949:

Mr Rabie (???)

0962:

Mr Rabie

0987:

..... has ??? work ?

0991:

in a Continent? a country?

1013:

Dr Maluwa?

1076:

they in that fumble (?) tumble (?)

1087:

?????

1107:

Who is speaker? Dr Maluwa?

1158:

Spelling of Barry Keyes

1247:

Zaire (?) Ireland?

1287:
???? Führer???; in theory???

1298:
van Seiseker??? Sweizeker??

1372:
Ireland?

1603:
Professor Bellville? Dada?

1916:
Who is speaker?

1993:
Mr Bes ???

2060:
He vanished through??

2124:
Who is speaker?

2252:
one ???

2328:
Mr Lebornay??

2530:
Who is speaker?

2593:
Who is speaker?

2629:
Who is speaker?

2664:
Who is speaker?

3299:
Mr Daykin ? Mr Duiker ? - who is speaker

3645:
Is it Dr Maluwa?

3703:
???

3724:
The G-7 Sunnies??

3932:
so that they are responsible to family???

3960:
my brother there, the State captain???

4095:
Who is speaker??

4224:
with Mr Beard's assistance

4229:
Not sure of spelling of Dr Tia Maluwa

4530:
Sound very poor - fading away.

4890:
President Makavenny??

5039:
and the king of ????

5107:
about chiefs??

5140:
our cult here ??

5180:
Not sure of name, sounds like Dr Maluwa.

5190:
?? I attack some of those commentators

5205:
elect leaders, erect leaders??

5264:
???

5289:
to attend Jeffers??

5295:
sitting in the Reeses gaalie? gallery???

5424:
Mr Damuse??

Tape 1, Side A

Theme Committee 2 - 15 February 1995

Dr Maluwa

...does not bring up the party political interests and permeates our Constitution which will write a new script for the new powers to have to do the same thing in the way of a vicious circle which will unfortunately leave us in a state of conflict, a state of war, and we pray to God we don't have to think about that. Our preoccupation at this stage in time, with all these examples, it does appear is going to be locked in that kind of instance and how to brace from that side is of critical importance for us to find out as early as possible.

The final point, I think I gleaned from what has been given to us, is that being a country in Africa it is inescapable for us, in the African context, to find or at least to be endowed with wisdom to see beyond that kind of development that has shaped the African states. Maybe the wisdom of Solomon has to prevail here, what it is that will make South Africa different, but whatever forces shape the direction different from Africa, it does appear then that maybe the authority should rest with the people that they should not abdicate their responsibility to another structure or another institution and that they should be the final arbitrators of whatever happens in Parliament or Executive or Judicial. Whether there is a mechanism to give the power to the people as final arbiters may perhaps be the only balance, but it does appear to me that we are going to be visited by the same unfortunate history as has been given to us. Thank you, Mr Chairman.

Chairperson

Thank you, Dr Maluwa, before I allow the technical

members and the speakers to respond, I want to share with you in the house an ancient wisdom in constitutional writing. I heard this 15 years ago from my constitutional professor and today ??? . As she makes those remarks bear in mind that the Constitution is no more than the will of the people, how they would like to be governed. And this ideal, this is the highest level of generality. But then you have this competing and conflicting psychology that by the very nature a Constitution will be written by people who are in power – and I use 'power' very advisedly – who have some form of a policy, but the best form of Constitution we would all like to see if we had to make a test, it will be that Constitution which would protect you when you are out of power. But the best test: if I am powerless, what would I like to say? That is ideal but at the time when we are called upon to write that Constitution, we are not out of power, so there is the psychology of tension, that those who are in power must write what they would like to see when they are out of power. Now the philosophical question is: Can we conceptualise in power how it would be when we are out of power? I would allow response to the question.

Dr Maluwa

Well, actually I did take the contribution not so much as a question but a comment and it is just the comment that I agree with. I would only say this: What is it that will make South Africa different from the other African countries. It is this that South Africa has the opportunity to write its own Constitution through consultation, debate and discussion amongst South Africans. In other words, the other African countries had constitutions that were invariably, I mean there were constitutional conferences invariably taking place in Lancaster House, as in the case of former British

colonies, but what the problem was is that these constitutions were designed – I make the joke about Oxford undergraduates walking around with briefcases full of Constitutions – these constitutions were designed in Britain and basically handed over to these pioneering African leaders in the various countries, and it took a while for people to set about re-writing constitutions in their own image. Unfortunately the constitutions that were then re-written, to reflect the reality of the African condition in these countries were constitutions that were used often enough to portray the idea of a one-party state where the one-party state was in vogue. South Africans are not being handed a Constitution drawn up in London or Paris or wherever; South Africans are writing a Constitution that's the difference.

Chairperson

Mr Rabie?

Mr Rabie

The question has been covered, but I would nevertheless just amplify on it. Now it appears that a ceremonial has ??? in a ???. Now what is the idea, or what is Dr Maluwa's (???) opinion if the majority party leader becomes the prime minister, in other words, he is directly elected through his party's machinery and then after that, when Parliament has been meeting, they in that ???, outside of party politics ??? ceremonial head of state?

Dr Maluwa

You still need the numbers of the majority. Are you saying it must be a provision that that person should not come from the majority party?

Mr Rabie

He mustn't have been an active politician in the party

hierarchy as such. Like we've mentioned Barrie Keyes that's not a political party animal who is the Minister of Finance at the present moment, something of that nature.

Chairperson

Dr Maluwa?

Dr Maluwa

I think somebody there wants to comment. Oh, I see, to ask a question. I was just going to say that perhaps these are things that can be written into constitutions. I mean, the experience... Again one doesn't want to forget that we mustn't borrow from European countries, but we know, for example, that in certain contexts the election of the president of the Republic of Ireland(???), for example, is on the basis that you elect the office of President – a known sort of practising politician, let me put it that way – not a party political candidate. Right? Similarly, the Führer (???) at any rate, is in Germany, but again I mention that President Richard van ???, having been elected as president of Germany, in his long career as president of the Federal Republic of Germany, did actually participate in politics in a sense. Right? So, it is difficult to really come up with this package that you can call a politically neutral entity – the ceremonial president. Even Robinson, the president of the Republic of Ireland(???) now is a political animal in her own right because she once did belong to a political party, but then you expect her, having been elected president, to be a ceremonial figure and shy away from political involvement. Did you want to respond to that?

Chairperson

Before him, Professor Steytler.

Prof. Steytler Perhaps just a comment on the question of ceremonial heads, the obvious question: What are the powers of it, is it literally opening of buildings and schools and so forth?

Chairperson And kissing babies.

Prof. Steytler It is often said in South Africa that one needs a person outside politics to unite the country, to assist the nation building, but then the problem is: How does such a person do it without any significant powers to effect it in a meaningful way. Is it simply by the power of the present personality that you can actually draw people? And it is extremely difficult to see such a person which cannot give effect to obvious policy issues which would promote, in his or her view, nation building. So that's been the difficulty which I perceive in seeing a ceremonial head. A laudable object – building national unity – but how do you do it without power?

Chairperson Professor ???

Professor It's something that we need to think about very carefully. We will be locating too much power our side which also may create its own problems. We already have got a Constitutional Court, which is an extra-parliamentary body, that will be legislating for example if they go through it with the issue of the actual... Who will be telling us what are we... We should have people on it. Something of a very high quality matter. Now if we go on and we have to be... and that will be the problem of the country. Also that comes in on this issue. Who is the country? Now it is... For the normal head of state it will look very simple. Yet, it is an

office of great dignity, the issue of being chief of the armed forces, being this, being that. Now prime minister feels a little bit like that when ambassadors are coming; and there is the opening of Parliament, he doesn't feature anywhere, and if we don't take him seriously, other people take him seriously when he goes to Britain. The royal persons level the carpet which they don't roll for the prime minister and so on. So these things do hit at the level of the person of a prime minister. Now when you have a great man of stature as you have mentioned there... Jomo Kenyatta died, and so. Who else? Perhaps devoted his whole time in bringing about a certain situation? And all of a sudden the other things that look very small and yet he is not able to do. Now these are some of the things that we must take into cognisance when we are thinking very seriously as to whether we should contract out the office of head of state. I just wanted to mention that.

???

In law there is something called "the issues" and the issues are defined. The evil we seek to prevent or the good we hope to achieve is the guiding principle in analysing the issue. Now when you talk about the ceremonial head of state, the key issue is: What is the evil we seek to prevent or the good we hope to achieve, and can it be best achieved through that political dispensation? Mr Bes (???)

Mr Bes ???

Mr Chairman, Professor Steytler made an important point that the most effective control on the presidency elected by the legislature was through the opposition and the multi partyism. If that is true, and I think it is true, sir, may it not be necessary to have an institutionalised opposition which can be duly empowered to play an effective role in the

legislative part to control, inter alia, the president?

???

I think the experience... If one says that the only effective control over the Executive is in fact the legislature – and, as the Germans say, it is not the legislature as a whole but the opposition in the legislature that plays that role – so, if that is the premise that one works on, then clearly critical is then entrenching multi-partyism. Critical then is that the Executive cannot control parliament by, for example, appointment of members by the Executive in parliament because of election. The third then important principle is that other outside bodies may not control parliament, for example, political parties, and this is the issue of crossing the floor. That is effective political parties controlling one ??? within parliament. And then the fourth principle is to have an effective parliament or to allow opposition parties to be effective in parliament and that then looks at access to information, freedom of speech etc. That is where then attention should be paid; it's to make parliament an effective body to be able to be a check, or a balance against the Executive, and then strengthen, obviously, the hand of minority parties.

Chairperson

Mr ???

???

Thank you, Chair. The swaztika to me... all the amount of their examples, drew a vacuum somewhere, especially on the parliamentary presidentiality where mention was made of a vote of no confidence. During that period when it is a parliamentary presidentiality, with who does the power lie? Is there a vacuum? I would like to know. And also I understand it to mean a parliamentary presidentiality when

the term of office comes, it goes for both the president and the parliament. I also find a vacuum that this call to the judiciary which lasts longer than the term of parliament, where does it go? I feel there's a vacuum. Can you help me out?

???

Just on the vacuum, I think our Interim Constitution is very clear on that point. The president is a president until the next one is elected so there is an attempt not to create... to provide for such a vacuum that you have mentioned. So you provide for it and so, well, until a new person is appointed, there is no vacuum.

??

Thanks. And the best way to do that is to have in the Constitution certain individuals who take over from the president in the event that he is incapacitated. So you have your chain of command provided for. Mr ???

???

... comments that we should draw up a Constitution that would feel comfortable if we were out of power, I take it it means that those of us who are out of power are of very special importance!

(General laughter)

(Interjection: You wouldn't be sitting here if you were out of power!)

While on this question of having an executive president or a head of government separate. I'm not going to argue in favour of a separation because I don't share that view, but there is a very strong view – there is certainly one major party in this assembly who believes there should be a separation. I don't think so far we've done justice to this in that Professor Steytler's discussion was essentially around

the executive presidency and how that functioned and what the problems were, but nobody caught up from the other side and said: What is the case for the other side? And I don't think we've looked at the other side in terms of accountability, in terms of openness, in terms of x, y, z. I think that hasn't been looked at. The other issue is the question of the titular or the ceremonial head of state. My understanding is that in fact there are few places where you have a ceremonial head of state. In many countries, in Germany and let's say in Israel, the head of state has got a very critical role to play at times of change of government or times of political instability: Who do you call upon? How do you get the people together to reach a consensus of who the next government should be? All I'm saying is if we are going to have a workshop, I don't think we can only work on the basis that because there may be defects in the other system, we are only going to look at the executive president. I would have thought that there should be a serious objective analysis of: Is the German system better in fact? Is the Head of State and the Chancellor... is there a lack of accountability, a lack of openness, is there a lack of frankness which is what we're about. The issue as to whether the head of state should be titular, is very much political. Here we want the society to be driven by a powerful president who would unite the people. I don't think that we've done justice to examining the second alternative as a system before we come to the political decision, and I hope we can have some development of that on an objective basis.

The second part is a different one entirely and that is Professor Steytler, correctly in my view, pointed out that

let's presume you've got an executive president, how does he become the president? Is it through Parliament, or is it through popular election? As I understand the Professor, he said that it comes through popular election, it does dilute some of the parliamentary control over it because you shall have a mandate from the people and parliament's got a separate mandate. And I think that is correct: there is a dilution of parliamentary control and I think we've got to explore, if you're going to have an elected president, are there any mechanisms for parliamentary control and I think there is a predominant move that there should be parliamentary control. I can just mention two ways in which other constitutions have tackled this. The one is the French. Although the president is the executive president, he is required to appoint a prime minister and a cabinet which is directly responsible to parliament. And though it is correct you cannot topple the president, in fact parliament can topple the president's cabinet. In that sense there is a considerable degree of parliamentary control of the government as a whole although the president in fact stays in place. It's taken further in the Namibian constitution where the president is also required... Sam Njoma has to approach the prime minister. He then has a cabinet which is accountable to parliament. In the Namibian case, if the cabinet falls, the president falls as well. In other words, president Sam Njoma's term of office is five years, or as long as the government lasts, as parliament lasts. And so, if in fact an election is called after three years in Namibia, although the president was popularly elected, he actually resigns together with parliament at that time. So it is a second device of linking the presidency, although he is elected, to the fortunes of the parliament and whether it

should continue or not. I think one should explore perhaps further are there parliamentary devices to strengthen the whole of parliament even if you have an elected president?

Chairperson

Thank you, Mr ??? Let me, before I allow Professor Steytler to deal with your last example of the Namibian constitution, because I was involved, let me tell you something that goes on behind the door. And that might scare you. When the president was linked, his fortunes were linked to parliament and the cabinet. It wasn't for the noble reason you said. A situation was envisaged and we had to come with a solution to deal with that and we did what you just said. An individual – because now he holds power because of the constitution and the state machinery – can be big-headed and no longer take instructions, his party is not consulted, and he can go one way or the other, and you'll virtually do nothing to that individual because his power is stated in the constitution and he is the person. Now how do you tie the man back to your party caucus? You make his life dependent to that of the legislature and you are in the majority and that is the party. If he doesn't look after you, he has no constituency and he has no base and that's something which is never said, so as to make the president responsive to the party. Professor Steytler?

Prof. Steytler

This is response. Clearly, if the mandate of the president comes from the people directly, it need not be inevitable that only the people... or specific procedures like impeachment, is the only way in which the president can be removed. One can have like in Namibia that the government... the president falls when the cabinet falls. But what one would try to avoid is that you make the executive

president that he is not able to govern, that there should be effective government. And there is nothing that prohibits that a person who is elected by the population at large and the legislature can bring that person to an end by simply passing a motion of no confidence in himself or even in his cabinet. There is nothing inevitable about it, but one would say it does not necessarily flow because the mandates from which they came, the power bases, are different. But certainly Namibia has done so and we can do so, nothing prevents one.

Chairperson Thank you. Dr Maluwa?

Dr Maluwa I would just like to comment. I am always fascinated by the French system. The theory, of course, is that the president appoints the prime minister and that exercise is constrained by the composition of parliament and the political base that the candidate for prime minister has in parliament. And then the prime minister is supposed to be head of cabinet, head of government and ??? of the cabinet. But there is also always a very high level of contestation for political space in the French system; for example, when the ??? started years ago, it was very noticeable that the French insisted on sending President Mitterand and the prime minister of the day to participate from France. In other words, neither President Mitterand nor his prime minister was prepared to concede that symbolism of participating in that sort of thing. I mention this just to show that there is tension and this is a tension that arises from some of the other factors that are mentioned.

Chairperson Thank you. Ladies and gentlemen, we'll have to be fast.

And two speakers who haven't spoken... The next speaker in terms of sequence would have been General Groenewald, but he had his bite of the cherry, I'm going to demote him to the level of a rifleman and the next one would then be Mr Ebrahim, and then Mr Dexter. Those are the two speakers and I want them to be heard. I see a hand there. What is the name? (Inaudible) You're also on the list. We want to do justice to those two speakers and I know that some other people have appointments for lunch. Now may I propose something that when we come back from lunch, you give those two speakers a chance so that they are ?? so that you do justice to them, so that they don't feel that they have been cut out when the response comes. So we're going to start with them or with my brother there, the ????. Then you know that you're finished with them.

(Many voices together).

Let's have order. There is a suggestion that we go for lunch, we defer the remaining speakers, which are three on my book, to the first item after lunch. Is that carried? It shall be so ordered.

Dr Maluwa

Sorry, may I just apologise: I'll not be here after lunch. I suspect in fact I've already got a parking ticket. Apparently I can't use parliamentary privilege to refuse to pay a parking fine. In any event, I would just like to say that whatever my colleagues answer in terms of questions that have been posed to me in my absence, I accept, I mandate them. Thank you.

??

... except as a Technical Committee member. I just want to

thank Professor Maluwa. I phoned him on Friday very late and he was very reluctant to come, so I must say how grateful we are for the type of input that he has shared with us this morning.

Chairperson We'll reconvene at 2 o'clock.

Afternoon session:

Chairperson Thank you. The afternoon session resumes. As per agreement, we'll carry on where we left off. I want to deal with one or two administrative matters. Two things: the good news and the bad news. I'll start with the good news. The good news is, with Mr Baard's assistance, we managed to persuade Dr Tia Maluwa(??) to be here for this afternoon to field questions. And the incentive was very simple: we will take care of the parking ticket! Dr Maluwa has been asked here for the afternoon session. The bad news. The bad news is that I've been reliably informed that the entire proceedings for the morning session were not recorded, have been lost, despite my promise that they were being recorded mechanically, and I'm told it is due to a button error, they didn't realise there was a button they had to press in order to record. So all along they were under the impression that the proceedings were recorded. So those proceedings, the entire morning's proceedings, were lost save for maybe the last 20 minutes. Now I don't know whether the button has been pressed now before we start with the afternoon's proceedings. The good doctor... I mean, we are here participating in the process all the time to write up his input, so that at least we would have his input. It is a fair request. A request has been made in

anticipation of you, Mr Beard, and the good doctor has agreed. So we will have papers from Dr Tia Maluwa and from Professor Steytler. We'll meet only the question, answer and the contribution.

The next speaker was Mr Ebrahim.

Mr Ebrahim

Thank you, Mr Chairman. Mr Chairman, we are discussing the question of the Executive and, of course, there is the question of whether we should have an Executive with powers or have a ceremonial Executive. What I want to do briefly is to get from the speakers ??? on the issue of the ceremonial heads, in particular the question of the powers with which they are vested. As I understand it, you have several types of ceremonial heads. You have the monarchy that is a ceremonial head, in which case there are no elections that take place, or you have a ceremonial head that is elected by the members of parliament. But then you could also have a ceremonial head that is directly elected from outside of parliament. I think a lot will depend on what form we choose, before we can decide what election process we will have to go through. What I would like to know from Dr Maluwa is, there are some examples in Europe, in particular, about the question of election of the ceremonial head, but as far as I understand, there is not a single example on the Continent where you have an elected ceremonial head as such. And if there is, I would like to know, because it is very important for us to understand also the system of the power of the ceremonial head. Is it the type of thing that comes out of Westminster or is it something that we will go beyond that in understanding what our requirements are in that regard? I would like to

know something on that. The other question is this that two other issues have come up. One is the question of the time factor. People are saying that Europe took a hundred years, two hundred years. Of course, a time factor is also determined by the political development and the circumstances in which we live. This is very important. If we take Africa for that matter, and we look at the conference that was held after the Second World War, when we drew up the United Nations document, we find that three countries from the Continent participated in that, that is Liberia, Ethiopia and South Africa. And if you look at these three countries that are still grappling to draw up a Constitution at the moment and whereas countries that have come long after that already have a Constitution or are in fact implementing a Constitution and adjusting it as they go along. I think we must also look at the question of the development rather than just simply the number of years because it depends on the process. The other question is that Dr Maluwa has quoted quite extensively from the Zambian experience. I've known the head of state when he was a student in Tanzania, President ??? and also I've been following also to some degree the country's development. I would like to comment on the question there that at this particular moment in Uganda it is the melting pot of a number of experiences that we are undergoing on the African continent. There is the question of nationhood that is now being carried out given that there is a lot of ethnic types in the country that is the process now. And as a result they are trying to build a nationhood because its political parties in that country previously were not considered to be ethnically oriented. Political parties have been banned in the process of trying to establish this

nationhood, as you know. We also – I know that they have taken from us, but we have taken from them – but they just had a constituent assembly election to try to draw up a new constitution for the country and that process, as you know, is taking place. Another experience that Uganda is going through at the same time, is that it has restored the monarch. I had the privilege of attending the restoration of the king of Togo and the king of ??? and it was quite an interesting phenomenon to see the restoration of the monarchy there. But it is an interesting restoration of the monarchy in that it is the restoration of the monarch in terms of accepting the conditions that are there but within a democratic set-up, within an executive presidency that we have in Uganda at the moment and I think that is an important element that we can look at. I understand some people are... Alright, we also have chiefs, some are complaining that ??, others are pretending to be pretenders to the throne, but be that as it may, we have these processes that are taking place. These are experiences that we can look at in the process because I think our ?? is merely to look at the different experiences and the different alternatives so as to see how best we can come up with a situation that is befitting our progress and to the benefit of our people. I thank you.

Chairperson

Thank you, Mr Ebrahim. Any response, Dr Maluwa?

Dr Maluwa

I just wish ??? I'm not particularly required to respond to. On the question of whether or not we have ?? leaders, in Africa now, to the best of my knowledge and belief President Zanana was the last one, not directly elected in the popular national vote, but elected by parliament. This is,

of course, discounting the restoration of the king of Lesotho, on the throne as a ceremonial head in Lesotho. So, we don't have a ?? Right, the question of Uganda, and I am quite aware and I agree with you about the development. I was in Uganda fairly recently. In fact, I had occasion to attend ?? as a member of the public, sitting in the ?? some of the sessions on their Constitutional Assembly. It so happens, as my luck would have it, on the particular day that I attended the session, one of the issues they were discussing was what exactly to do with these monarchies that were being restored in Uganda? Were they in fact going to go back to their original position as it were, and introduce the idea of a ceremonial head and so on and so forth. So, I am aware of those items. We can draw lessons from that experience and what lessons we can draw, I don't quite know in terms of our current debates now, I don't think I should pronounce on that. Something we can draw from the attempts by Uganda: to re-incorporate the idea of traditional rule, the idea of monarchies into their current political system, but I am not really in a position to say authoritatively what lessons we can draw from that.

Chairperson Thank you. Mr Damuse??? I must apologise, I didn't see your hand earlier. Thank you very much. General Groenewald? You were last in the queue.

Gen. Groenewald Thank you, Mr Chairman. I think most of the doubts I have have been addressed in one way or another, but one thing that we have found consensus on on this Theme Committee is that the Executive, and specifically the head of government, should be accountable to parliament. I think we have all agreed on that. The second point which came

out clearly was that most of the parties recommended that there should either be a president and a prime minister or a president and a deputy president. There should be two people up there. Whether the one is the head of state and the other one the head of government, or whether the president is both the head of state and the head of government and he delegates some powers to the deputies, I think it's not important at this stage, but there is one very important factor, and that is if we want to have these people accountable, it means we must know exactly what their functions are. We must know exactly what the functions of both the head of state and the head of government are. And we have not made an attempt...

(end of Side A of Tape 1).

Is it **consultation** and **consultationalism**?

Notes

Presumably opening speaker is Gen. Kriel.

0937:
Professor Ndlova???

1068:
and refreshing constitutional law??

2574:
of province here.

2644:
one parrot/parent is going to outline????

3000:
Pres. Clinton's ???

3163:
Of course this EP's fortunate??

3167:
Some fleet falls vacant??

3619:
Is it Luipaard or Luiperd??

3650:
most significant elite?

4034:
majoritarian type

4835:
What is the gentleman's name? - Ndlova??

4930:
Professor Jean Blondell?

5338:
Is Mr Moosa's Christian name correctly spelt?

5350:
Mr Matollie Matsheka????

5377:
Mr Ndlova??? Please check all these names.

Tape 3, Side A
Theme Committee2 - 15 February 1995

NOTES

throughout is it **consensualism**?and
consensual?

throughout is it **Glova, Njova, Ndlova**???

throughout is it **Parr/Par/Baad/Pahaad**??

1550:

listed a number of factors with regards to the NU??

1695:

that are necessitated by ??? ...power relations in a given/different (?) ...???

1755:

the beginning of this ???

1786:

I didn't get ??

2149:

I think the U end???

2912:

Name? Mlangeni?

2938:

Who is speaker

3568:

and I've noted you, Mr ???

4100:

the Constitution has been bigamied??

4198:

?? Speaker?

4293:

4555:

Mr Eglin and Mr Pahaad/Parr/Baad???

4725:
right out?

5396:
Is it Glova/Njova/Ndolova?

6135:
Mr Diali?

6224:
were not ?? as constitutional

6716:
should be feeling ???

6766:
and then you have ???

6777:
through maybe the ???

Tape 2, Side A & Tape 3, Side A follow on one another (both Sides B are blank)
Theme Committee 2 - 15 February 1995

Gen. Kriel(???) ... it is also very difficult to decide whether or not you should have a head of state and a head of government as separate entities or whether there should be one. Now my question, Mr Chairman, is – and I don't feel that we have the time for that now – but what are the important functions that we should distinguish as functions belonging to the head of state and functions belonging to the head of government. Could the technical advisors perhaps give us some guidance on those questions? Thank you.

Chairperson Thank you very much. Professor Steytler?

Prof. Steytler Gen. Kriel, I think you're totally correct, we haven't dealt at all with the powers of the presidency. First, it is difficult to decipher in the abstract unless one decides yes, there is a head of state, which is separate from the head of government, and the head of state is not simply a ceremonial head, I think as the IFP have suggested, a stronger person, with more powers and to ensure the constitutional order. If one determines that the head of state is... the function would be to preserve the Constitutional order, then one would start looking at what does it actually mean. Does it mean therefore more control of the Constitutional Court, for example with appointments, the submission of legislation to the Constitutional Court etc.? but unless one actually determines first that there is a separation and secondly, what precisely is the separation and the division of powers, then I don't think it's possible to discuss that now, rather in the abstract. But there is a

list of real powers that needs to be discussed, particularly, I think, the role and the powers of the president vis-à-vis the Legislature, particularly dissolution of the Legislature. Because if one talks about checks and balances, what becomes clear is that it is the position in the Legislature to exercise some control and therefore of primary importance is to preserve the integrity of the legislature and how do you do that? It is that it is the master of its own fate and in particular that there is not the possibility of appointments to the legislature by the Executive so that you can have a loading of the legislature to serve particular purposes. One can just look at our own history: 1950 - the loading of Senate was controlled by outside by increasing the Senate. That would be a very important area to see what are the powers, if any, of the president vis-à-vis the legislature, and so on. I could go through the list of powers and then try to separate them out, or allocate them if there should be a split between the head of state and the head of government. Thank you.

Chairperson

Thank you, Professor Steytler. At the end of this session, the programme indicates that the co-chairperson of the Theme Committee would then summarise the day's events. Just to keep the ball rolling, let us move without much ado to the next topic, but before then I would like to thank Dr Maluwa and Professor Steytler for their informative and effective input. Thank you very much, gentlemen.

Ladies and gentlemen the next item of the Executive is the cabinet. Professor Ndlovu, would you please join in. The speaker is Professor Ndlovu. Professor Ndlovu is a member of the Technical Expert Committee. He holds a BA. Law

from the National University of Lesotho, and holds a Masters degree as well as a Ph. degree from the University of Cambridge. He taught at the University of London in Constitutional and Business Law and at present he is teaching and ??? constitutional law at the University of Transkei. Professor Ndlovu conducted a research in 1987 on the constitutional model in Lesotho and that was published in Lesotho Law Journal and the name of the model, much opposite to what we are discussing now, was "The non-racial, quasi-federal constitution in South Africa". That will be part of the reading list. Professor Ndlovu.

Prof. Ndlovu

Thank you very much, Mr Chairman. I will preface my short remarks because basically we did not prepare papers. In fact, how we were able to get Dr Maluwa here: he had flatly refused because of the shortness of time, and we did say to him what we will be engaged in today is a high level conversation, not papers as such. So that is what we hope perhaps that we will be engaging in: an exchange of some sort. Now, the topic is cabinet and concert of thoughts and voluntary collusion. The other thing perhaps that I should mention here is that if the relationship between us as technical experts and the library becomes better, perhaps we will be able to service better the committee here. At the moment we are still regarded as just ordinary members of the public who have to follow the tube as it is there and we've got volumes of things that we want to extract from that library and we are not able to access them at all. So those are some of the things that is why I have not been able to prepare you a list, a shortlist perhaps of reading material, but we hope, and the issue also of summarising and the typing or word processing of the commentaries on

the discussions that we are going to have here. Now we hope then later that we will be able to give you summaries of this and those basically because what we want to do is to share with you the experiences perhaps of other people. Another useful thing that may happen... For example, Mr Neethling pointed out today that the whole trend of our discussion tended to show the failure of bad preparation and now it will be useful... because one of the functions of a Technical Committee is a research function. If after this session you are able to tell us some of the gaps that are there, for example, you want more interpretation and overview on the story, even if they are not on the African continent, that can be done. And also, for example, there was mention here about the functions of the head of state, the functions of the head of government; whether these can be separated and to what degree they can be separated. Now those are types of topics that we can either conduct ourselves if we have got time or we could farm them out to other specialists, like Dr Maluwa etc., so that at least you get now not volumes of paper, but just salient factors as far as these issues are concerned.

Before we come down to the issue of cabinet system, we are operating within certain parameters. We have, for example, what we call the Constitutional Principles and you will remember ours is a Constitutional Assembly, not necessarily a Constituent Assembly, which perhaps means that there are certain constraints that we are operating under. For example, our Constitution will have to be certified by the Constitutional Court and being in accordance with the Constitutional Principles. Now it will not be helpful for us here to discuss options that fall outside

the parameters of those Constitutional Principles because they cannot, as a matter of a certification... We can do them as a matter of data collection etc. and for possible amendment perhaps of the Constitution after the Constitutional Principles have been certified, but even then it is certainly a debatable point whether that is possible. It will have to be settled again by the Constitutional. So, at least we have got second parameters which one can always look back to. Now we looked at the Constitutional Principles as far as cabinet systems are concerned. There doesn't seem to be much constraint on how the cabinet should look, with the exception of (xxxii) of the Constitutional Principles which said that the Constitution shall provide that until 30th April 1999 the National Executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of the Constitution. That is the current manner. So, apart from that, there is not much. Of course there are other sections of the Constitutional Principles that may have a bearing on the issue of the type of Executive. For example, there is talk of separation of power between the Legislature, the Executive and the Judiciary, with appropriate checks and balances. Now to a constitutional lawyer when you talk about separation of powers, they immediately think about the American system, where there is separation of personnel, not only of function, but there is also the separation of personnel: Who does what? Now, of course, it does seem within our South African setting that when we talk about separation really, we are talking about the independent Judiciary because, apart from that, there is overlap between the Executive and the Legislature within parliament, the principle of ministerial responsibility, the principle of collective responsibility. And

there seems to be consensus within the political parties and other actors that we need to retain this form of separation of powers, which is not the American type of separation of powers, but nothing stops us from looking at the American module of separation of powers because it is not excluded as a possible model for our situation. Now that is perhaps one element. The other element is that in the principles there is talk about diversity of language and culture which shall be protected and acknowledged, but it is not said to what extent; whether that protection goes to the extent of ensuring that there is somebody there in cabinet coming from certain quarters, etc., but of course this may seem to be an extreme form of interpretation, given the fact that there is the explicit time-bound limitation as to thought collusion, which is in (xxxii), as I have said.

Now the other element of the Constitutional Principle that may be relevant to us is (xiii) which says that the institution and status and role of traditional leadership should be recognised and protected in the Constitution. Now, to what extent should this protection be given, is not clear. Again, as you know, traditional leaders tend to exercise – especially in the rural areas – executive powers, judicial powers etc. So to what extent? We have got the recognition of the Zulu monarchy for example and also the other possible recognitions. We are not dealing with ??? province here. But generally there is the issue of to what extent does the recognition of the role of traditional leaders impact on our Executive etc.? These are some of the issues, but these are not serious constraints or life threatening. I think the most serious constraint is the one that we have mentioned, i.e. the time bomb one which goes to 1999.

Now, having said that, is going to outline now some of the executive models that have been practised by mankind in different scenarios. Now we are talking basically here about cabinet systems. Now, a cabinet – I define a cabinet as a core committee of decisionmakers in government. This may not be a perfect definition, it is just a working definition that I'm using this morning – a core committee of decisionmakers in government. It's called the cabinet in Britain. In America it's the president himself, together with the men who surround him, who are called the president's men, who are appointed by the president himself. In East European I suspect what the cabinet was, the so-called Politburo, and so on, that is the central power of authority that was directing in matters of government. Now, within the American system, as we have said, there is a near total separation of power where the personnel that mans the Executive is separate from the personnel that mans the Legislature. Now, of course, the American president is a more powerful man. In the examples that were mentioned by Dr Maluwa in the conversation between Roosevelt and Churchill there was, the way Churchill said: "I worry about my cabinet, but not much about parliament, as long as my cabinet is okay." Of course, there is a chief whip in parliament who is going to make sure that parliamentarians, as long as the government is popular of course, do toe the line to a very large degree. Now, with regard to the presidency, he said that: "Well, I don't have to worry much about my boys, I have to worry about the Congress." And, of course, you can see President Clinton's ??? at the moment with regard to the Congress because the Congress is not in his grip, and so on. Now the system of checks and balances makes sure in America, to some

degree, that the president is held in check, but it works both ways because the president in America, as you know very well, can also veto legislation. Of course, there would be an override if there is a very strong feeling of the other people there. Now there is the Senate competence for example on matters relating to treaties, key appointments of state, and so on. They have to be ratified by the Senate, so the president is not just a loose cannon as it were. Now there is also the issue of the president's competence on issues of who is in the Supreme Court in America. So, as in America, the Constitutional Court does a lot in terms of striking down, but the president also has a role in who comes in there. Of course ??? is fortunate, but some ??? falls vacant during the term of his presidency and then he can put up somebody there.

Now, there is also the issue of impeachment. Now, somebody asked this morning whether impeachment is really a serious instrument because it may not have been used much. Now it is very difficult to deduce an answer from that because such impeachment may be there, besides that so few presidents have been impeached. I am not very sure how successful impeachment is, but American presidents are so afraid to make those things, to do those things that impeachment... would result in impeachment that the matter is a great success. I am not saying it is, but I am just saying that, that is one possibility. Now, there we are dealing with the issue of the American system. Now, the other system, the system to which we tend to lean on ourselves, is the British system, the British cabinet system, or the Westminster model. Now, that system is party based. Cabinet members are senior members of the party

from which the prime minister comes from. He cannot easily ignore them because of the political base that they enjoy from the political party from where they come. Now, of course, cabinet have got several things that they have to do to parliament; for example, there is the individual responsibility of ministers for the performance or non-performance of functions of department, which if they do it, they are accountable directly to the parliament. There is the issue of collective responsibility where all the ministers must stand in one voice to face the parliament, and because one minister has blundered so much that it would raise the possibility of sinking the whole government, they gently ask him to resign. And if he doesn't resign, they fire him, basically, in order to save themselves. Now those are some of the scenarios within the cabinet system.

Now, there is of course another system of forced collusion or constitutionally prescribed collusion, which is called consensualism. Now in that system, it has got basically four features that have been identified by one of the greatest advocates of consensualism who is Luipaard. Now, Luipaard identifies four elements in consensualism; he identifies the issue of "grand collusion" where all the most significant ??? are incorporated in the executive system. He also identifies another feature which is called "mutual veto" where, if they go for consensus, even the smallest of their participants within that framework can block decisions so that he forces a situation where there is compromise. In other words, in the Luipaard model minorities are not only heard, but they are also heeded, because if they are not heeded, they can always go on a veto which creates a crisis, but may result in a consensus ultimately being reached. Now, the other

central feature of this constitutionally prescribed collusion is "proportionality", that you are represented in the cabinet or in the Executive in proportion to your strength in the National Assembly. Now, the final feature, of course, is that to a very large extent, to as far as it is possible, the fat men that form part of the grand collusion are allowed competence in those areas that affect them only, or largely affect themselves only. This is the concept of "own affairs" that was used in the 1983 Constitution that was replaced by the 27th April Constitution. Now, the central issue, as I said, in the consensual model is that the Constitution itself dictates who should be there in the cabinet or in the central executive organ. Now, the advantage to have perhaps in that system is that all the main actors in the political scene – that is those people who have the capacity perhaps to destabilise the political system – are all rounded up around a table to discuss their differences. On the other hand, the disadvantage perhaps of the consensual model is that the minorities tend to have more power than they would ordinarily have in a free majoritarian type situation. There are other advantages, there may be disadvantages. There are a number of countries that have practised consensualism. It does seem, however, that the more developed a country is, the smaller a country is, consensualism has tended to work better. The more populous perhaps – and this is not a strict formula – the more less developed country, then consensualism in Lebanon or in Cyprus has not worked as well as in Belgium or in Switzerland. Again, I am saying that this is not the place for a formula, then maybe there are examples of consensualism succeeding in less developed countries. Now, there is the other issue of whether consensualism is

a permanent feature of the Constitution or is a temporary, transitory feature of the Constitution. In our Interim Constitution it is stated at the moment a transitory feature, but its transitoriness is not dictated, but there is at least a limit to tampering with that transitory nature of the consensual model that perhaps we are operating here.

Now, finally, perhaps I should very briefly outline our own current model of Constitution with which you are very much familiar. Now, at the present moment, as you know, we have got a fusion of the head of state and head of government. The president, of course, does not sit in parliament, but his political party is the dominant party. Now there is a provision for the removal by vote of no confidence and also by the process of impeachment. Now, at executive president level, as you know, all those parties that have got at least eighty seats have got an opportunity to put somebody there in the deputy president's seat. Now, with regard to the cabinet ministers, there is also a prescription of some sort. The president is not fully free to do what he likes. For example, the president himself and the two deputy presidents are part and parcel of the cabinet and furthermore, those parties that have got more than 20% of the vote are allowed to participate at that level, although there is some discretion as to where the people are. Now, finally, the issue of proportionality, of course, is written in our Constitution so we have got a model which can come closer to consensualism than to other systems. But, of course, there is the other element that despite... our consensualism does not have the veto, the mutual veto, in a tied situation. Now what of the implication of the consensual model to collective responsibility, for example?

You may have realised what happened during the furore around the 3 500 pardons or whatever you call them. There was some public debate that it is not very much usual within the context of a very established ministerial responsibility or collective responsibility model. I will stop there so that we can allow the discussion to flow and to exchange ideas.

Chairperson

Thank you very much, Professor Ndlovu I now call on Professor van Wyk. Ladies and gentlemen, Professor David van Wyk is the head of the Department of Constitutional Law at UNISA and has been one of the technical experts at CODESA and as a multi-party negotiating forum in Kempton Park and has requested me to say no more than that. He said to me that the length of a man's CV is indicative of the man's ego and I will scrap that and say no more. Professor van Wyk.

Prof. van Wyk

Thank you, Chairperson. On a more personal note, let me start off by saying I note in your official documentation that my absence last week was noted on at least two occasions. I did send a fax, Honourable Committee. Unfortunately it didn't reach you, but I apologise if my absence caused any offence. I promise to be better in future. I am on the agenda, Chairperson, to report briefly on a seminar in Pretoria yesterday. I sit here under the close supervision and scrutiny of Messrs Rabie and Ndlovu who both attended. Mr Rabie, I can report, asked some intelligent questions and Mr Ndlovu presented a paper. Like the Chairman, I can almost say, first the good news and then the bad news. Or maybe first the bad news and then the good news. The bad news maybe is that at the conference yesterday no specific new

proposals were put forward. That compels me to keep the report fairly brief.

The first paper was read - it was supposed to be delivered by Professor Jean Blondell(?). He is in Italy at the moment, but he was sick, so he sent his paper. I'll make a copy of the paper available to the Secretariat, it's interesting. It is quite an interesting, incisive analysis of the executive systems of the United Kingdom (Britain), Germany and the Netherlands, and it dealt extensively with the workings of these systems and, I think, gave us a good insight into the kind of thing that one should take into account in deliberating on the Executive. Without going into the detail, it appeared clear from his paper to me that one cannot discuss the Executive without taking into account the party system in the country, without taking into account the electoral system, without taking into account the nature and the role of the public service and Constitutional Principle - something, I think it's certainly here in our Constitution, prevents a public service which is not non-partisan and career orientated, but in Germany, for instance, their senior servants are actually political appointments. He also said that one should take into account the political culture of a specific dispensation, the history and importantly - and that came out time and time again - whether a system normally has a majority party. In Britain there normally is a majority party. In the other two systems, Germany and the Netherlands, there normally isn't a majority party. In other words, they are forced to have coalitions and having mentioned that expression, forced coalition or voluntary coalition, of course, it is a kind of contradiction: all coalitions are forced, I don't think there is a voluntary

coalition. Parties form coalitions to obtain power. Ironically, at the end of his presentation, when he turned to South Africa, he said that we should not look at United Kingdom, Netherlands or Germany, but perhaps at the Belgian example. He had a very brief reference which could serve as a link-up because it was without... A specific reference, also picked up by other South African speakers that is that in Belgium a number of conventions or practices have developed in order to accommodate the other side, specifically in the Belgium context, linguistic parties. And then he also made quite a point of the fact that wherever there are coalitions there are pacts or agreements on how the country should be governed, but I suggest that once the paper is made available to you, that you read the paper. It makes good reading.

He was followed by the Deputy Minister of Constitutional and Provincial Affairs, Mr Valli Moosa(???), followed by Mr Roelf Meyer, to lead in discussions Matollie Matsheka (???) of the Gauteng provincial legislature and Dr van Tonder of the Potchefstroom University. And then finally, after lunch, Mr Ndlovu's session. What appeared to me from the papers that followed was that there are in at least three areas political differences at the moment which need to be addressed. The one is assumptions about the extent of the fragmentation of South African society. There is an assumption on the one hand that it is a deeply fragmented society and there is the contention on the other hand that maybe that fragmentation isn't as deep as is normally claimed. The other area of difference is the nature or the extent or the duration and the definition of the transition, or, if you like, the interim. What are we dealing with? Are

we dealing with five years until 1999? Or are we dealing with something much deeper that's going to take much longer to resolve? And then, finally, also differences on the accommodation of minorities and minority party and minority in the ethnic sense and in another sense aren't always separated and the question how to accommodate minorities if they are not parties.

To come to Mr Valli Moosa, to briefly summarise his paper. He said that their approach – and I assume that when he said "our" approach he spoke on behalf of his party – was that whatever is in the 1993 Constitution, whether it's good or bad, it requires a thorough re-look, in other words a re-investigation. He made the point that the Interim Constitution of 1993 was the result of a political settlement. I wasn't quite sure whether he suggested that the final Constitutional text will therefore not be the result of a political settlement. He made the important point that the Constitutional Assembly and all its committees are bound by Constitutional Principles. He interestingly isolated at least I think six or seven, mainly Constitutional Principles 6, 8, 4, 14, 30, 31 and 32. He identified a number of areas of disagreement at the moment, i.e. what we have been discussing this morning, whether there should be a split top-executive, in other words a head of state, head of government, combination or separate, the question of minority parties, the question whether if there's a deputy president or deputy whatever whether it should be either by convention or by Constitution from another party and then also the role of parliament: whether parliament should be a reactive body, in other words following the Executive at it were, or whether it should be pro-active, playing a more

active role in government. Then he asked a number of questions which suggested to me that he was seeking the real reason why it was necessary according to some to have the so-called enforced or forced coalition of the current Constitution. He was questioned on that by Mr Rabie. He also maintained that inclusiveness in government should be reflected in other institutions of government such as the Senate, provinces and local government. He also emphasised the role of a vibrant opposition; I think he was making the point in the context that if we don't have a ... or maybe a forced coalition government isn't necessarily the best thing because it undermines good and vibrant opposition. And he advocated the development of a number of conventions of usages such as possibly that there should be technocrats in the cabinet, for instance, conventions as to gender equality at all levels of government and in the public service. That's in a nutshell what he said.

Tony Leon from the Democratic Party was the discussant there which made an interesting and uncontroverted observation as far as I can remember, that despite the constitutional guarantees in the 1993 Constitution, the second-largest party in parliament did not get any cabinet portfolio which was essential to the running of the country; in other words, the point he made was that despite the guarantees – and they are in the cabinet – their posts are not essential to the running of the government. That is the one point he made. He also said that the idea of a government of national unity is a good one, it bridges cleavages during the transition, which then raises the question: How long is the transition? He also maintained

that the government has to be inclusive, but that enforced coalition is not necessarily the best way of doing it, advocated the possibility of a convention or a usage for inclusiveness and he also said that maximum power should go to provinces, there should be maximum separation of powers. At the end he again emphasised the need, if there are coalitions for what he called "natural" coalitions, in other words not enforced coalitions.

Mr Roelf Meyer was the next speaker. His theme was "Lessons from the Government of National Unity for a future South Africa". I can just say that Mr Valli Moosa's theme was "Requirements for an Executive in a deeply fragmented South African society". It was in that context that he questioned fragmentation. Mr Meyer made a number of points about the present Government of National Unity, said that the first month was spent on team building, that the Government of National Unity manages the transition, put emphasis on the nation building and stabilising effect of the Government of National Unity, expressed support for the idea of a Government of National Unity and then he said, perhaps differently structured, but he didn't, as far as I can remember, say exactly or potentially how differently structured. He listed a number of successes of the Government of National Unity so far, dealing with things such as stability, nation building, the economy. In his contours for the future, he stressed the good things: negotiation, the RDP and the need for reconciliation. He also said something about the need for framework agreements on policy for the Government of National Unity. He also referred to conventions or usages and he referred specifically to the convention on criticism by a minister, for

example, of the government on policy issues. He said that the country should be run in accordance with the will of the majority in the broad sense. He didn't specify what he meant by "in the broad sense", but I assume that it means more than just one party and finally, said that South Africa, or the new South Africa, came about as a result of a solemn pact and that this solemn pact should be maintained.

The discussions: Matollie Matsheka was fairly brief in his presentation and it amounted also to three points. The first was that the Government of National Unity of the present Constitution was the result of a political settlement, that he was not convinced that it should be taken into the year 2000 and beyond, and that he favoured democratic majority rule.

Dr Van Tonder of Potchefstroom University made two important points, according to my assessment. The one was that we are in an unfolding situation, in other words, it's not cast in concrete and that the negotiating that has developed should be preserved at all costs.

I am not going to dwell on Mr Ndlovu's paper, not because it wasn't interesting, but he spoke essentially about the promises and as I have it we are dealing with the National Executive at the moment. Mr Ndlovu, I suggested to the Secretariat that they should get the paper that you read yesterday afternoon from you yourself and also to distribute it to the members of the committee because it contained instructive suggestions for the improvement of the Executive at provincial level.

debate yesterday was the question whether there should be some form of coalition, whether it's a natural, voluntary, conventional coalition, or whether it's a constitutionally guaranteed prescribed coalition, to use that phrase, as the one we have at the moment. Finally, what will have to be taken into account here are the implications of first the Constitutional Principles...

(end of Tape 2, beginning of Tape 3)

...and Professor Ndlovu has referred to the Constitutional Principles. What also will have to be taken into account is what this Committee, in terms of its preliminary report has already submitted and that is that the Executive will form part of a parliamentary form of parliament, and maybe one should flesh out the notion "parliamentary form of government". What must also be taken into account is the fact that this Committee has proposed that the Executive must be accountable to parliament and here the question arises as to whether a purely ceremonial head of state, for instance, falls within the definition of "executive" and within the definition of "accountable to parliament". I think that can be an interesting debate. And finally, this is just a personal observation, the one thing that I missed this morning, but made today so far, but maybe its because I'm cold in this Committee's work, is very little assessment of the good or the bad of the current Executive system; in other words, whether it's functioning, whether it has merit, and what of these merits can be taken into the future Executive. Thank you, Mr Chairman.

Chairperson

Thank you very much, Professor van Wyk. It's now ten past three and I'm opening the floor for discussion. I would like to caution though that inasmuch as the Constitutional

Principles are binding, in discussion please feel free not to be too constrained by that because even the interpretation of those Constitutional Principles is also a matter for the Constitutional Court. I would like to have a free floor of discussion, as much as possible. The first person is going to be Mr Beyers on my list. Let's see further. Hands? Nkosi Holomisa. Mr Beyers.

Mr Beyers

Mr Chairman, as Mr Ndlovu mentioned, an advantage of a system of consensualism is to then involve all the major parties in the decisionmaking process on the Executive level and then secondly, he also stated that an disadvantage was that it tends to benefit minority parties with more power than they deserve. I can't remember his words exactly. Can the Professor, Mr Chairman, as an objective observer, explain to us with reference to the present Constitution, and our recent experience, to what extent he thinks that majority parties have been given too much power in the present Constitution and for what reasons he thinks that the majority parties are being frustrated by the presence of the minority parties within the Government of National Unity?

Chairperson

Professor Ndlovu?

Prof. Ndlovu

Let's first try to remember what I said. I think I said that the advantage, as you said correctly, is that everybody is brought around the table and there is an exchange of views on different issues etc. and I said a possible disadvantage is that perhaps the minorities are given more say than they ordinarily would have. Now I also said that our consensual system is not a mutual veto type, in other words, it is not an extreme form of consensualism in the sense that you are

not... minority parties don't have a veto in what is discussed in cabinet. Of course, they have extra parliamentary alternatives like withdrawing from the coalition itself etc. or threatening withdrawal or things of that nature. But there is no constitutionally prescribed veto. Now, in that sense it moderates the impact of minority on frustration of opposition. So I did not exactly say that as the current situation is unfolding, but I am not excluding the possibility as things go on, that there may not be an element of persisting frustration when certain programmes perhaps are put up. I am thinking, for example, when issues are constitutional issues, but when issues of property gradually suffer over the years then it may be a possibility that the minority parties may – by minority parties now I am talking of the minority parties within the context of perhaps our recent past – be perceived to be clinging to certain situations that may cause tensions over the long term. But as far as the situation is concerned now, in fact as early as in 1987, I did say that there may have to be a need, on a transitory situation, for a settlement that will allow a type of consensus as long as it is not cast in iron.

Chairperson

Nkosi Holomisa?

Nkosi Holomisa

Thank you, Mr Chairman. My first question is directed at Professor Ndlovu. I would like to ask him to clarify on the difference between Constitutional Assembly and the Constituent Assembly. I think he did touch on it, but I would like him to elaborate, I didn't quite get that, the difference. And the second question is directed at Professor van Wyk. In his report he mentioned that the Minister of Constitutional Development listed a number of factors ???.

Did you list any number of the shortcomings of the NU and what were those shortcomings? And the second question to Professor van Wyk is regarding his comment earlier to the fact that there really is no difference between... there is no such thing as voluntary coalition and that all coalitions in fact are forced or enforced. I would hope that he doesn't mean that there is no difference between coalitions that are decided by a Constitution and coalitions that are necessitated by ??? in the power relations in a ??? I would like him to elaborate a bit on that. Lastly, I don't know if I heard him well, but I heard him to be saying again at the beginning of his ??? Professor Rabie asked some intelligent questions, and I don't know, I didn't get ??? He was saying Mr Ndlovu asked to be open in time for questions.

(Drowned out by laughter).

Chairperson No, I can say from the Chair that he didn't say that and if he was saying that, he didn't mean that. At any rate, the intention was not to contrast the IQ of Mr Rabie and that of Mr Ndlovu. Professor Ndlovu?

Prof. Ndlovu Well, a Constituent Assembly, to most constitutional lawyers perhaps, would mean a sovereign body with ultimate authority to do or undo a constitutional order, to put the country into fire or to send it to heaven as it were. Now, our Constitutional Assembly is constrained by their Constitutional Principles and it has to be certified by the Constitutional Court whether it has acted according to the prescription of the political settlement that was reached at CODESA and in the Interim Constitution, basically the Interim Constitution. Now, that is the difference that I was alluding to. A Constituent Assembly is an sovereign,

ultimate authority on constitutional matters. Ours is not such a sovereign body.

Chairperson

Maybe on that, just to enrich the quality of the debate before I allow Professor van Wyk, the Namibian settlement had a Constituent Assembly and the Namibian settlement had Constitutional Principles which they had to adhere to – I think it's the 1972 principles – and they had to be certified; I think the ??? or the Security Council was the watchdog whereas the Constituent Assembly in the new Namibian Constitution would adhere to those Constitutional Principles. Now, I can see a parallel here and still the nomenclature is different. I want Professor Ndlovu, in answering Nkosi Holomisa's to take account of that, how do you relate to that?

Prof. Ndlovu

Well, I'm talking conceptually here. I said most constitutional lawyers, I believe, when you talk about a Constitutional Assembly, they are thinking of something that has got power to do or undo. Anything, however it is called, whether it is called Constituent Assembly, whether it is called Constitutional Assembly, if it is constrained in its ability to do or undo a constitutional order, then it cannot be said to be a sovereign constitution-making body. Once you need a certificate from somebody else, then you are not sovereign.

Chairperson

Very well. Professor van Wyk?

Prof. van Wyk

Thank you, Chairperson. With your permission and with that of Nkosi Holomisa, I will answer his question in the reverse order, starting with the trap that he set for me – thank you

for preventing me from falling into it! As regards the coalition question, I tried to make the point that we use expressions which acquire a certain meaning, but if we look at them, they aren't quite accurate. A coalition, for instance, is to my mind not really a voluntary. One party would enter into a coalition with another party because the other party can give it the majority of seats in a parliament. That normally would pass as a so-called voluntary coalition, but it's forced by political power dictates. I think if one wants to distinguish one should actually say, as you have suggested, a constitutionally prescribed coalition, if you still want to call it a coalition. In the same way as we talk about an Executive President. If one really looks at our current president's position, it is not really an executive president in the full sense of the term. he is so bound in terms of the way in which he exercises, or she, constitutional power that its no hands-on executive position, but we call it executive. It can be misleading; it's convenient, but it can be misleading. But I would suggest, in terms of my argument, it's no big deal and if you prefer to talk about forced and voluntary coalition, for instance, it's fine.

Mr Meyer, I have consulted my notes again. The only thing that I see in terms of what could be termed "shortcomings", was that he said at some stage that the process of democratisation in South Africa is full of growing pains, but he hasn't mentioned specifically any drawbacks that I can see of the current system of Government of National Unity.

Chairperson

Thank you, Mr van Wyk. Let me see how I have them, in the following order.

Prof. van Wyk The follow-up questions...

Chairperson No, you are one of the speakers. There is no rule that follow-up must be immediate; the members have sufficient retention within the spell to remember what was said before so... because I will lose control. I have noticed your hand. I just want to mention, go back to my notes... You, sir, you have your hand up? It's Mr Ebrahim, ??? In that order, yes.

??? I understand about forced coalition or voluntary coalition. What do you say if a thing is in any constitution before everybody has gone to the voting and then the power of the people has been exercised, do you call that a "forced", or do you call that a "constitutional" or did you call that a "voluntary" because it's happened before that people go to elections, how do you call that? Do you call that a forced, a voluntary, a constitutional?

Chairperson Is that a question?

??? Yes.

Chairperson Professor van Wyk?

Prof. van Wyk My answer to that would be: to me, it's not very important whether it's called "forced" or "voluntary" or whatever, if it's in the Constitution, it is prescribed by the Constitution. We can call it a coalition if we like, we can call it a specific formation of government and I don't think we should really make an issue of this. It was more an aside that I started off with, maybe unwisely, saying that we use expressions in a certain way and they gain in our common parlance a

kind of meaning which isn't always accurate.

Chairperson

Mr Ebrahim?

Mr Ebrahim

Thank you, Mr Chairman. Chairman, Professor van Wyk says there that all coalitions are forced. This is what he said in his original statement. As far as I understand it, there can be three types of coalitions that you can have. One is that is prescribed in the Constitution, you have a coalition based on that. The other one is to a degree forced in the sense there that a political party may need to bring in others in order to help the majority, therefore in that respect it is forced to do so. But there have been instances, and not very far from our borders – in Zimbabwe – where, after the first election, ZANU PF was not forced in any circumstances to bring in ZAPU, but it did that in the formation of a national government of national unity. I am saying that, that was not a forced coalition. That was perhaps a politically expedient coalition, but certainly not a forced one, so I don't think it is correct to say all coalitions are in fact forced coalitions.

Chairperson

But in terms of pure logic what is the difference between your second example and your first example where you are forced to bring another political party in, in order to have the numbers to do certain things, or in order to form a government if you're lacking in numbers? The second is where you are having the question of dissidents and the country's in political turmoil, you would not want the country to be ungovernable unless you bring the other parties in. What is the difference? Wouldn't that be argued that, that is also a form of forced coalition although the

force is outside the letter of the law?

Mr Ebrahim No, not necessarily, Mr Chairman, because in the second instance you won't be able to form a government. But in the third instance you will be able to form a government, perhaps a different way of dealing with the dissidents, but at least there is the very important element that in case you won't be able to form a government and in the other one you will be able to form a government.

Chairperson Very well, the next person to speak is Mr Mlangeni and I've noted you, Mr ???

Nkosi Holomisa(?) (inaudible)...and it is a point made by Professor Ndlovu. I think he said that a Constitutional Assembly cannot be said to be sovereign if there is another body there, in our case the Constitutional Court, which has to ratify its decisions. If that is the position and I understood him correctly, would he then say that the Constitutional Assembly could still be called the sovereign body if the Constitutional Assembly is not sovereign because each decision must be ratified by another body?

Chairperson Yes, let me re-state the discussion in order to move forward and I'll allow him to answer. Nkosi Holomisa asks what is the distinction between two phrases: Constituent Assembly and Constitutional Assembly and Professor Ndlovu conceded that it's a matter of nomenclature, but most constitutional experts when they talk of the two cases – not that I agree, I am re-stating the argument – to them Constituent Assembly means the ultimate arbiter on the content and dispute of the Constitution in that country. If

you are not the final arbiter as to the content and dispute of how the people or the governed would want to be governed, somebody else must still ratify or confirm, approve that document. He says that you can't be a Constituent Assembly, perhaps maybe that's why you are a Constitutional Assembly. That's how I understood the argument, but Professor Ndlovu is the big boy, he can speak for himself. Professor Ndlovu?

Prof. Ndlovu

What I am saying, the important thing here is that who has the ultimate word, the final word on how the country should look like? Now, I'm saying that in France, for example, and in the Russian Constituent Assembly before the October Revolution, and in all other situations, these were bodies that were given power. In the American Constituent Assembly, which is the most celebrated and the one that has lasted for a very long time, there the people were sitting there, knowing that they had been elected by the people to determine how the country should look like. Now you yourself are sitting here with 30 Constitutional Principles that already telling you how the country should look like and saying to you that just furnish that out, which is best? So you cannot call yourself a Constituent Assembly or an ultimate authority on the Constitution because the Constitution has been ??? after seven ways, it is a multi-party democracy, it's this, it's that, seven questions that are going, for example 1987... are all answered in those Constitutional Principles. So, you are not the ultimate authority on how South Africa should look like, so you are not a sovereign body, and you are not a Constituent Assembly as far as most constitutional lawyers, but you are a Constitutional Assembly because you are dealing with

constitutional issues, very important ones too.

Chairperson

Very well.

???

Who then is sovereign if the Constitutional Assembly is not sovereign? Who is sovereign? Is this the Constitutional Court?

Prof. Ndlovu

The declaration of intent of CODESA is still the ruling authority on the issue of how South Africa should look like so far.

Chairperson

I'm going to avoid a debate of the question. Let me understand the content of the question and the implication then I'll decide if I'll allow it. Let me hear it.

???

He has referred to CODESA declaration, which I can't remember at the moment. Now...

Chairperson

Would you like him to refresh your memory?

???

No, I don't think I understand, you see, clearly because my problem is I understand he says: "Look, you chaps are really not the final legislators on these issues, these matters have already been decided by CODESA" as he puts it "and all that you are required to do here as Members of Parliament or Constituent Assembly, as you might call yourself, is merely to put on the finishing touches." My problem is okay, let's accept that, that this is the position. I am now saying: Who then is sovereign, if we are not sovereign. I don't know if that question...

Chairperson Yes, except in that question "if you are not sovereign, who then is sovereign?" is a dangerous presumption, that somebody else might be sovereign. There might be a number of institutions to reach a conclusion and nobody is sovereign. So in the question I see something very dangerous which does not exist. You need a Constitutional Court to look at the final product and say "indeed this product complies with the Constitutional Principle" or say "it does not" and strike it down. So, this assembly, plus the Constitutional Court, would have to produce a final document which is legal. The function of each is quite clear: you bring a final document, they confirm that it complies. If they don't, that document is not a Constitution. The next person is Mr Eglin and then Mr ??? Let me just get the name right.

Mr Eglin (inaudible - mike not on)...this Constitution. Now if that is what is ... Professor van Wyk involved...

Chairperson Mr Eglin, while you are proceeding on the floor, to make sure you proceed and people don't intervene, my colleague was dealing with the power. If you can address the power not the text, not the label, not what we call ourselves, the power this assembly has.

Mr Eglin The power is ??? out of the Constitution. It's not before us. In fact we are operating in terms of the constraints and the powers given to us in the Constitution so it's not a matter for debate. We can like it or not like it, but it's a reality as far as the work of this Assembly is concerned. I would like to go to the question of Professor van Wyk as to whether he should call the president "executive president". Don't

call him that, but just look at his powers. I think to argue about whether we should call him one thing or the other. I raise "forced coalition". We use the phrase and then we argue about what it means. What we know is... I don't know if the present government is even a forced coalition, but it does not look much like a coalition to me. What it is though, it is a constitutional device which says that parties with more than 5% must have representation in the cabinet. I just want to say that I think that we must really get back to the substance of the issues rather than spend a lot of time arguing about the labels which we give the particular issues.

Chairperson

Thank you very much. Mr Pahad?

Mr Pahad

We are going to have to, possibly in this group and together with the assistance of the technical experts, in relation to the cabinet, see whether or not or to what extent are the differences in terms of style of management, in terms of accountability to the legislature, in terms of relationship of the cabinet to a person whether its the head of government, by the distinction of ceremonial. What are the differences with regard to how they operate in the United States for example to the way they operate in Britain? Does the principle of collective responsibility cabinet apply any differently in Britain as it would apply to France or Germany or Italy, or some other country in Africa, not necessarily just take any European country? And I don't think we have in this workshop actually dealt with the fundamental issue of the cabinet because I would have thought one of the things we would want to do is to show whether there is a difference and if there is a difference, what is the difference

in terms of our own understanding that we want some kind of parliamentary form of government. And I took it that, that meant that you didn't want a pure presidential form. I am saying that we haven't really dealt with this and I'm noting this because I think we need to come back to it in the future with regard to how the cabinet operates. I thought the second issue that we may well have to come back to is the notion of collective responsibility of cabinet whether or not you have a shotgun marriage, or forced or voluntary or whatever coalition or you don't have a coalition, I mean. Now the issue for us is not to discuss in abstract, but whether indeed you would want to say something or not in your Constitution about whether or not there should be collective responsibility of cabinet or whether you want to leave this for the government of the day to decide, how the cabinet operates. I think we should not forget what Colin is now saying that our fundamental task is to draft and write this new Constitution. Of course, we can engage in all kinds of interesting discussions, but in the end would have to come back to whether or not there are certain things which should or should not appear in the Constitution and that one would be about in fact the powers of the cabinet; how much of it do you want to put in the Constitution? I think we need to look at this. I think we need the technical experts to give us a number of possible options. Maybe we need to say nothing except to say that there will be an Executive that will be accountable to parliament, maybe that's all the Constitution needs and we don't have to say more. I'm just saying that it seems to me that we need to return with respect to these kinds of issues because it would affect what we want to see appearing in the Constitution itself. That is the first point

about the cabinet as a whole. The second point I wanted to make was – again in relation to what was said at this meeting or this seminar in Pretoria – it is not for us to discuss somebody else’s seminar. With regard to what Mr Ndlovu said, but that perhaps if Professor Blondell’s paper is going to be of some use – I don’t know whether it is or not because we haven’t had it, Professor van Wyk thinks it might of some use, then would want to examine that and then would want to see whether or not we want to return to some of the issues that he has raised in the papers. And the last thing I want to say is, it is not very useful to me in a workshop – and it’s not the fault of Professor van Wyk at all, so I am not being critical of him, that’s why I said I wanted Blondell’s paper – to say in Belgium what happens is that there is an arrangement which enables linguistic groups to be able to have some kind of share in coalition. I think for the purpose of this particular group, we would need more than that, but not in relation to discussing every single country in the world, because every single country in the world has something different about them, but in relation to our single objective which is to draft this Constitution and this Theme Committee started to deal with this thing that we have to deal with the structure of government. So really I am also asking for the assistance of the technical experts here that in relation to the wider questions that come up, if we ourselves could also nail them down, our own approach, otherwise you might find that we are also going all over the show and maybe get involved in arguments about this, that and the other and what you are calling one and not calling the other. And then you could perhaps take this thing one step further. Thank you.

Chairperson

Let me just find out, Mr Pahad, what are you saying? This interesting paper from the conference should be distributed to the honourable members or are you suggesting that the Technical Committee receive this bulk and then summarise it for the members? Because what you suggested can be in two ways. First, maybe they come to the Technical Committees and the salient points be flushed out for the benefit of members or just take these papers in bulk and give it to the members to read for themselves? Which one? On the papers?

(inaudible - mike off)

So you are saying that we do both? Professor Ndlovu?

Prof. Ndlovu

Of course what members will be wanting is what will be done, but I am very much worried about the situation of actually analysing. I don't know what that conference was about. I don't even know what type of people were being invited by the organisers and so on. So, circulating ideas of a certain number of... I know that many very important people from different types of organisations came in, but as far as academics is concerned, you see what I mean? We don't know so what we are saying here now is being subjected to the situation of processing that type of material. What I think here we want to know, is what is it that the Technical Committee wants and we furnish that and we go out... If we go to those papers, or to other papers, or to all papers that we have, when we go to that situation... Because what we have been saying here, Mr Pahad, is that you may ask us, for example, to look at the issue of collective responsibility within the consensual model, how does it operate? Because it has got different implications within the US system, within the UK system

and within that system. So you should come with that type of thing then it is better, but now to be asked to analyse, it's worrying.

Chairman Thank you. On the issue of the papers here...

Mr Eglin (inaudible)...precise mandates as to where we are going. Let me say what I think would be helpful to me and probably to the other members. Bearing in mind that we want a common voter's roll, we want proportional representation, we want democracy, we want a parliamentary system – that one is taking into account, there are four issues that I think have emerged. The one is: How should a cabinet be composed? And there may be examples of how you compose cabinet...

Chairperson Mr Eglin, are you dealing specifically? The issue is whether the papers delivered at the conference in Pretoria should be summarised by the Technical Committee (I am speaking, Mr Eglin), whether those papers should be summarised by the Technical experts or should be handed as they are. Is that the issue?

Mr Eglin They could be handed to us, but I don't believe that those papers – and I haven't seen them – necessarily go far enough in analysing the various alternatives. They might give us some alternatives, but there may be further alternatives. I think we should get them, and let the Technical Committee look at them, they might want to add. But if I could just finish these four areas...

Chairperson No, you'll deal with those four areas when your turn comes.

Mr Eglin Okay.

Chairperson Now people in the queue are to deal with this specific issue and I'll have you down here. What are we doing? We distribute the papers as they are to the honourable members? Yes? Is that sufficient consensus I've got? Very well, the papers shall be so distributed. The next honourable member to speak is Mr Diali(???)

Mr Diali Mr Chairperson, we listened to all the experiences of all countries in terms of Constitution and in that the other countries which to my concern were not ??? as constitutional this morning. Like for instance Eastern Europe, I would like Professor to explain more about Eastern Europe constitution in relation to the cabinet and the president after the October Revolution and the current political undertaken now presently.

Chairperson Very well, Professor Ndlovu, Professor van Wyk, Professor Steytler. I'm giving you three Professors! Any remarks on the question?

Professor Ndlovu Well, I had, but I don't address the question at the moment. But what I would say is that where I alluded to this question of Eastern Europe insofar as you were talking about the Core Committee that deals with issues of decisionmaking. Now, the little problem that we would have in dealing with the post-October situation up to perhaps the Berlin wall situation is that while there would be no problem at all in summarising those experiences but the experience that we are dealing with here is an experience of whether by an elite or by the majority or by everybody, we are dealing with

some form of directly elected institution, that is the so-called popularly elected institution and that is why perhaps there was this focus towards this direction. But if there has to be a broader review then also it comes in within the context of: What is it really that could be of assistance? And then we could summarise perhaps in three pages; we don't want to give you big papers, we could summarise in three pages the type of thing that we are talking about and make an investigation around that issue instead of talking here in very big generalities.

Chairperson Professor van Wyk?

Prof. van Wyk In a nutshell, Chairperson, a large number of the Eastern European countries have adopted new constitutions. Information here in South Africa may be sparse but we could approach embassies, for instance, to get the documents themselves. What I can tell you from firsthand experience is that many of those countries have used so-called Western constitutional advisors in the drafting of the constitution, so one shouldn't be too surprised to find that most of these constitutions follow typical so-called Western democratic patterns.

Chairperson Professor Steytler?

Prof. Steytler Just to comment on perhaps the post-October Revolution constitutions of Eastern Europe. They sometimes, on paper, look very nice to the extent that there was separation of powers, but what one didn't take into account is the overarching role of the party and I think, if you just pick up what Professor Blondell in his paper apparently said, is not

to see the structure of cabinet, the structure of the legislature separate from other issues like the party system, like the electoral system, and that, that interaction should probably be uppermost in our minds the whole time to see it as an integrated process because the ease would be to provide a system here like in Eastern Europe before the fall of the Berlin wall, that there was a separation of powers, but there was in reality not, because the party system was a very one-party position.

Chairperson Thank you very much. Nkosi Holomisa?

Nkosi Holomisa Even though Mr Eglin felt it is not important to attach mighty significance on the meaning of terms, but if I'm going to use terms in adopting principles bearing those terms, it is important that the Constitutional Assembly and this Committee should be ??? what those can mean? Now, what I'm coming to is the question of the separation of powers. It would appear in looking at the submissions given by the various parties in this Committee that they have all got a parliamentary system of government, wherein you are going to have parliament from which the Executive is going to come. And then you have ??? which is going to be separate, but in some way, through maybe the ??? the parliament or the government is going to have some say. Now, it seems to me that

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Tape 4, Side A
Theme Committee2 - 15 February 1995

NOTES

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Mr Kolondiso??? (inaudible)

Tape 4, Side A

Theme Committee 2 - 15 February 1995

???

...which is going to be ???, but in some ways the truth may be ???, the parliament or the government is going to have some status. Now it seems to me then that if we are going to be talking about the separation of powers and the working of that type of government or parliament, it is clear then that the Executive and parliament, or National Assembly... it doesn't make sense. There's no way that you can say that's separated, especially if you take into account the fact the parliament will therefore pass a vote of no confidence to that cabinet, and therefore dissolve it, that cabinet. Therefore you cannot talk merely of the separation of powers. If also you bear in mind that the cabinet does not have the power to pass a vote of no confidence on parliament. Now can you really say then we are being honest in this Constitutional Assembly if we come out with a Constitution that says you are committed to the principle of separation of powers between legislature and the Executive when in fact the Executive is an integral part of the legislature. I would like your comments on that?

Prof. Ndlova

I will find it very difficult because I am now hearing the expression, to use the expression, but that in fact... Really, at the top of separation of powers in our Constitution is, I think this was a ??? that was just thrown in and it has never been followed up. And given the submission of the political parties, there is no commitment to separation of powers. There is a commitment to an independent judicial and that is a perfectly valid democratic system. There is nothing wrong with that, but to talk of checks and balances is to use an American terminology to a situation that is

basically British. So I think that Constitutional Principle, even the Constitutional Court will just ignore it because they are going to certify that whatever you bring, however meshed it is, they are going to say it is separation of powers, so at that level there should be no worry about nomenclature.

Chairperson

Let me put it to you this way. The last speaker is Mr Eglin and I hand back over to the Chairman of the Theme Committee, but before that I want to put something in perspective and it does help to inform clarity of mind if we understand. I said earlier that those useful formulae of the mischief we intend to prevent or seek to prevent and the good we hope to achieve in whatever we do, we form either by the carrot or the stick. Now, the constitutional idea is checks and balances, to avoid abuse. Now separation of power must be seen in context. It is one of the methods of having checks and balances. That's why you separate them. It is not the other way around. Now the question arises whether separation is sufficient check. In fact separation of powers is a loosely used term so you don't concentrate everything on one person. But I can't think of any constitutional model anywhere where it has been achieved in the ultimate. You will have overlaps and we'll have more time to debate. Let me give you an example of the ideal; mankind by its very nature strives to achieve the ideal. Whether we will finally arrive there, I don't know, but it is important for the quality of life for us to seek for the ideal. I know we have a problem, the shifting judicial review which we have adopted by way of the Constitutional Court, is beginning to cause a problem in the United States. The argument is whether the Supreme

Court of the United States of America is democratic, and the very formidable argument that it is not, because it inhibits the will of the representative of the people to make law. You have nine men – I apologise, you have one woman now – eight men and one woman who tell the whole country and the will of the people to go to hell. It's not how they see it, and they strike the law down. So an argument has started whether the system of judicial review is democratic, and it is a very formidable to say that the institution of the US Supreme Court is undemocratic because it suppresses the will of the people. So this argument will continue to seek to achieve the ideal state and the power. Having said that, I would allow Mr Eglin to be the last speaker on the topic.

Mr Eglin

I would like to come back to the subject of this workshop which is essentially the nature of the Executive. That's what it is about. The subject is "what kind of cabinet, what kind of Executive do we want" and I want to put it... because the Technical Committee might be able to help us as to how we should go about our work programme. I think we are going to, at the end, forget about the separation of powers and we have to deal with at least four crisp issues on the nature of the Executive. One is how it is composed. Is it composed of a enforced coalition? How is it composed? Secondly, how does it take decisions? Thirdly, how does it individually or connectively exercise its responsibility, collective responsibility or not? And, finally, how is it accountable to Parliament? Now it would certainly be helpful to me if the Technical Committee could look at these issues and say: we think, with the minimum amount of effort or the maximum amount of effort, we can find

examples either in Africa or in India or in Europe or in America as to how these four issues have been dealt with in the structuring and the functioning of an Executive. So it will certainly be helpful if we have illustrations of how this has been done in other countries and with what effect. In the end we are going to actually have to produce a report which says how is it composed, how is it going to take decisions, how they are going to exercise responsibility and how they are going to be accountable. And while I can't prescribe, I think it would be helpful if the Technical Committee looked at the problem and they came back to us and said: We think we can be helpful in a certain way or we suggest a certain route in which you can get this information.

Chairperson

Thank you. I might just add something. As lawyers and technical experts would like to say, that we also have a conscience and a responsibility to make sure what we give to you is a responsible research. Now I, as an individual, will have extreme difficulty if I know the dangers of what I speak to you without telling you. And one of the dangers of running through the world and saying: This part of the world does things this way, this way. It might look wonderful and good on paper, but you see, unless you know the social stratagem, the environment and what I said, the mischief that is sought to prevent, or the good, unless you know the way of life and the things why people do things this way, it's very dangerous to give a considered opinion why people do things in a particular way because they've done that for a certain purpose. And if you don't understand that milieu and the problems they had, and why they have a constitution of that nature, you might be

presenting to the honourable members only one side of the story, which cannot help matters unless we get a social anthropologist or a historian in that country to come and give the background to the events.

Mr Eglin

I am comfortable with what you say, although disappointed in a sense. And that's exactly... if you feel that you are unable to give us this information, then you must also tell us. So I am not arguing that you should give us the information, what I feel is we are going to have to find out this information and I just put it: Could the Technical Committee collectively say that we can assist to this extent or we can't assist to this extent and for the rest it's over to the politicians to find out.

Chairman

Professor Ndlova and then Professor van Wyk.

Prof. Ndlova

Perhaps one of the ways in which to do this, we are just thinking aloud now, would be... We have, for example, this morning identified ?? things, there may be more of them. We have identified the American system. We have identified the Westminster system. We have identified the consensual model. All of them have got different ways of doing the types of things that we are talking about. So one possibility would be in that outline we'll say what happens in this particular model and what happens in this particular model and what happens in the other model. And more or less the histories of those models are fairly new so perhaps that would be one way in trying to address and not just process through in one-day action as far as this is concerned.

- Chairperson I'll recognise Professor van Wyk, but I want to question... I've completed my mandate. The Chairman of the Theme Committee when he summarises and how the technical experts in this Theme Committee should proceed ahead in future will be entirely his task. If you want to talk of those matters, I'll then defer you to him, but if you want to talk on this topic, I'll take the last comment.
- Prof. van Wyk Mine is a question, Chairperson. Maybe I can put the question and then the Chairman of the Theme Committee can answer the question.
- Chairperson You want to wait for him once he is in?
- Prof. van Wyk Can I just put the question and then he can think. In the Theme Committee's work, what is the status of the current Constitution; in other words, is it taken into account at all, is it a kind of basis, working document, or should it not be looked at, at all?
- Chairperson Ladies and gentleman, I now give you the Chairman of the Theme Committee to take over and summarise the events of the day. Thank you very much.
- T.C. Chairperson Mr Chairperson, members of the Theme Committee, ladies and gentleman are included, I wish to thank you very much for the opportunity given to summarise the events of this workshop this afternoon. May I first and foremost start by saying I wish to thank the Tactical Committee for arranging this workshop at short notice like this and I think they have really done their best. It's not an easy thing. We only decided last week about this workshop and it went on very

well this afternoon. We've experienced our little faults here and there, we know now what to do, when we organise for the second workshop or seminar, I think we will be more perfect than today. I therefore wish to thank them all. Mr Chairperson, you've been a very good driver, you stick to your time certified for this workshop, you've been very strict but more democratic and I wish to thank you for that. And all our technical experts who delivered papers today, Professor Steytler, Professor Ndlova and Dr Maluwa in absentia, may I please thank you all. You've done a wonderful job. It's the beginning of it.

In two minutes, let me just try to remind you or give you the brief of this Theme Committee. You will remember that our brief is to really refuse submissions from political parties ??? to individuals etc. and all organisations outside the CA. And we need to facilitate that, and once we've done that we need to look at all the submissions, simplify them, compile a report, debate the issue amongst ourselves, put the contentious issues among contentious issues in our report and then submit this to the CC for a further debate and to CA for a final debate. It is very, very important. Also we have to have different options that we can come up with in the Theme Committees to enable the CC to look at those options, debate them as well, and forward them to the CA for a further debate. Just to remind you once more, the Theme Committees are not actually the negotiating bodies. As I've already said, we do not take agreements, but as we say we are facilitating the work of the entire CA, by means of getting this information and processing it forward. Having said that, outlining the brief, that the critical issues arose today when our technical experts have

been dealing with this question of the Executive, and I will briefly sum up. I don't want to waste your time because we'll have enough time to debate about these issues in our Theme Committee. But some of the critical issues which were raised were the question of head of state, with both ceremonial and executive powers, assisted by a deputy president. These are some of the things which we need to debate amongst ourselves. Whether we need that type of a precedent or not. And the question of the head of the state with ceremonial powers assisted by the head of government with executive powers, is also another issue that arose; that's an issue that we need to discuss. And I think all technical experts in this regard have done their best to highlight the ??? assumptions of the head of the state, whether it be ceremonial or both ceremonial and executive. I think what we need to do... We didn't get enough in regard to the head of the government as to what will be his powers, what will be his functions, what is the relationship between that head of government and the head of state. I think we need to look at the broader options in that regard and, say, group them aside, that the relationship between the head of the government and the head of state would be this, and if there is a head of the government, what are his duties and powers? And we should be in a position to look at that and then at the ultimate end we can then decide whether do we need a head of the government or do we only need a head of the state. These are issues which we need to look at. How should that head of state be elected? Was the question also put forward by the members of the Theme Committee and the members of the Technical Committee? Should he be elected by the Legislative Assembly or should he be elected by the populace,

whatever the case may be? We need to look into that. What are the advantages and disadvantages in all those things, but that's a critical issue that you also need to look at. And we also need to look at the question of the tenure of office. If he is elected by the Legislative Assembly, does it also become an office of a five-year term period like the Legislative Assembly, or does he go for further years, like other political parties would propose? We need to look into that question. We need to look into the question of the motion or the vote of no confidence in the Executive. How should it be done? The procedures? What are the advantages and disadvantages of that? That is also very, very crucial. It will arrive in our Block 2 and Block 3 when we debate about those issues. Appointment of members outside parliament to serve under Executive structures. That's another thing that we need to look at. It is now in the Interim Constitution, members will remember that we did allow one member to be appointed outside parliament to serve in the cabinet. He is responsible to the cabinet and also responsible to the legislation although he is not a member of parliament. Now those are other issues that we need to define and those are other issues that we need to research and we need to do a lot of work in that regard. What are the powers and functions of all the above structures which I've just talked about? We need to identify that, they need to be very clear so that once we have done that we know exactly what we can go for. Should there be forced coalition or voluntary coalition? I didn't have my dictionary with me. I wanted to check what is "forced" and what is "voluntary" because there was so much argument about the forced and voluntary, but I think I'll do my best tonight again just to go through the big Oxford dictionary

and check what is what, what is the correct thing. But we need to look at that as well. Whether do we need that forced coalition or do we need voluntary coalition in the next Constitution? The question of majority rule, we need to look into that and when we look into that then those two systems will determine the type of the cabinet that we would like to have. The question of your Government of National Unity, for example do you want that to carry on in the next Constitution, should it be included or shouldn't it be included? Now, we need to look at the power functioning and the relationship of the cabinet with the legislature. How should they function? And what should our relation be with the legislature? Now those things are very crucial. And lastly, one person touched the question of the electorate system, that it will also have to be interlinked with this and I think we have already started some work on it. Now, I think that is also very, very important. The Theme Committee will have to start doing some work in this regard, with the guidance of the technical experts. Now, let me just comment on two things. There was the question as to the technical experts in regard to the work that we are doing here with the Theme Committees, I would personally suggest - I have not discussed this with my Core Chairperson, I have not discussed this with my fellow corporate members - that it would be best sorted out between the technical experts and the corporate members as we are going to have very, very regular meetings to structure how these processes should be taken forward in terms of looking at the issues ahead of us, in terms of debating these issues, in terms of compiling a draft report so I propose that those issues be left for the Core Group members and the technical experts who will deal with those

issues. Briefly, there was the question as to whether... What is the status of the Interim Constitution at the moment? I'm glad that the Professor said I must apply my mind to that. I don't know what status should I give it. I haven't checked out with other people, but I think as an individual at the moment that the Interim Constitution is a working document. If we think there is something valuable in the Interim Constitution, we could take from it. If we think we should really change and get something totally new into the Final Constitution, we could do so. Some people have an opinion that good work has been done at the World Trade Centre(???). We cannot just take that Constitution and drop it into the dustbin, we might extract some of the good work in that Constitution, but I would say briefly that it is a working document and we are prepared to look into it and see what good we can get out of it. And lastly, just to remind all technical experts who deliberated this afternoon, we would request you, your papers in writing, and we would like to have a look into that and have them in our files to study and for reference in the future.

And may I lastly also thank all the members of the Theme Committee for your contributions and your participation and I think it has started throwing or shedding a light amongst us and I think that is wonderful. Yes, Mr Holomisa???

Mr ???

???

Chairperson

Alright, the next meeting of Theme Committee 2, that is a good question. Monday next week. The Core Group to work out the agenda and we'll send it to you. If the meeting will not be there for any other reason, also Administration will

let you know, but up to now the meeting for the next
Theme Committee stands for Monday next week. 9 o'clock.
Oh, 6 p.m., I'm sorry. 6 p.m. to 9 o'clock. I thank you all.
Thank you very much.

(End of Tape 4, Side A, Side B blank)

Tape 6, Side A

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Prof. Steytler ...the only question really is what is the time, and how quickly this committee want to move forward, whether it's now the next meeting, the next Monday or in two weeks' time. We would be able to submit a list of whether it is we ourselves who would be making presentations or also drawing on other persons with expertise to give again input that we would in fact submit either to the Core Group or at least to the Chairperson so that there is some agreement as to how we should proceed. But I think all that this committee needs to do is give us the time frame and we would be able to organise the in-house workshop for that day.

Chairperson Could you finalise this issue as a matter of urgency? If I may ask a question, do you think it is possible to have a workshop next week this time? If the Theme Committee decides so or is it too soon for you?

Prof. Steytler Mr Chairman, I think it would be possible. I know there are a number of other technical experts who have written quite extensively on the matter, we ourselves would be able to prepare something on that so it would be possible. Last time I think we had four days and now we've got seven, so...

Chairperson Having had Professor Steytler state that, what is the view of the Theme Committee on that? Do you think... should we proceed, let him make preparations, let's have another in-house workshop on bi-cameral and uni-cameral system of legislation next week? Monday? Personally, I don't know

about other people, but I would be in favour of that because I don't think next week we shall have started debating the submissions from the public; rather let's utilise the day next week for an in-house workshop dealing with this type of topic or a theme that we would not want to put on the agenda for next week so that we utilise the Monday for this in-house workshop, if the technical experts feel that it is possible. He has already indicated that it is possible, but I would like to hear from other people what's your view on this? Mr Beyers???

Mr Beyers We have no complaints, sir, I think we should support that.

Chairperson Mr Eglin?

Mr Eglin I take it the issue's generally uni-cameral or bi-cameral. I think, I would hope that, that would embrace specific views on the function in particular of the upper house because unless one knows what it's function is, it's very difficult to argue for or against so I would presume that there will be an in-depth discussion on that particular aspect.

Chairperson Ja, Professor Steytler does have it here. He has indicated to us that they will also deal with the functions and powers of the second house, that's what he is doing, I think he indicated that. Mr Pahad?

Mr Pahad I mean it should be fine if the technical experts are ready. Is there in the terms of reference the question of that, if you had a bi-cameral legislature, how that bi-cameral should be constituted? I mean, what would be the electoral process, who would they represent? I mean, there are all of these

issues. As you saw from ??? proposals they were proposing that like second house these should indeed represent purely provincial interests so I am just asking whether if you are not covering that, whether it would be possible in part of your submissions to cover that aspect?

Chairperson

Professor Steytler?

Prof. Steytler

There is a whole range of issues in terms of bi-cameralism and the question that we just would like some guidance on is the time that we need to... that we have available. Would it be the three hours, four hours in the morning? Or is it like the last time that we could also go into the afternoon? If we could just have some guidance on that.

Chairperson

Proposal? How long will our workshop last? Like last time?

Mr Eglin

Scheduled for the afternoon is the CA meeting, in the afternoon on the 6th.

Prof. Steytler

If today's meeting is in the morning, then I assume that the next one is in the afternoon, or even the evening. 6,00 p.m. So that only can give us three hours.

???

I think that's enough.

Chairperson

So, what are you proposing? Are you proposing that we meet in the morning for a few hours, adjourn, get to the CA in the afternoon, and then 6 o'clock in the evening we start again? Is that what you are proposing?

Prof. Steytler

Mr Chairman, on an issue like this I think we can handle the

three hours during the morning.

Chairperson Oh! So you're proposing the morning?

??? Yes, and evening only. We start at 6 and finish at half past ten.

Chairperson It doesn't matter. We could say we have our workshop in the morning and then we do away with the evening or we can say: Right, let's do other things in the morning and have our workshop in the evening. Do you think three hours will be enough? 9 to 1? Alright, there's a proposal from Mr Pahad, 9 o'clock to 1 o'clock, and then 1 o'clock you break for lunch and 2 o'clock CA. Agreed? Professor Steytler, there it is. Okay, thank you very much.

??? I know we've agreed, but I hope the time factor is not going to put constraints on Professor Steytler to raise all the issues that he wants to raise...

Chairperson Well, let's hear from him.

??? ...for you see, I mean, there's a number of issues and depending on the time factor, so now we have...

Prof. Steytler Mr Chairman, any of these matters are so complex and it is just illustrated with our previous workshop on the presidency and the Executive. One can in any period of time really thrash the matter and try to isolate important issues. One cannot – even if we get six hours – really cover every issue and fairly detailed because you have to look at various models, various ways in which the upper house works. So,

in four hours we can at least start to identify major issues that need to be done. What are the different election procedures and then what are the powers of the upper house? Clearly it cannot be exhaustive of the topic. As probably was done now, one may identify major issues and then try to do further research on those very issues that call for further exploration.

Chairperson

Okay, fine, so let's go ahead. Okay? Fine. So we've finalised that. We will carry on with the workshop on Monday from 9 o'clock to 1 o'clock. Can I draw the attention of the Administration that they also invite other Theme Committees? All those who are interested could attend the workshop, there's no problem with that. They all have meetings? But let's invite them. And another thing I think which is important, there are also other members of the CA who don't sit in the Theme Committees and so it's very important also to spread that message all over the members of the CA, and those who are free to attend on Monday, let them attend the workshop. Okay, will you do that for me? Please. Okay. Now the following issues... the question of the work programme for the technical experts. I reported this earlier that we discuss the issues. We have once more referred this thing I think back to the technical experts. We haven't finalised exactly what would their programme be. I think what we did... we've given what we are going to do in Block 1 and Block 2; they know exactly how much work should be done. They also know what should be done in other blocks. The question of a Volkstaat, the question of the traditional leaders where they are not very much involved, the question of the amendment to the Constitution, the question of the electoral system etcetera.

But we haven't actually finalised their work programme as to precisely say how is it going to look, ??? involvement, but they could also be involved in the public participation; they can go and listen to the contributions and submissions of public participation, but we haven't dealt exhaustively with this matter. Professor Steytler?

Prof. Steytler

Mr Chairman, what we would actually also like, just in terms of our own work programme, is identification of dates for further in-house workshops because in each Block there is a number of very discreet issues that one can hold workshops around and what we really would ask is, very soon if possible, to set times, dates for particular topics like traditional leaders, perhaps we would not have an in-house workshop or try to arrange one together with other Theme Committees, but at least for the Volkstaat, for the electoral system, amendments to Constitution, provincial government, and if we can, within a short space of time, get dates down, it will just simply assist us in organising proper workshops much more effectively and efficiently and that people can prepare proper written papers for the committee. So, I'm not sure what the process should be; which committee or which organs should in fact determine those dates, but if we can put that on the agenda as a matter of urgency, it would assist us greatly in our task.

Chairperson

There's a contribution from Professor Steytler. Which is the relevant body to deal with setting up that type of a problem? Mr Mangeni(???)

Mr Mangeni

Mr Chairman, I apologise for coming late. I left home at 8 o'clock and am surprised that I am here now. Traffic is just

??? I would suggest, in connection with the question raised by Professor Steytler, that the Core Group should look into all the possible dates and come and make a recommendation here.

Chairperson

There is a proposal that the Core Group should deal with that type of a programme and bring it forward for adoption to the Theme Committee. Any seconder? ??? Okay. Quickly then list that as attempt for the Core Group meeting. So the Core Group then will fully discuss this matter once more with the technical experts and we'll find and approach as to how to go about coalition. Will that be satisfactory, Professor Steytler? Remember last time I just said to you maybe you could sit down, the technical experts will come with a proposal and a few dates to us, but I think it's going to be possible. Let's rather sit together and then work out a formula as to how we want to come about with the whole thing, offer you an agenda, taking into consideration your other work as well. Other people are not here. Let's deal with item 6, that is the supplementary report in respect of Block 1. I reported to you that the issue of the civil society submission and individual submissions which we felt may be... but really anything burning we can come up with a supplementary report in that regard. Members will remember that our report, Theme Committee 2, is now on the agenda for the Constitutional Committee for a debate I think this afternoon. Now, if there is really a burning issue which has been raised by the civil society which we couldn't consider at that stage, the technical experts will the advise us and then we would look forward to come onto the supplementary report, which will be discussed with the Theme Committee members and then forwarded again to

the Constitutional Committee. Maybe also Professor Steytler could brief us with regard to how do they see the way forward in this regard?

Prof. Steytler

Mr Chairman, just on whether a supplementary report is required... Because of the topic, the separation of powers, it's such a broad topic, which everybody agreed upon, there wasn't really divergence of views, I think views are going to be diverging when we come to the details of it, how it is actually reflected in the Executive and in the Legislature, so at this moment I don't think people, apart from saying whether they all agreed about the central principle and anything new, no-one rejected it so there was no real necessity for a separate report.

Chairperson

That's the report from Professor Steytler. Do we all agree on that statement?

Mr Eglin

Chairperson, I agree, but I think there's no harm done... In general, Theme Committees have tended to report on what is the attitude of the political parties. In our particular report we did refer to nine individuals, I think, who also made inputs. I think we could just say that we've looked at those individual reports and in fact they reflect the consensus that appears between the political parties, so that at least they're acknowledged. I think the Management Committee's concerned that we're asking the public to make inputs and yet in the end our reports seem to reflect the views of the parties. So, I see no reason for us not to say in a supplementary report that we've revisited those nine private or individual inputs and they reflect substantially the views expressed in our original report.

Chairperson Any other comment on this issue? We are all happy with what Professor Eglin is saying? Now, Professor Steytler, could you take that one on board?

Prof. Steytler Mr Chairman, I wonder whether the minute secretaries could just note precisely what Mr Eglin has said and submit that as a report because I think that really captures... I wouldn't be able to add anything further to that.

Chairperson What he is asking is whether could Mr Eglin report exactly what he said so that he can correctly minute it?

Mr Eglin It's a little unfair to ask Professor Steytler to do our report, but basically the requests from the CC and the management is: We hope you haven't ignored the inputs from the public. And to make quite sure that we haven't, I think we should say that we have just re-examined the inputs from the public, we give the nine, if it's correct, we are satisfied that they reflect broadly the consensus which is reflected in our first report. That's all we have to say. At least we've revisited them and we're satisfied that they do reflect in broad terms the consensus in our first report.

??? The implication of that is, Mr Chairman, of course, that so far this Theme Committee has managed to represent the public which is after all why we have been put here where we are.

Chairperson Mr Olifant(???)

??? Chair, I don't want to belabour this point. I think at some point the Core Group or... We need to find out a mechanism

as to how we are going to deal with public input, particularly where there is no... where it can be controversial or not in line with what consensus political parties have reached, because those people are not within this house to dictate their issues or to bring their points across and I think we need to work out a mechanism at some point in the future, which at this point is not clear, as to how we're going to deal with that.

Chairperson

Thank you. Maybe we could later on, with the technical experts, just look at how other people are doing and then when they draft reports in the future then they know exactly how to go about it to bring all these issues on board. I'm just looking at other people who have done it here. The copies of the other Theme Committees here, the way they've done it and I see it reflects more or less what we want. But we will discuss that with Professor Steytler maybe later. Any other input in this report? Thank you very much. Then that matter is closed. The other issues are in respective Blocks 2 and 3. In your documentation pack we have attached an advert which is now in all the print media, right at the back. This is what you requested that we should do. This is an advert that we put through all the papers. Now it's for Theme Committee members to comment and to tell us whether we did a correct thing or not. You remember you asked Mr Eglin to break it into smaller points so that it could be clear to the public what they should submit, except that we didn't ask that they should also send submission for the provincial level at the same time as the national level structures, but let's ignore that. It has been done. If we get them its OK, we'll start processing them as well. I don't think that should cause a

lot of problems for us. Adding to that is the press conference which will be following today, just to make the people aware that they've got to submit immediately what is the importance of them submitting to this Theme Committee etc. etc. So, we have done that, the adverts are out, let's hear your comments on it.

??? Could I just get clarity as to what you want us to do now on this.

Chairperson I want you to comment. Is it a bad thing, is it a good thing?

??? It's been seen by the public already, what you don't like...

Chairperson We need to improve on it for next time. We need to improve if it is not well done. And when we submit next time, then we'll know exactly what to do. Accepted? OK fine.

??? All the languages?

Chairperson So far I think we did it in English only.

Ms ??? ...only done it in English for now.

Mr Olifant I am just concerned about the question for now because what's the use in getting the thing out and you tell us now it's only for English?

Ms ??? Can I please take it up with media and come back. I'll take it up with ???

Mr Olifant Ja, we must have...

Chairperson The request from Mr Olifant is that it should go out in all the languages? OK, fine. Alright. I'll request Thandi to meet them straight away now after this meeting and see whether they can do something urgently about it. OK. Now the next item on...

Nkosi Mr Chairman?

Chairperson Yes, Nkosi?

Nkosi It is important that we have got a cross which I think is for election which says you have made your mark and on top of 1995 there's something which I don't understand what is it. Is it an "E" or what? Mr Chairman, let's get the right, correct thing because others say it is a parachute, others say it is... I want to get the real thing.

Ms ??? The real thing is that it's supposed to symbolise now that you've made your mark, now you can talk, you can make a speech, you can say something about it. If members are saying it's not clear enough, we can take it up again with media.

??? Well, I don't think he was indicating that it is not clear, I think he just wanted to know the meaning of it.

Ms ??? The common symbol used for speech.

Chairperson The common symbol used for speech. Thank you, ??? I didn't know too. Thank you very much. You've helped me. I've learned. Mr Beyers, then Mr Pahad and then Mr ???

Mr Beyers Mr Chairman, I just want to know in which papers this advertisement has been placed?

??? ... from Cape Times.

Ms ??? Daily newspapers Cape Times, Natal Mercury, the Transvaal papers, the Star, daily this appeared in the papers.

Mr Beyers Only in the Western Cape?

Ms ??? No, no in the...

Mr Beyers In which Afrikaans papers has it been?

Ms ??? The language issue, including Afrikaans, I'm going to take up now.

Mr Beyers Mr Chairman, this is a very serious omission. We cannot operate on this basis. I mean, sir, what we have here we have published only in some English newspapers asking the people to come and... Many Afrikaners, for instance, don't read English newspapers and don't even understand English that well and I can mention quite a few...

??? We've just raised the point.

Mr Beyers Ja, so we are making an objection here. I think that's an omission and it shouldn't happen again. We all know, should know by now, how sensitive this matter is, please sir.

Chairperson Point taken.

Ms ???

I thought we'd raised the point and it's going to be addressed because in all the places we also have papers which are written, Lebowa only Northern Sotho and in Venda only Thoyandou so we have read the point and said we will address it. May we please progress?

Chairperson

Thank you very much. I think that was a brilliant question, Mr Olifant. We need to address that as a matter of urgency. Mr Pahad.

Mr Pahad

To just proceed with Mr Olifant's question... You see it's not sufficient, I think, to say we used the print media. We have to ask them to use the radio, that's especially true of the majority of our people and therefore the adverts will only get to a large number of people if the radio is used, so we've got to ask them. Look, it might be difficult, because there are nine Theme Committees, I am not underestimating the problem, but I think from our side we could at least recommend that they look at how the radio can be utilised for this purpose.

???

I looked at The Citizen this weekend. All adverts were out for Theme 1, 10, 4, 5 and 6, but our advert was not there. And the weekend papers also, I looked at that.

Chairperson

Thank you. Mr ???

???

Thank you, Mr Chairman. I was just asking as to whether would it be appropriate just to put the South African flag just next to "What.."? The South African flag?

(tape off for a small time)

Chairperson Don't cock us, Mr ??? Just speak louder, let's hear.

??? Mr Chairman, we've all got sympathy for the flag and it would be a good idea, but this is a black-and-white advertisement so it will not be practical to put in the flag unless you do it in colour and then this advertisement is going to cost much more than just a black-and-white.

??? I was just being multi-??? that's all.

Chairperson OK. Any other comment on the advertisement? Right. Then let's go to item number 8, Report on public events. ??? The ??? for this item. I don't know who would like to kick off. Let's discuss that. Joy, would you like to kick off on this one?

Joy OK. The weekend public participation. I will just talk generally on the reports which we got and what we experienced too.

Chairperson And the Administration must listen very carefully.

Joy Yes. Generally we have discovered that we are losing a lot of resources because the results were not good at all. The meetings are not well publicised. We find that people don't know about the meetings because some of the adverts come only in the local Afrikaans paper and also in mentioning that there is free transport. Nothing was done... People who wanted to assist were told that it is a neutral thing and that only neutral people must assist in such a way that they ended up neutralising the meetings. Generally most of the groups which went out this weekend, it was a

general programme. We need to address this and see... We can't just leave it to ??? and the CA can't take it to ??? and then end up there with ??? The ??? need to be monitored on a daily basis. What have they done? ??? How far have they gone? tractors ??? of what is happening? The radios, are they used in different languages? All that needs to be monitored up to the last day. And in fact many people have complained again about the venues, venues were far away from people. It would be put at a certain hotel far from everybody and without transport. When some people try to find transport, there is no transport. So people are never consulted, just to take it to somebody and this somebody decides on his or her own and just run the whole show alone. Some only got pamphlets when they were coming into the hall and then they saw the advert and the programme for the day. Now I think we must take it up very seriously otherwise we are losing thousands of rands for nothing, so somebody can fill up.

Mr Eglin

What venue are we talking about?

Ms ???

I went to ... We went to Pelham Road and...

Mr Eglin

Pelham Road? I just wanted to know which one it was.

Ms ???

Ja. And even... In fact we were in big groups and the Eastern Transvaal gave the same generally, not worth the... generally, the Free State not worth... It was the same, Eastern Transvaal was the same, the Free State was a little bit better, but generally there is no publicity at all. We have to address this issue seriously and urgently.

Chairperson Thank you. Mr Olifant and then Mr ???, then Mr Beyer, then ??? in that order.

Mr Olifant Mr Chairperson, we went to the Eastern Cape, Graaff-Reinet. Other than the technical problems that we faced here from the office they did not prepare themselves very well because on the morning of Friday we were told that we must go to these various areas without our being notified before... that led to the delaying of the flight and all those kinds of things. But be that as it may, I think they can improve on that. In the Eastern Cape, I think we had a much better situation than in the Transvaal. When we got there the first thing that we noticed was that there was not one single placard on lamp poles, indicating there is such a thing, but the lady from the hotel who picked us up said that people were quite aware there was such a happening in the place. What we also noticed was some kind of notification in the paper which was very, very small. It is a problem because almost 80% of those people are not reading the newspapers, which is a problem, people just... Because the place is much smaller, just came out of being inquisitive. And then we had complaints about the towns surrounding Graaff-Reinet which had not been properly informed. In that fashion we only had small numbers of people that got there. In terms of our itinerary, they expected between 200 and 500 people. We at one point reached something like 210 people, which, in our opinion, was fair. I must also say the composition of the people was quite widely mixed. We had from the far right, right into the far left and a good number left and right and a good sizeable number in the centre. I think it is important to reflect that just to indicate that... people's interest in this programme.

I must also say that the kind of input in Graaff-Reinet was of a very high quality. Two or three people didn't know what they were there for, they thought that the government was bringing some handouts, money and these kind of things, but the majority of the people knew what actually they want out of this Theme. Now to the problems. We have been told her in our meetings, in the briefings, that we as parliamentarians just had to go out there, and go sit there like dummies and listen to what the people have to say. It was not expected of us to make any input other than clarify points from our respective Theme Committees. So when we got there we were told but we must make a brief, we must give a brief overview of the Constitution and where we come from and where we are going to and what the role of the people that's going to participate is. And none of us were actually prepared for this because our brief was just to go sit and listen there. We were meant to believe that the MEC/mayor would make an input. The mayor... the deputy speaker of the Eastern Cape was sent to get there and the poor lady didn't know what she was to do there. Honestly, she was just told that: You pack your bags and you go to Graaff-Reinet, which was a bit of a problem. And then the other question... the ??? experts from Imsa??? I don't know. I strongly believe that we could make of our own people, the Secretariat, the officials, the staff of the CA and in that fashion we will save money, in that fashion they've got direct access to this whole process and would have a better understanding of what's taking place. The experts that we had there, I mean, I don't know. With due respect to the person, didn't know what the role was. Really. And it was a bit of a problem. Lastly, we noticed that only two Theme Committee members actually

went there. We had more ANC people there, but the ANC people who went there, some of them weren't meant to be part of the scene, but they came because they were interested. We had two people from the National Party, but they were from the Eastern Cape, which was a bit of a problem in the sense that those people are not part of this process so they could not make a meaningful input. Something that really concerned us was that the deputy speaker made an announcement that they are going to put into their parliament, as the National party, a motion that they are going to draw up their own programme, CA programmes, and I don't know how that's going to work. It is a problem because I am not aware that the problems which we are dealing with, with the constitutional matters at this point in time and I think we need to discuss what their role would be. It would be important for the provinces to be part of us, but in terms of participation it's going to be a problem because they don't know a thing what's going on, no matter from which party they are. Lastly, I would say the secretariat of this office, please, before we go anywhere, inform us very well because we are going to look very stupid and unprofessional. It almost turned out to be that because we were questioned seriously. I was really very impressed with the level of questioning and the high quality of those questions that were actually directed to us. And at some point we looked like little fools because we had to run around to seek for answers. Had we been briefed properly, I mean, we would have been prepared and I think we don't want to hear that we're going there because we're on the gravy train because we've heard that already. We also believe that the Senate has been paid for doing nothing, that also came out there. So those kinds of things

we need to be conscious of. But generally, Comrade Chair, I believe that in terms of the input, it was very well, the quality was high, but in terms of our own technical input, very, very poor. Thank you very much.

Chairperson Thank you, Mr Olifant. Were you on the gravy train to Graaff-Reinet?

Mr Olifant It must have been the gravy train because we were six people in an aircraft – military aircraft – so it was really a gravy train.

Chairperson A gravy plane?

Mr Olifant Oh yes, just before Susan comes. You know the question of translation? Very important is... I think the office need to know exactly when they send us to different areas in the country what languages are there that are spoken and that they also send the people that're suitable, that're qualified or comfortable in those particular languages to go to a particular area. In Graaff-Reinet it is mainly Xhosa and Afrikaans and it was a problem because most of our panel were not Afrikaans-speaking or even Xhosa-speaking and I had to do the translations. I don't know who is going to pay me. I was told on the spur of the moment to give an overview in both languages. Unfortunately, I couldn't speak Xhosa, but I did an overview of the Constitution and the process in both English and Afrikaans and then I had to do the translations from English to Afrikaans. I didn't mind, but it is a problem and people need to be prepared for that.

Chairperson Thank you, Mr Olifant.

Ms ??? Sorry, I forgot the statistics. Ours was 67 in Phalaborwa. Just imagine that.

Chairperson Thank you. ??? Miss ???

Ms ??? I think, Comrade Chair, I was also on the plane trip to Graaff-Reinet and I just want to make a correction. I know that Danny has said that... you know he's joking, there was no gravy train or gravy flight or whatever because if you look at the time we left... we left it was awkward because we had to wake up at about half past four in the morning. So I just want to put that on record and put the record straight that there was no gravy train at all. Gravy train and gravy buses and flights they normally leave at about nine-ish and there was nothing like that for us! I also want to say through Chairperson, I think you've covered all the issues. One area which maybe we need to look at or which needs to be geared up is the involvement of the provincial parliament in the whole processing becomes important because our experience is that they were informed very late and they have indicated they were only told: Just go there. And they didn't know what to do and it becomes imperative for us that all those problems are geared to them too. What is going to be their role? So that when we reach those areas they are not confused because there is a lot of confusion. And I would also like to move that Comrade Danny should be paid for his services for interpretation.

(tape switched off for a short spell)

Chairperson In our Theme Committee in Phalaborwa it was the same, but all other parties I approached, they indicated that they

would not be in a position to go, but I think you are raising a very good point because otherwise it looks as if it's an ANC thing and yet it's a constitutional making process for all the political parties. Mr Beyers?

Mr Beyers

Mr Chairman, Mrs Sethema and Mr Louw and myself (???) from this Committee attended the meeting at Klerksdorp. I think it was not well advertised and the result of that was a very weak representation. I think there were approximately six buses and more or less 70 or 75 people who were bused in through those six buses to the meeting so it was very badly attended. But I must say that from the Administration side I think it was handled quite well. The facilitator there actually knew what she was doing and it was done in a non-partisan way. The level of the debate was reasonably high, I think. People talked on constitutional matters and not on politics. The meeting was not represented from all communities. My impression was that only the one township there - Joverton??? - was represented. We also had the problem that actually we had been instructed that parliamentarians should not take part in the proceedings, but actually I got the impression that the public also wanted some response from parliamentarians. I think it is more or less embarrassing actually to sit there and not be expected to say anything whatsoever so all that we had to do was to give some overview of what is going on in the Theme Committees. I think it was not worth the money that has been spent on the occasion, Mr Chairman, because of the very bad representation from the community and only from one community.

Chairperson

Mrs Sethema?

Mrs Sethema Just let me take this opportunity to actually confirm a few things as raised by Mr Beyers. Just to speak a little bit about the facilitator. I think we have a different view there. I think the facilitator was naturally a good person, a person who was able to facilitate, but as far as the issues were concerned, we had to assist here and there. I think what is really being dealt with, she wasn't quite clear with those issues. And what she was really doing was to facilitate the meeting not about any issue which, of course, is a problem if we really have to pay a person maybe a large amount of money just to come and chair the meeting, we can just as well grab anybody else to chair the meeting. Thank you.

Chairperson ??? ???

Ms ??? I think our meeting in Bloemfontein was quite well attended although there was also a problem with the advertisement.

Chairperson Dr Steenkamp are you on the ??? one?

Dr Steenkamp No, I'm on the General.

Chairperson OK, fine, carry on.

Ms ??? There were also a few problems with the advertisement that was circulated. It did not really come out on the availability of free transport with the result that people did not really bother to make use of the buses that were made available. There were about six or seven buses made available and some of those buses transported two and three people only. I think it was a waste of money although we started off at about half past ten and people started


trickling in by eleven, half past eleven, and the numbers grew quite a bit towards the end of the meeting. On party representation there were representations from all the Theme Committees except Theme Committee 6 and it was only ANC people. We had Dr van Heerden from the NP, but he had to leave earlier. So it was also expected from us to give an overview of what is happening and from each of the Theme Committees we had to give a brief input and I think that went quite well because we could at least give a broad overview of what is happening on the Constitution-making process. I think with our facilitator he was also a bit lost and practically we had to do whatever needed to be done with regard to this because he didn't know really what was expected of him. ??? also didn't provide a translator with the result that our two senators who were present had to do all the translation and even with the advertisement also it was done in Afrikaans and English only, no advertising in either Sotho or in Tswana. And the representation from the neighbouring smaller areas there was very poor because no proper advertisement was done there and people did not have transport to bus them into Bloemfontein. I think maybe the areas which they elect to have these meetings should be more central and perhaps they should look into going into the smaller, rural areas instead of busing those people into the larger areas. The input from the people was very constructive and it was mainly dealing with constitutional issues so I think our meeting went off quite well. One other thing that I must also raise is that there was a press conference. They scheduled a press conference for after the meeting, the local press didn't bother to pitch up. So maybe they should look at the issue of liaising with the local press in each and every area.

Chairperson

Thank you. Somebody on Bloemfontein? That ends of the report. Thank you very much. From the Eastern Transvaal, which will be the last report. Is there somebody who can report about the Eastern Transvaal? Nobody? OK fine.

(end of Side A, Side B is blank)

members and the speakers to respond, I want to share with you in the house an ancient wisdom in constitutional writing. I heard this 15 years ago from my constitutional professor and today ??? . As she makes those remarks bear in mind that the Constitution is no more than the will of the people, how they would like to be governed. And this ideal, this is the highest level of generality. But then you have this competing and conflicting psychology that by the very nature a Constitution will be written by people who are in power – and I use ‘power’ very advisedly – who have some form of a policy, but the best form of Constitution we would all like to see if we had to make a test, it will be that Constitution which would protect you when you are out of power. But the best test: if I am powerless, what would I like to say? That is ideal but at the time when we are called upon to write that Constitution, we are not out of power, so there is the psychology of tension, that those who are in power must write what they would like to see when they are out of power. Now the philosophical question is: Can we conceptualise in power how it would be when we are out of power? I would allow response to the question.

Dr Maluwa 

Well, actually I did take the contribution not so much as a question but a comment and it is just the comment that I agree with. I would only say this: What is it that will make South Africa different from the other African countries? It is this that South Africa has the opportunity to write its own Constitution through consultation, debate and discussion amongst South Africans. In other words, the other African countries had constitutions that were invariably, I mean there were constitutional conferences invariably taking place in Lancaster House, as in the case of former British

colonies, but what the problem was is that these constitutions were designed – I make the joke about Oxford undergraduates walking around with briefcases full of constitutions – these constitutions were designed in Britain and basically handed over to these pioneering African leaders in the various countries, and it took a while for people to set about re-writing constitutions in their own image. Unfortunately the constitutions that were then re-written, to reflect the reality of the African condition in these countries were constitutions that were used often enough to portray the idea of a one-party state where the one-party state was in vogue. South Africans are not being handed a Constitution drawn up in London or Paris or wherever; South Africans are writing a Constitution – that's the difference.

Chairperson

Mr Rabie (P??)

Mr Rabie (P??)

The question has been covered, but I would nevertheless just amplify on it. Now it appears that a ceremonial has ??? in a ???. Now what is the idea, or what is Dr Maluwa's (???) opinion if the majority party leader becomes the prime minister, in other words, he is directly elected through his party's machinery and then after that, when Parliament has been meeting, they in that ???, outside of party politics ??? ceremonial head of state?

Dr Maluwa (P??)

You still need the numbers of the majority. Are you saying it must be a provision that that person should not come from the majority party?

Mr Rabie

He mustn't have been an active politician in the party

Tape 6, Side A
Theme Committee 2 - 27 February 1995

NOTES

0020:

??? Who is male speaker??? Is it Professor Steyter as indicated in the dialogue?

0566:

Is it Mr Beyers?

0722:

Is it Mr Baard? Mr Pahaad? or Parr?

08013:

??? peace proposals???

1099:

Unknown male speaker

1208:

Who is lady speaker?

1388:

Who is speaker?

2024:

??? counter involvement

2369:

Mr Mangeni???

2397:

traffic is just what???

2488:

Name of seconder?

3240:

Who is speaker??

3278:

Mr Winston/Olifant/Oliphant??

3713:

Who is speaker?

3779:

Who is speaker?

3794:

Who is lady speaker?

3834:

I'll take it up with ???? department?

4032:

Who is speaker??

4056:

What is lady's name?

4072:

Don't know name of third speaker.

4093:

??? from Cape Town

4197:

Who is speaker??

4379:

Who is speaker??

4416:

Thank you. Mr Mhlaningan???

4492:

Don't cock us, Mr ??? sounds like Ackerman.

4561:

I was just being multi-confident???

4606:

Is it "public events?" Then ...the different rates(???) for this item, I don't know who would like to kick off.

4627:

Is it Joy, Joy who???

4817:

We can't just leave it to sacks??? and the CA can't take it to sacks??? and then end up there with these sacks???? The ??? need to be monitored on a daily basis, what have they done, ??? how far have they gone, tractors ??? of what is happening, the radios are they used in different languages, all that needs to be monitored up to the last day...